[Cite as *State v. Mosley*, 2015-Ohio-1390.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 14AP-639 (C.P.C. No. 13CR-4053)
Frisco M. Mosley,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 9, 2015

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Thompson Steward, LLC, and *Lisa F. Thompson*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

HORTON, J.

{¶ 1} Defendant-appellant, Frisco M. Mosley, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas pursuant to jury verdicts finding him guilty of one count of attempted murder with a gun specification and one count of felonious assault with a gun specification. The trial court judgment reflects a further conviction of one count of having a weapon while under disability in violation of R.C. 2923.13, which was tried to the bench.

{¶ 2} The charges against appellant arise out of his encounter with three individuals, including the eventual shooting victim, Spencer Leavell, in the parking lot of Smith's Market on Sullivant Avenue in Columbus, Ohio, on July 21, 2013. The state presented the testimony of the shooting victim, his two companions, two patrolling police officers who came upon the scene at the time of the shooting, and forensic experts who

analyzed a recovered firearm. Appellant testified on his own behalf, not denying that he was the shooter but claiming that he had acted in self-defense.

{¶ 3} Pursuant to the jury and bench verdicts, the court sentenced appellant to seven years on the attempted murder charge, a consecutive three-year sentence for the firearm specification on that charge, and a consecutive two-year sentence on the weapon while under disability count. The court merged the felonious assault count with the attempted murder count for sentencing purposes.

{¶ 4} Appellant appeals and brings the following two assignments of error:

> [I.] The trial court violated Frisco M. Mosley's rights to due process and a fair trial when it entered a judgment of guilt against him, when that finding was not supported by sufficient evidence. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.
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> [II.] The trial court violated Frisco M. Mosley's rights to due process and a fair trial when it entered a judgment of guilt against him, when that finding was against the manifest weight of the evidence. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

{¶ 5} Because the two assignments of error present related issues, we will discuss them together.

{¶ 6} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 78; and *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶ 7} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *See Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at

¶ 79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001); *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶ 8} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? *Id.* at ¶ 25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; *see also State v. Robinson*, 162 Ohio St. 486 (1955) (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95 (2000).

{¶ 9} "When 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." *Wilson* at ¶ 25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 10} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' "

State v. Brown, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶ 10, quoting *State v. Long*, 10th Dist. No. 96APA04-511 (Feb. 6, 1997).

{¶ 11} The state first presented the testimony of Travis Tucker, a patrol officer with the Columbus Division of Police. Officer Tucker testified that, on the day in question, he was patrolling in the area of Sullivant Avenue in a squad car with his partner, Officer Bryce Garlock. The two were engaged in a "courtesy transport," a voluntary transport of an individual from the scene of a domestic disturbance to defuse the situation.

{¶ 12} The officers were not dispatched to the scene of the shooting, but came upon it by happenstance as they proceeded down Sullivant Avenue and essentially intercepted the crime in progress. They heard three gunshots from a neighboring parking lot and observed individuals running from the lot and a car fleeing in the other direction. The officers decided to chase the escaping vehicle, turning on their lights and sirens as they did so. The chase vehicle only proceeded a short distance up South Wayne Avenue before coming to a stop, at which time the passenger bailed from the car. Officer Garlock pursued the fleeing passenger on foot while Officer Tucker secured the driver, who had not attempted to flee the vehicle. As he did so, he noted a gun lying on the floorboard on the passenger's side of the vehicle. Officer Tucker observed that the fleeing passenger had attempted to jump a fence, which collapsed under him and allowed Officer Garlock to apprehend him at gunpoint.

{¶ 13} The officers radioed for back-up because of the presence of the gun in the car and the previously-heard gunshots. At this point, the officers became aware through radio chatter that there in fact had been a shooting victim in the parking lot of Smith's Market where the officer's had first observed the disturbance. Officer Tucker participated in the separate transportation to police headquarters of the two persons apprehended at the scene.

