[Cite as *State v. Howard*, 2012-Ohio-3023.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-109**
- vs -	:	
MAXIE L. HOWARD,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 11 CR 000074.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Lisa M. Klammer, Baker, Hackenberg & Hennig Co., L.P.A., 77 North St. Clair Street, Suite 100, Painesville, OH 44077 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Maxie L. Howard, appeals the judgment of the Lake County Court of Common Pleas finding appellant guilty after a jury trial of having weapons while under disability, carrying concealed weapons, attempted murder, and felonious assault, with a firearm specification. We decide whether appellant's convictions for attempted murder and felonious assault were supported by sufficient evidence and whether they

were against the manifest weight of the evidence. For the reasons that follow, we affirm the decision of the court below.

{¶2} On the evening of January 24, 2011, appellant approached James Brown, pulled a loaded firearm out of his jacket pocket, and pulled the trigger. The firearm jammed. Appellant, in a videotaped confession, admitted that when he pointed the firearm at Brown, who was standing only six feet away from him, he wanted to kill him.

{¶3} On this evening, Brown was working for the Lake County Narcotics Agency as a confidential informant. Before Brown began working, narcotics agents searched him for weapons and drugs and wired him so the agents could monitor the drug transaction. The narcotics agents were in a nearby van, while Sergeant Brad Kemp of the Lake County Narcotics Agency and Detective Decaro of the Painesville Police Department were parked in an unmarked vehicle. They were monitoring a controlled narcotics buy from a separate, targeted individual. After the transaction, Brown started walking back to the van.

{¶4} At this time, appellant drove by and saw Brown walking down the street. Brown and appellant were acquainted with one another. According to appellant, he and Brown had a previous altercation whereby Brown hit appellant in his face with a gun. Appellant stated that he had to receive 12 stitches as a result of the incident. Appellant also stated that since that incident, he had heard that Brown was threatening to "get him." Appellant claimed he saw Brown walking down the street earlier, and Brown flashed a gun at him in a threatening manner.

{¶5} Seeing Brown, appellant's cousin drove appellant to his house to retrieve a loaded gun. Appellant's cousin then drove appellant back to the area where they had

observed Brown. Appellant, with a loaded gun in his pocket, exited the vehicle and walked toward Brown. Brown, however, did not want to speak with appellant and informed appellant they would talk later. Over Brown's objection, appellant insisted they talk. Brown's cellular telephone began to ring, and he answered it. During that cell phone conversation, appellant, who was standing approximately six feet from Brown, retrieved the loaded gun and pulled its trigger; the gun jammed. Appellant fiddled with the gun and ejected the jammed bullet. As Brown was running toward the van, appellant this time successfully fired the weapon in the direction of Brown. A bullet mark was later found in the passenger side of the van.

{¶6} Appellant was indicted on seven counts: (1) having weapons under disability, a felony of the third degree, in violation of R.C. 2923.13(A)(3); (2) carrying concealed weapons, a felony of the fourth degree, in violation of R.C. 2923.12(A)(2); (3) attempted murder, a felony of the first degree, in violation of R.C. 2923.02 and 2903.02; (4) felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2); (5) attempted murder, a felony of the first degree, in violation of R.C. 2923.02 and 2903.02; (6) felonious assault, a felony of the second degree in violation of R.C. 2903.11(A)(2); and (7) receiving stolen property, a felony of the fourth degree in violation of R.C. 2913.51(A). Counts 3, 4, 5, 6, and 7 carried a firearm specification.

{¶7} The jury found appellant guilty of counts 1, 2, 3, and 4. Appellant was sentenced to a total of 15 years in prison.

{¶8} Appellant filed a notice of appeal, and asserts the following assignments of error:

{¶9} [1.] The trial court erred when it denied appellant's motion for acquittal under Criminal Rule 29 because the state failed to present sufficient evidence to establish beyond a reasonable doubt the elements necessary to support the conviction.

{¶10} [2.] The appellant's convictions are against the manifest weight of the evidence as there is overwhelming evidence that the defendant acted in self defense.

{¶11} Under his first assignment of error, appellant focuses on his convictions for attempted murder and felonious assault. Appellant claims there was insufficient evidence to prove the "knowingly" element of felonious assault and the "purposely" element of attempted murder. We note that although the trial court found appellant guilty of both offenses, felonious assault merged with attempted murder as they were allied offenses of similar import. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147 (2010), paragraph two of the syllabus.

