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

STATE OF OHIO,	:	APPEAL NO. C-150387 TRIAL NO. B-1300802-B
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY.*
LAVON ODEN,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Lavon Oden appeals from the judgment of the Hamilton County Court of Common Pleas convicting him, after a jury trial, of one count of murder, in violation of R.C. 2903.02(B), with a firearm specification, three counts of aggravated robbery, in violation of R.C. 2911.01(A)(1), each with a firearm specification, and one count of having weapons under a disability, in violation of R.C. 2923.13(A)(3). Oden was acquitted on one count of aggravated murder. The court imposed consecutive terms, for an aggregate sentence of 63 years to life in the department of corrections.

The evidence at trial demonstrated that Oden shot and killed Da'Shawn Wheeler after robbing Wheeler, Robert Johnson, and Darryl Craig, all occupants of a car that Johnson had driven to Burton Avenue in Cincinnati to sell marijuana. At the time of the shooting, Oden was under a disability that prohibited him from having a firearm.

Johnson and Curtis Boston had set up the sale of Craig's drugs to Oden with text messages, although Johnson was not informed of Oden's name. When Boston brought

Oden to the car, Oden took the drugs from Craig and then pulled out a gun and demanded and received money from the car's occupants. When Oden demanded Johnson's earrings, Johnson sped away. Oden, who goes by "Whiteshit," fired a shot through the open back window. The bullet traversed the front passenger seat where Wheeler was sitting and caused his eventual death about five minutes later at the nearby hospital where Johnson, accompanied by Craig, had driven him.

Boston was charged as a codefendant but testified against Oden as part of a plea agreement. He testified, consistent with a text message that he sent shortly after the shooting, that "Whiteshit" had robbed the occupants of the car during the drug deal and had fired the shot that killed Wheeler. Boston additionally testified that Oden had used a Ruger pistol, which was included among the 30 brands of firearms that could have fired the bullet based on the ballistic testing. Johnson testified, consistent with his pretrial identification of Oden in a photographic lineup, that Oden was the robber and shooter. Craig apparently refused to testify, but the contents of his cellular phone text records and his pretrial identification of Oden were admitted into evidence without objection.

The cellular phone locator records for the phone numbers associated with Oden and Boston demonstrated that both phones had been exclusively pinging off of the same Cincinnati Bell cellular tower and sector for the relevant time period before and after the shooting. That tower and sector were closest to the shooting, which demonstrated that, consistent with Boston's testimony, Boston and Oden had been together and in the vicinity of that tower around the time of the shooting. Further, Oden's text messages indicated that he was trying to sell a Ruger firearm less than a day after the shooting.

In his defense, Oden presented testimony from two experts, one generally challenging the use of "cell tower forensics," and the other challenging the use of eyewitness identification testimony. Oden now appeals, raising six assignments of error.

We overrule the first assignment of error, claiming that the court permitted the state to exclude a prospective juror because of his race, in violation of *Batson v. Kentucky*,

different conclusions as to whether each element of the offenses as charged in the indictment had been proven beyond a reasonable doubt. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). And, second, we find nothing in the record of the proceedings below to suggest that the jury, in resolving the conflicts in the evidence adduced on the charged offenses, lost its way or created such a manifest miscarriage of justice as to warrant the reversal of the convictions. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We note that the weight to be given the evidence and the credibility of the witnesses were primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

Oden's final assignment of error involves his sentence. He first argues that the trial court erred by not merging the murder and aggravated-robbery counts. Oden was convicted of felony murder for causing the death of Wheeler during the commission of an aggravated robbery. He was also convicted of three counts of aggravated robbery in violation of R.C. 2911.01(A)(1), which provides that "[n]o person, in attempting or committing a theft offense * * * shall * * * [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it." Here, Oden fired the fatal bullet into the passenger seat of the car as the driver sped away from the robbery. This gratuitous violence demonstrated an intent to seriously harm and intimidate separate from the animus involved in the aggravated robberies. *See State v. Bailey*, 1st Dist. Hamilton No. C-140129, 2015-Ohio-2997, ¶ 87; *compare State v. Curtis*, 1st Dist. Hamilton No. C-150174, 2016-Ohio-1318 (finding no separate animus when victim shot to obtain his property during an aggravated robbery). Thus, merger was unwarranted. *See* R.C. 2941.25(B); *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892.

Oden also argues that the sentence was erroneous because the trial court failed to consider the purposes and principles of sentencing, did not make the findings required by

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IN THE

SUPREME COURT OF THE UNITED STATES

_____

LaVon Oden — PETITIONER
(Your Name)

VS.

Neil Turner, Warden, NCCI — RESPONDENT(S)

PROOF OF SERVICE

I, LaVon Oden, do swear or declare that on this date, September, 28, 2020, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

NCCI P.O. BOX 1812 Marion, OH 43302

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 9-28-, 2020

LaVon Oden
(Signature)