{¶ 14} At this point in his testimony, Officer Tucker authenticated and explained a video taken from the cruiser's camera on the day of the crime corroborating some aspects of his testimony and consistent with other aspects that were outside the visual field of the camera. Officer Tucker then identified appellant in open court as the person that he and his partner had apprehended on the day in question.

{¶ 15} On cross-examination, Officer Tucker stated that the decision to follow the vehicle rather than the individuals fleeing on foot was a split-second choice based on his assessment of the situation. He confirmed that, because he had not immediately pursued the individuals fleeing on foot, he could not determine whether they had been armed at the outset of the situation that led to gunshots.

{¶ 16} Officer Garlock testified for the prosecution and essentially corroborated the testimony of Officer Tucker regarding the events on the day in question. He further specified that after he and his partner had noted the gun on the floor of the fleeing vehicle, they did not disturb the gun and left it as found for processing by the crime scene unit.

{¶ 17} Detective Kevin Jackson, of the Columbus Division of Police, testified about his participation in the investigation as a crime scene detective. Working from his photo log, he authenticated various photographs of the crime scene that identified blood splashes, used shell casings, and the location of a surveillance camera. He also identified shell casings presented to him on the stand as those bearing the evidence markers of the shell casings he had assisted in collecting at the scene. He then identified a grey shirt and grey hooded sweatshirt collected from appellant at the scene and identified these items by their police property room identification numbers.

{¶ 18} Detective Larry Shoaf, of the Columbus Division of Police, Crime Scene Search Unit, testified for the prosecution. This testimony paralleled that of Detective Jackson with respect to the various photographs of the scene. Detective Shoaf also further explained crime scene photographs of the car in which appellant was a passenger, including the pistol in its original position on the floor in front of the passenger seat. Detective Shoaf then identified that pistol when presented with it in court, and authenticated the evidence numbers and chain of custody through the police property room.

{¶ 19} Spencer Leavell testified as the shooting victim in the case. He began his testimony by explaining that, prior to appearing in court, certain municipal court warrants for him had been set aside, but that the underlying cases had not been terminated. He explained his prior criminal record, including felony convictions for receiving stolen property, robbery, possession of drugs, and possessing a weapon while under disability.

{¶ 20} Leavell stated that, at the time of the shooting, he lived in the hilltop area with his girlfriend and her children. He worked for a trash disposal company. On the afternoon of the shooting, Leavell was socializing with his friends Steven Gales, nicknamed "Ant," and Robert Bush, nicknamed "Six Nine." Later in the evening, the three decided to go to Smith's carryout to purchase beer. They rode there in Bush's Cadillac. When the three entered the store, they observed another individual come in. Despite the warm weather, this individual was wearing a black or grey hoodie with the hood pulled tight around his face. Leavell was immediately concerned that this individual intended to rob the store and had arranged the hood in this manner to conceal his identity.

{¶ 21} When the individual came in he approached Leavell and asked if Leavell's name was Spencer. Leavell replied that it was, whereupon the individual immediately commenced to leave the store. Leavell was perturbed by the inquiry since he did not know the man and followed him out of the store towards the parking lot. Leavell repeatedly asked the individual who he was and how he knew his name. The individual finally replied, "you don't know who I am." (Tr. 128.) Leavell persisted in asking the individual why or how he had known Leavell's name. As they walked in the parking lot, the individual suddenly pulled a gun and fired at Leavell. The first bullet seemed directed at Leavell's face, but struck his arm as he raised it up to shield himself. The bullet went through his bicep and exited near his shoulder. Leavell saw the blood and said "you shot me" to the individual. (Tr. 132.) The individual did not say anything but continued to point the gun at him, causing Leavell to turn his back and flee, zig zagging towards the street. Two more bullets struck him in the side.

