[Cite as *State v. Fugate*, 2013-Ohio-79.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-194 (C.P.C. No. 11CR-4759)
v.	:	(REGULAR CALENDAR)
Willis Frank Fugate, III,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on January 15, 2013

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Yavitch & Palmer Co., L.P.A., and *Nicholas Siniff*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Defendant-appellant, Willis Frank Fugate, III, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of felonious assault in violation of R.C. 2903.11, with a firearm specification in violation of R.C. 2941.145. Because sufficient evidence and the manifest weight of the evidence support defendant's conviction, we affirm.

I. Facts and Procedural History

{¶ 2} By indictment filed September 7, 2011, defendant was charged with one count of felonious assault, and an accompanying firearm specification, arising out of a shooting on the west side of Columbus on August 19, 2011. The matter was tried to a jury on February 6, 7, and 8, 2012 and resulted in a jury verdict finding defendant guilty of

both the indicted offense and the firearm specification. The trial court sentenced defendant to seven years on the felonious assault charge with an additional three consecutive years of actual incarceration on the firearm specification.

II. Assignments of Error

{¶ 3} Defendant appeals, assigning the following two errors:

> [I.] THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S CRIM. R. 29 MOTION FOR JUDGMENT OF ACQUITTAL THEREBY DEPRIVED [sic] APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.
>
> [II.] THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION BY ENTERING VERDICTS OF GUILTY, AS THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. First Assignment of Error - Sufficiency of Evidence

{¶ 4} Defendant's first assignment of error challenges the sufficiency of the evidence, contending the trial court should have granted his Crim.R. 29 motion for acquittal.

{¶ 5} Crim.R. 29(A) provides that the court, "on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses". Review of a denied Crim.R. 29 motion and of the sufficiency of the evidence apply the same standard. *State v. Turner*, 10th Dist. No. 04AP-364, 2004-Ohio-6609, ¶ 8, citing *State v. Ready*, 143 Ohio App.3d 748 (11th Dist.2001).

{¶ 6} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense

proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Conley*, 10th Dist. No. 93AP-387 (Dec. 16, 1993).

{¶ 7} To prove felonious assault, as defendant was indicted under R.C. 2903.11, the state was required to demonstrate that defendant, on August 19, 2011, did "knowingly cause or attempt to cause physical harm to Justin Caldwell by means of a deadly weapon or dangerous ordnance," in this case a firearm. (R. 2.) To prove the specification, the state was required to demonstrate that defendant "had a firearm on or about [his] person or under [his] control while committing the [felonious assault] and displayed the firearm, brandished the firearm, indicated that [he] possessed the firearm, or used it to facilitate the offense." R.C. 2941.145.

A. *The State's Evidence*

{¶ 8} According to the state's evidence, Justin Caldwell, accompanied by his girlfriend Courtney Dulaney, went to the apartment of their friends Billy and Maggie Sprouse at 176 N. Central Avenue on the west side of Columbus during the afternoon of August 19, 2011. Maggie and Billy's apartment was one of four or five in a single story apartment building. To the west of the apartment building was Central Avenue; the apartment fronted on Merrimac Avenue, which trailed off to the east into a dead-end alley.

{¶ 9} As the two couples were watching television that afternoon, Justin received a phone call from someone known to him as "[P]ackman." (Tr. 42.) He had known Packman, whom Caldwell identified as defendant, for approximately one month and thought they were friends. According to Caldwell, defendant told Caldwell he needed to talk to Caldwell. Caldwell told defendant where he was, and defendant arrived approximately 15 minutes later. Maggie Sprouse answered the door, about the time Caldwell approached the door as well. She told him something was not right, noting three men had arrived. They were defendant, his brother Fallon Fugate, and a third individual Caldwell did not know.

{¶ 10} Caldwell exited the apartment; unknown to him, Dulaney followed behind him. They headed east from the apartment building toward the gravel area that led into the alley and, as they did so, Caldwell had a "funny feeling" about the situation. (Tr. 45.) As Caldwell explained, defendant never had arrived with two or three people as he did

that day, and the third person Caldwell had never seen in his life. The third person only added to the unusual circumstances, as "[h]e wouldn't look at [Caldwell], nothing. So you just kind of got like that gut feeling like something ain't right. So [Caldwell] took it, okay, well, [he was] about to get jumped or whatever." (Tr. 44.)

{¶ 11} Caldwell finally determined he would go no further. Defendant then pulled a black 9 mm gun from his waist and aimed it at Caldwell. Defendant fired the gun six or seven times. Once Caldwell saw the gun, he turned around to run and realized Dulaney was running in front of him. The two of them ran west back to the Sprouses' apartment and jumped over the gate placed to keep the dogs in the apartment. Maggie Sprouse, who was watching from the doorway, saw defendant aim and fire the gun at Caldwell. She felt bullets whiz by her and saw a bullet hole in the trash can just west of her apartment door.