{¶12} With respect to the sufficiency of the evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307 (1979).

{¶13} "Attempt," as defined in R.C. 2923.02(A), states that "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶14} Here, the principal offense is murder. R.C. 2903.02(A) states that "[n]o person shall purposely cause the death of another[.]"

{¶15} "Purposely" is defined as: "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

{¶16} To commit felonious assault as defined in R.C. 2903.11(A)(2), one must knowingly cause or attempt to cause physical harm to another by means of a deadly weapon.

{¶17} "Knowingly" is defined as: "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶18} Appellant supports his sufficiency argument by citing to his testimony at trial. Appellant claims he is the only person who could have provided direct evidence as to what he was thinking at the time he shot the firearm. Appellant maintains, as he did at trial, that he pointed the weapon into the air when he fired the gun. We note the conduct at issue is not when appellant fired his gun the second time, but when he pointed his firearm at Brown and pulled the trigger, although it failed to discharge a bullet.

{¶19} The state presented evidence of appellant's voluntary written statement, which stated that when he exited the vehicle, he began to walk toward the victim.

Appellant stated, “I then pointed the gun at [the victim] and shot [the] gun. It jammed so I cocked it again and shot one shot[.] He took off running.”

{¶20} Appellant also made an oral statement to Patrolman Ticel. The state presented the recording of appellant’s oral statement documenting the events. Appellant stated that when he saw the victim, he went to his house to get a .22-caliber gun. In the audiotape, appellant stated he then returned to where the victim was walking and exited the vehicle. Appellant approached the victim, stood within six feet of him, and pointed the gun at his chest. Appellant explained that the firearm jammed the first time he shot the gun, but he ejected the bullet and shot the firearm again. Appellant stated that when he initially pulled the trigger, it was his desire to kill the victim.

{¶21} There was sufficient evidence in the record to support appellant’s conviction of the two counts at issue. Evidence was presented that the gun used by appellant was operable, that appellant had knowledge it was loaded at the time he fired it, and that it was appellant’s desire to kill Brown when he pulled the trigger to fire the first shot.

{¶22} Appellant’s first assignment of error is without merit.

{¶23} In contrast to sufficiency of the evidence, to determine whether a verdict is against the manifest weight of the evidence, a reviewing court must consider the weight of the evidence, including the credibility of the witnesses and all reasonable inferences, to determine whether the jury “lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶24} Further, "[n]o conviction resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the appeal." (Citations omitted.) *Webber v. Kelly*, 120 Ohio St.3d 440, 2008-Ohio-6695, ¶6.

{¶25} At trial, appellant raised self-defense as an affirmative defense. Under his second assignment of error, appellant maintains he satisfied his burden on the claim of self-defense by the manifest weight of the evidence. To establish self-defense, a defendant must show (1) he was not at fault in creating the violent situation; (2) he had a bona fide belief he was in imminent danger of death or great bodily harm and his only means of escape was the use of force; and (3) he did not violate any duty to retreat or avoid the danger. *State v. Williford*, 49 Ohio St.3d 247, 249 (1990). If the defendant fails to prove any one of these elements by a preponderance of the evidence, he has failed to demonstrate that he acted in self-defense. *Id.*

{¶26} We find that the record supports the jury's finding that appellant did not act in self-defense. The jury heard appellant's videotaped confession that when he was driving as a passenger in his cousin's vehicle, he saw the victim walking down the street. Appellant's cousin then drove appellant to his house to retrieve appellant's gun. Driving back to the area where the victim was walking, appellant exited the vehicle carrying the loaded gun in his pocket. Appellant approached the victim and, despite the victim's statements that he did not wish to speak with appellant, appellant pointed a firearm at his chest and pulled the trigger.

{¶27} Appellant's testimony that he was in fear of the victim was contradicted by the evidence. Appellant's confession, along with the testimony of the victim and the

recording of the events admitted at trial, indicate that the victim did not wish to speak with appellant and walked away from appellant. Furthermore, the victim was talking on his cell phone during his encounter with appellant.

{¶28} Appellant's statement that Brown flashed a gun at him in a threatening manner is also contradicted by the evidence. As previously stated, there was testimony that Brown's person was checked for weapons due to the fact that he was engaging in a controlled drug deal.

{¶29} Upon the record before us, we do not find his convictions were against the weight of the evidence. There was sufficient, credible evidence to support appellant's convictions. Appellant's second assignment of error is without merit.

{¶30} The judgment of the Lake County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.