{¶ 22} Leavell further testified that after the shooting he was taken to the hospital, where medical personnel removed the bullets from his side, which had not exited his body. He then identified several pictures depicting his bullet wounds. When shown police surveillance video of the crime scene, he identified himself and his companions in the video, the shooter, and himself as he ran from the scene after being shot. Leavell then identified appellant in open court as the shooter.

{¶ 23} Leavell testified that at no point during his encounter with appellant did either man lay hands on the other. He identified the gun shown to him in court as the gun

used in the shooting. He testified that appellant carried the gun in his waistband, concealed by his hoodie, and that he had a good view of the gun as appellant pulled it out to shoot. He recalled that appellant's hand was shaking as he produced the gun.

{¶ 24} On cross-examination, Leavell admitted that prior to his trip to Smith's Market, he and his friends had been drinking beer and smoking marijuana. He clarified that only he and Gales followed appellant outside. Leavell further added that just prior to this Bush had returned to the car to retrieve his wallet. As the two followed appellant into the parking lot, Gales did not speak or participate in the exchange preceding the shooting. Leavell reiterated that at no time did he threaten appellant with physical violence, or even raise his hands to appellant.

{¶ 25} Donna Schwesinger, of the Ohio Bureau of Criminal Identification and Investigation ("BCI"), testified about her forensic work on the case. She performed gunshot residue analysis of clothing retrieved from appellant and the driver of appellant's car. She confirmed the presence of gunshot residue on appellant's shirt and sweatshirt, and the absence of such residue on the shirt of the driver. On cross-examination she agreed the presence of gunshot residue on an item of clothing would not mean that the wearer had himself fired a firearm, but only that he had been in close proximity to a discharged firearm.

{¶ 26} Steven Gales testified for the prosecution. He corroborated Leavell's account of their activity preceding their trip to Smith's Market. He identified appellant as the person they had seen wearing a hoodie, and agreed that it was unusual to be so covered on a warm July day. Gales also recalled his surprise at hearing someone refer to Leavell by his real name of Spencer, because everyone in his circle referred to Leavell as "SP." Gales confirmed that the two followed appellant out of the store into the parking lot, but that at no time was there a physical confrontation prior to the shooting. As soon as he saw appellant produce the gun and start shooting, Gales turned and ran toward the front of the store. Although he distinctly saw appellant produce the gun, he did not get a good enough view of the gun to identify it, nor did he actually see Leavell being shot.

{¶ 27} After the shooting, he saw Leavell running down Sullivant and across the intersection, while he himself attempted to get on his cell phone and call an ambulance. He soon realized that his efforts were unnecessary because the police were already on the

scene and the ambulance was there in a few moments. Gales had known Leavell for approximately six months and had never seen appellant in the neighborhood. He did not consider Leavell's actions in following after appellant as particularly dangerous or aggressive.

{¶ 28} The third individual in Leavell's group, Robert Bush, testified and corroborated Leavell and Gales' version of events. Bush stated that at the time of the crime he lived on the west side and owned his own janitorial company doing commercial and residential work. Bush testified that the three began their evening of socializing and drinking around 5:30 or 6:00 p.m. After they had finished a bottle that Bush brought with him, they took Bush's Cadillac to the carryout to buy beer and cigarettes. The three went in the store, whereupon Bush discovered that he had forgotten his wallet. He left the store to go back to his car and retrieve it. As he returned to the store, he heard Leavell state that "this dude just asked me my name." (Tr. 240.) Bush asked what he meant by that, and Leavell stated "I'm trying to figure out why he asked me my name." (Tr. 240.) Bush also noticed that the individual in question was wearing a grey hoodie, which Bush took as an indication of a possible robbery because of the warm weather.

{¶ 29} Bush turned away from the conversation to go back in the store. He immediately heard a pop and felt gravel spray against his legs. He ducked around the building and peeked around the corner to see Leavell "jumping back and forth," and then run away. (Tr. 244.) He then saw the shooter jump in a car and attempt to escape down a side street, but stop because the car was blocked by traffic. At no time did Bush see Leavell or Gales touch the man in the hoodie. Bush heard approximately three or four shots.

