

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-150413
	:	C-150414
Plaintiff-Appellee,	:	TRIAL NOS. B-1501523
	:	B-1404265
vs.	:	
ALEX PENLAND,	:	
	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY.

We consider these appeals on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Alex Penland and his girlfriend were at the Golden Nugget Lounge when Damon Cure arrived at the bar. Upon seeing Cure, Penland immediately left. Cure followed. Cure allegedly threatened Penland in the parking lot, and Penland retrieved a gun from his car. Within moments, the men began shooting at one another. A security camera captured the entire incident on video.

Upon arriving at the scene, police officers saw Penland lying on the ground with a severe gunshot wound, and found Cure in his vehicle with several gunshot wounds and a revolver in his hand. Police could not locate Penland's weapon. Both men were taken to the hospital. Cure succumbed to his injuries.

Police impounded both men's vehicles. After obtaining a search warrant, officers recovered what appeared to be heroin and drug paraphernalia from Penland's vehicle.

Penland was thereafter indicted in the case numbered B-1404265 for two counts of murder under R.C. 2903.02(A) and 2903.02(B), each with accompanying firearm specifications, and for having a weapon while under a disability under R.C. 2923.13(A)(3). Penland was later indicted under the case numbered B-1501523 for trafficking in heroin under R.C. 2925.03(A)(2) and possession of heroin under R.C. 2925.11(A), after lab results identified the substance from the vehicle as heroin.

The state moved to consolidate the indictments under Crim.R. 13, and Penland objected. After hearing oral argument on the motion, the trial court granted the state's motion and consolidated the indictments for trial.

The case proceeded to a jury trial. At trial, the state presented witnesses who had investigated the crime, interacted with Penland and with the victim, and saw the crime occur. Penland testified on his own behalf, admitting to trafficking and possessing heroin, and to having a weapon while under a disability. Penland claimed that he shot Cure in self-defense.

The jury rendered guilty verdicts on all counts. At sentencing, the trial court merged the two counts of murder, and merged the trafficking and possession counts. The court then sentenced Penland to 15 years to life for murder, three years for the firearm specification, three years for having a weapon while under a disability, and three years for the drug count, all to be served consecutively.

Penland now appeals. He asserts seven assignments of error. In his first assignment of error, he argues that the trial court abused its discretion in allowing the joinder of the indictments. This argument has no merit.

Penland contends that his indictments should not have been tried together because they did not meet the joinder requirements under Crim.R. 8. He also argues

that the consolidation of the indictments was prejudicial because the association with drugs improperly influenced the outcome of the trial.

Crim.R. 13 provides in part that “[t]he court may order two or more indictments * * * to be tried together, if the offenses * * * could have been joined in a single indictment * * *. The procedure shall be the same as if the prosecution were under such single indictment * * *.” To determine whether the offenses could be joined in a single indictment, we turn to Crim.R. 8, which provides: “Two or more offenses may be charged in the same indictment * * * if the offenses charged * * * are based on the same act or transaction, or are based on two or more acts or transactions connected together * * *, or are part of a course of criminal conduct.”

The law favors joining multiple criminal offenses in a single trial. *State v. Franklin*, 62 Ohio St.3d 118, 122, 580 N.E.2d 1 (1991). If the state can introduce evidence of one offense in the trial of the other, severed offense under the “other acts” portion of Evid.R. 404(B), or if the state could show that the evidence of each of the crimes joined at trial is simple and direct, then the defendant is not prejudiced by the joinder. *Franklin* at 122.

Here, the trial court concluded that because the offenses were committed “around the same time, same location, [and the] same car [was] involved,” the indictments could be joined together and tried in a single trial.

We agree that the acts were connected, and that the indictments could be tried together pursuant to Crim.R. 8 and Crim.R. 13. Furthermore, the state demonstrated that the evidence of both crimes was simple and direct, therefore overcoming any prejudice arising from trying the drug charges with the murder charges. We do not find that the trial court abused its discretion. *See Franklin* at 122. Penland’s first assignment of error is overruled.

Penland argues in his second assignment of error that the trial court abused its discretion when it allowed witnesses to testify about an unrelated robbery that occurred at his girlfriend's home, in which he was neither the victim nor the perpetrator. Penland argues that this testimony was irrelevant, and was unfairly prejudicial in violation of Evid.R. 403(A). The state argues that this evidence provided context and demonstrated Penland's motive.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Relevant evidence is generally admissible, unless "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 402 and 403(A); *State v. Frazier*, 1st Dist. Hamilton No. C-140369, 2015-Ohio-3116, ¶ 43. We will not reverse a trial court's evidentiary ruling absent an abuse of discretion. *Frazier* at ¶ 44.

Here, the state presented the testimony of two officers and a detective who discussed a robbery that occurred at the home of Penland's girlfriend several days before the shootout. The detective discussed a possible connection between the robbery and the shootings, but no direct evidence was presented linking them together. The trial court's finding that the testimony was relevant and that the probative value of the evidence outweighed the prejudicial nature to Penland was not an abuse of discretion. Penland's second assignment of error is overruled.

We address Penland's third and fourth assignments of error together. In his third and fourth assignments of error, Penland argues that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. We disagree.

Our review of the record convinces us that the evidence adduced at trial met the test for sufficiency. *See State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Given the evidence, including Penland's own testimony, a rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt. Additionally, we find nothing in the record that suggests that the jury, in resolving conflicts in the evidence adduced on the charged offenses, lost its way or created such a manifest miscarriage of justice to warrant the reversal of Penland's convictions. *See State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Therefore, we overrule Penland's third and fourth assignments of error.

In his fifth assignment of error, Penland argues that he received ineffective assistance of counsel because his defense counsel failed to use a crime scene reconstructionist to reconstruct the crime scene and the shootout. However, there is nothing in the record that demonstrates that a crime scene reconstructionist would have presented evidence that would have changed the outcome of this trial, especially given that there is a video of the entire incident. Penland has not demonstrated that his counsel's performance fell below an objective standard of reasonableness or that he was prejudiced as a result of his counsel's deficient performance. *See State v. Bowers*, 1st Dist. Hamilton No. C-150024, 2016-Ohio-904, ¶ 31. His fifth assignment of error is overruled.

In his sixth assignment of error, Penland argues that the record did not support the imposition of a consecutive sentence for a weapon under disability offense when there was already a sentence imposed for a firearm specification. This argument is without merit.

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A firearm specification is a penalty enhancement, not a criminal offense. *State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, 945 N.E.2d 498, ¶ 19. Additionally, the trial court made the appropriate findings when it imposed consecutive sentences and incorporated those findings into its sentencing entries. *See State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. We conclude that the trial court’s findings are supported by the record and that the sentences are not otherwise contrary to law. *See State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 11 (1st Dist.). Penland’s sixth assignment of error is overruled.

In his seventh assignment of error, Penland contends he was denied a fair trial due to the cumulative effect of errors and omissions that occurred at trial. “Under the doctrine of cumulative error, a conviction may be reversed if the cumulative effect of the errors deemed separately harmless is to deny the defendant a fair trial.” *State v. Dunlap*, 1st Dist. Hamilton No. C-140594, 2015-Ohio-4644, ¶ 11; *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. Penland’s claim of cumulative error is meritless, because he failed to demonstrate any error in his claims and identifies no other errors during the course of his trial. Therefore, we overrule his seventh assignment of error. We affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., MOCK and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on May 6, 2016
per order of the court _____.

Presiding Judge