{¶ 12} The state's evidence, if believed, is sufficient to support the jury's verdict. If, believed, the evidence establishes that defendant, armed with a weapon, fired at Caldwell six or seven times, attempting to cause physical harm to Caldwell by means of a deadly weapon, a gun. The evidence further shows that defendant displayed or brandished and used the weapon to facilitate the offense of felonious assault by firing it at Caldwell. Accordingly, the state presented sufficient evidence to support the indicted offenses, and the trial court properly denied defendant's Crim.R. 29 motion for acquittal.

{¶ 13} Defendant's first assignment of error is overruled.

B. *Manifest Weight of the Evidence*

{¶ 14} When presented with a manifest weight argument, we weigh the evidence in a manner to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley*; *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 15} In his defense, defendant presented the testimony of Ryan Lee Scott, a 16-year-old distant relative of defendant. According to Scott's testimony, he and defendant were spending time together on the afternoon of August 19, 2011 at the home of defendant's grandmother when defendant received a phone call that his house on Neil Avenue had been broken into and almost everything had been taken. Because factors indicated Caldwell was involved, Scott went with defendant and defendant's brother Fallon to Central Avenue to ask Caldwell who broke into the house.

{¶ 16} When they arrived at the Sprouses' apartment, a woman was knocking at the door; she advised the occupants that defendant and his companions were there. Caldwell stuck his head out the door and said something. Caldwell, accompanied by a friend, came out of the apartment with either a baseball bat or a metal pole. They started coming toward defendant, Fallon, and Scott when defendant pulled a gun and shot one time into the air; he did not shoot or aim at Caldwell. Caldwell began to run, and the other man went with him into the apartment. Scott, Fallon, and defendant all went down the alley and left in the car in which they arrived.

{¶ 17} Defendant contends Scott's testimony renders the jury's verdict against the manifest weight of the evidence. To the extent defendant contends the jury was required to believe Scott's testimony over that of the state's witnesses, his argument is unpersuasive. The jury has the responsibility to assess the credibility of the witnesses, and here it apparently found the testimony of the state's witnesses more persuasive and credible than that of Scott.

{¶ 18} Defendant, however, suggests the jury lost its way in assessing Scott's credibility, as Scott's testimony alone corresponds with the physical evidence. Scott testified defendant shot one time into the air. Because police recovered only one spent shell casing at the scene, defendant suggests the evidence corroborates Scott's testimony to the degree that the jury wrongly disregarded it. Defendant acknowledges the state's witnesses indicated more shots were fired, but defendant asserts police arrived within minutes, leaving little to no time for the remaining shell casings to vanish.

{¶ 19} The state's witness, Assault Squad Detective Tim Welsh of the Columbus Division of Police, testified to some reasons that could explain why police recovered only one shell casing at the scene. As he noted, "[s]hell casings are, obviously, difficult to see in

the grass. Could easily have been stepped on and forced into the ground, not make it visible to the eye." (Tr. 166.) Welsh explained the casings also "could have been picked up, taken somewhere. Cars, prior to the patrol officers arriving, could have driven back in there and they get stuck in the wheel treads." (Tr. 166.) As he said, "[t]here's a number of reasons why we don't often find all the shell casings." (Tr. 166.) He nonetheless testified that the shell casing found at the scene matched one of the guns recovered from Fallon Fugate several weeks after the incident. The jurors were free to find the state's evidence to be a rational explanation for the missing shell casings.

{¶ 20} Defendant also contends the record lacks evidence that defendant fired at Caldwell, as Caldwell would have been unable to determine at whom the gun was pointed while he ran away from defendant. Although Caldwell was unable to state that defendant actually fired the gun at him, Dulaney testified that defendant did so, as did Maggie Sprouse who watched from the door of the apartment. Moreover, the trashcan with the bullet hole was on the far side of Caldwell as he ran toward Maggie Sprouse's apartment. The gun thus was fired from behind Caldwell and pierced an object in front of him at the apartment just west of the Sprouses' apartment. The jurors could believe such physical evidence corroborated the testimony of Dulaney and Maggie that defendant fired the gun at Caldwell.

{¶ 21} Lastly, defendant contends he fired the gun into the air rather than at Caldwell. The state, however, also presented the testimony of George Seiber, who was on probation for workers' compensation fraud and had been sent from Medina County to Franklin County to appear in front a Franklin County Court of Common Pleas judge. He was held, prior to transport from the workhouse to the courthouse, in a group of 20, including defendant. He there heard defendant, the only one of the group who was speaking to any extent, state, "[m]e and my lawyer are saying that I shot in the air, but I shot right at that motherfucker's head." (Tr. 132-33.) Although the jury was not required to believe Seiber's testimony, it was free to do so.

{¶ 22} In the final analysis, defendant's manifest weight of the evidence argument hinges on Scott's testimony being the only testimony consistent with the physical evidence. The state, however, presented evidence that more than one shot was fired at Caldwell, with explanatory evidence concerning the absence of any other shell casings at

the scene. We cannot say the jury lost its way in finding the state's evidence to be credible in the circumstances of this case.

{¶ 23} Defendant's second assignment of error is overruled.

IV. Disposition

{¶ 24} Having overruled defendant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and BROWN, JJ., concur.