{¶ 30} Bush observed police pursue and apprehend the two occupants of the shooter's vehicle. An emergency squad rapidly arrived and medical personnel tended to Leavell. On cross-examination, Bush stated that the three friends had been drinking and smoking marijuana prior to going to the store, but none of them were particularly intoxicated. He denied acting as a lookout when he turned the corner after leaving the immediate vicinity of Leavell, Gales, and the individual in the hoodie.

{¶ 31} Amy Amstutz, employed by the Columbus Division of Police Crime Laboratory, testified as a forensic scientist regarding the identification of the firearm in

question. She conducted tests on the weapon, the casings recovered at the shooting site, and on bullets test-fired from the recovered weapon. Amstutz described her methodology and gave her conclusion that, based upon ejector and extractor marks, the shape of the firing pin, and general characteristics of the weapon, casings recovered at the scene were fired from the gun recovered from appellant's vehicle.

{¶ 32} Appellant testified on his own behalf. He stated that he attended Whitehall-Yearling High School in central Ohio, but at the time of the shooting, lived in Cambridge, Ohio. He had felony convictions for drug possession, theft, having a weapon while under disability, receiving stolen property, and escape. Appellant was familiar with the west side of Columbus and stated that he previously had been robbed at gun point and shot in 2011. Appellant also stated that his brother had been killed in a robbery that was never solved.

{¶ 33} On the day in question, appellant secured a ride with a friend from Cambridge to Columbus to buy marijuana. To this end, he was carrying approximately $2,100 in cash, representing his own money and that of some friends. They stopped to visit appellant's relatives on the west side and then sought out his usual drug supplier, from whom he intended to purchase a quarter-pound of marijuana for $1,200. The supplier did not show at the arranged place and time, so appellant considered going to other locations on the west side to find another source.

{¶ 34} Appellant and his driver stopped at the carryout to get a pack of cigarettes. There he saw Leavell and his companions. Leavell greeted appellant with the phrase "What's up, Blood" and "What's up with all that blue?" (Tr. 304-05.) Appellant took this as references to gang membership, namely to the Blood gang's traditional color of red and the Crips' traditional color of blue.

{¶ 35} Appellant testified that he had been wearing his hoodie because he had been sitting in the car with the air conditioning on and did not feel warm. He also was aware that there was a warrant out for his arrest at that time, and that he therefore preferred to conceal his face to some degree and avoid detection. He thought that Leavell had mistaken him for a gang member because appellant was wearing blue shoes and a blue t-shirt. Appellant asserted that he was not nor had he ever been a member of the Crips nor any other gang.

{¶ 36} After the initial exchange, Leavell continued to harass him and curse at appellant, finally asking what appellant had in his pockets. Leavell then began going through appellant's pockets, and appellant saw that one of Leavell's companions had a gun. Appellant did not initially resist because he did not want any trouble and did not want to be shot again. During this episode, Leavell and his companions told appellant that if he ran off they would "smoke" him. (Tr. 309.) Upon hearing this, appellant pulled his own gun and started shooting as he ran away. He believed that Leavell and his friends were going to kill him. He was not trying to hit anyone but to scare them off and defend himself. After firing a few shots, he jumped in the car and his driver drove away, quickly stopping when the police pursued them. Appellant then exited the vehicle, and was apprehended as described by the arresting officers.

{¶ 37} In order to establish the elements of attempted murder, " 'the state must prove that the defendant engaged in conduct that, if successful, would have resulted in purposely causing the death of another.' " *State v. Knight*, 10th Dist. No. 12AP-317, 2013-Ohio-1462, ¶ 26, quoting *State v. Helms*, 7th Dist. No. 08MA199, 2012-Ohio-1147, ¶ 27; R.C. 2903.02(a). In order to establish the elements of the crime of felonious assault, the state must show that appellant knowingly caused or attempted to cause physical harm to another by means of a deadly weapon. R.C. 2903.11(a)(2).

{¶ 38} Appellant argues that the state never established his intent to kill Leavell. Appellant argues that such intent cannot be inferred from the nature of the wounds suffered by Leavell. Appellant points out on appeal that the bullets that pierced either Leavell's arm or his side did not strike any vital organs.

{¶ 39} Appellant also argues that the weight of the evidence does not support the jury's rejection of his affirmative defense that he fired his weapon in self-defense. He points out that Leavell's testimony established that appellant's hand was shaking as he drew the gun, evidence of appellant's belief that his own life was in danger. In conjunction with the balance of his own testimony and the circumstances of the shooting, he stresses that the evidence could only be taken to show that he felt threatened and acted in fear for his own life. We review the evidence with respect to this affirmative defense only under the manifest weight standard, because a challenge to sufficiency of the evidence is

inapplicable to an affirmative defense. *State v. Goodwin*, 10th Dist. No. 14AP-395, 2014-Ohio-5669,¶ 13, citing *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160.

{¶ 40} We find that appellant's convictions are supported both by the manifest weight of the evidence and by sufficient evidence. The testimony of Leavell and his companions, if believed, support the jury's conclusion that appellant purposely engaged in conduct that could have resulted in Leavell's death. Intent may be inferred from the surrounding facts and circumstances of the case. *In re Washington*, 81 Ohio St.3d 337, 340 (1998). Here, Leavell described three gunshots. The first struck Leavell from the front, hitting his arm as Leavell raised his arm to guard his face. The next two struck Leavell's body either before or after he turned to run; the testimony is unclear on this point. Bush's testimony described Leavell as jumping and dodging as the last two shots were fired, which are acts not consistent with someone threatening a shooter. Appellant did not deny having a weapon on his person and shooting it in the course of the incident. "If a wound is inflicted upon a person with a deadly weapon in the *manner calculated to destroy life or inflict great bodily harm*, the purpose to cause the death may be inferred from the use of the weapon." (Emphasis sic.) *State v. Stallings*, 89 Ohio St.3d 280, 291 (2000).

{¶ 41} With respect to appellant's claim of self-defense, a defendant bears the burden to prove self-defense by a preponderance of the evidence. R.C. 2901.05(A); *State v. Smith*, 10th Dist. No. 04AP-189, 2004-Ohio-6608, ¶ 16. To establish self-defense, a defendant must prove: (1) he was not at fault in creating the situation giving rise to the affray; (2) he had a bona fide belief that he was in imminent danger of death or great bodily harm and his only means of escape from such danger was the use of such force; and (3) he must not have violated any duty to retreat or avoid the danger. *State v. Robbins*, 58 Ohio St.2d 74 (1979), paragraph two of the syllabus. A defendant may only use as much force as is reasonably necessary to repel the attack. *State v. Harrison*, 10th Dist. No. 06AP-827, 2007-Ohio-2872, ¶ 25, citing *State v. Jackson*, 22 Ohio St.3d 281 (1986), certiorari denied, 480 U.S. 917 (1987). The elements of self-defense are cumulative, so that "[i]f the defendant fails to prove *any one* of these elements * * * he has failed to demonstrate that he acted in self-defense." (Emphasis sic.) *Jackson* at 284.

{¶ 42} Appellant's own testimony supported his assertion that he reasonably felt threatened as three strangers approached him, threatened to "smoke" him, and went through his pockets. The testimony of Leavell, Bush, and Gales contradicted this in most respects and, if believed, established that appellant had both the opportunity to retreat and escape the situation and to protect himself without resort to deadly force. The jury's rejection of appellant's claim of self-defense was not against the manifest weight of the evidence.

{¶ 43} We accordingly find that the evidence in the record supports the jury's verdicts. Appellant's two assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and LUPER SCHUSTER, JJ., concur.