

[Cite as *State v. Vann*, 2009-Ohio-5308.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :  
 :  
 Plaintiff-Appellee : C.A. CASE NO. 22818  
 :  
 vs. : T.C. CASE NOS.07CR1735/1  
 : 07CR1587/1, 07CR3800  
 MANUEL A. VANN, JR. : (Criminal Appeal from  
 : Common Pleas Court)  
 Defendant-Appellant :

. . . . .

O P I N I O N

Rendered on the 2<sup>nd</sup> day of October, 2009.

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GRADY, J.:

{¶ 1} Defendant, Manuel Vann, Jr., appeals from his  
conviction and sentence for aggravated robbery with a firearm  
specification.

{¶ 2} On September 13, 2007, Davion Gullette and Ashanti  
Morris went to Gebhardt's market in Dayton, where Gullette was

approached by a friend, Chase, who asked Gullette for money Gullette owed him. Gullette said he did not have the money and Chase became agitated. When Gullette and Morris left the store, Defendant Vann approached Gullette and argued with him about the money he owed Chase. Defendant pulled out a black and brown small caliber semi-automatic handgun and stuck it in Gullette's side, and then proceeded to go through Gullette's pockets, removing twenty-one dollars in cash. Defendant then fled. Gullette and Morris called police. Gullette knew Defendant only as "Allen," and Gullette gave police a description of Defendant and his clothing.

{¶ 3} Dayton police officer Mark Ponichtera was dispatched to the area around Gebhardt's market to look for the robbery suspect. Officer Ponichtera immediately spotted Defendant, who matched the description of the robber. When Defendant observed Officer Ponichtera, he ran inside the store.

{¶ 4} Officer Ponichtera followed Defendant and apprehended him, but did not find any handgun on Defendant's person or inside the store. Officer Ponichtera released Defendant because Gullette had not yet positively identified a suspect. Gullette subsequently identified Defendant as "Allen," the man who had robbed him, from a photographic lineup.

{¶ 5} Defendant was indicted on one count of aggravated

robbery, R.C. 2911.01(A)(1), with a three year firearm specification, R.C. 2941.145, attached. Prior to trial, the trial court permitted the State to amend the indictment by adding the culpable mental state of recklessly to the aggravated robbery charge. Defendant was found guilty following a jury trial, of both aggravated robbery and the firearm specification.

The trial court sentenced Defendant to consecutive three year prison terms on the aggravated robbery charge and the firearm specification, for a total sentence of six years.

{¶ 6} Defendant timely appealed to this court from his conviction and sentence. He challenges only his conviction and sentence on the firearm specification.

{¶ 7} An appellant's brief must contain "[a] statement of the case briefly describing the nature of the case, the course of proceedings, and the disposition in the court below." App.R. 16(A)(5). The brief must also contain "[a] statement of facts relevant to the assignments of error for review, with appropriate references to the record . . ." App.R. 16(A)(6).

Appellant's brief combines these separate statements, which are intended to be neutral and informative, into a "Statement of Case and Facts" that is instead in the nature of an App.R. 16(A)(7) argument. Because the joint statement is not provided by App.R. 16(A), we will rely on the separate Statement Of The

Case and Statement of Facts set out in Appellee's brief.

FIRST ASSIGNMENT OF ERROR

{¶ 8} "THE TRIAL COURT COMMITTED STRUCTURAL ERROR IN CONVICTING APPELLANT OF THE FIREARM SPECIFICATION, IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF OHIO."

{¶ 9} Defendant argues that the firearm specification contained in the indictment is defective because it fails to specify any culpable mental state, such as recklessness, and that this defect constitutes structural error that requires reversal of his conviction and sentence on the firearm specification. In support of his argument Defendant relies upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), and *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732. In essence, Defendant argues that this court should extend the Ohio Supreme Court's holding in *Colon I* to firearm specifications. We decline to do so because firearm specifications are not themselves separate criminal offenses that require proof of a culpable mental state.

{¶ 10} In *Colon I* the Ohio Supreme Court held that the failure of an indictment for robbery in violation of R.C. 2911.02(A)(2) to include the mens rea element of recklessness constitutes structural error that requires reversal, and the failure of

the defendant to raise that issue in the trial court did not waive the defect in the indictment. Subsequently, in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*), the Supreme Court explained that its holding in *Colon I* was confined to the unique facts of that case, and that structural error analysis is appropriate only in rare cases, such as *Colon I*, where multiple errors at trial flow from the defective indictment. In most cases, when a defendant fails to object to an indictment that is defective because it does not include an essential element of the charged criminal offense, a plain error analysis is appropriate. *Colon II*. Defendant failed to object in the trial court proceeding to the alleged defect in his indictment.

{¶ 11} In *Lozier*, the Ohio Supreme Court found that the appropriate mens rea for the crime of trafficking in L.S.D. "in the vicinity of a school" in violation of R.C. 2925.03(C)(5)(b), was recklessness. *Id.*, at syllabus. The Supreme Court held that the finding that the trafficking occurred "in the vicinity of a school," which raised the level of the offense from a fifth degree felony to a fourth degree felony, was an essential element of the offense that required a culpable mental state. *Id.* at ¶31-33.

{¶ 12} Unlike *Lozier* and *Colon*, a firearm specification is

not an element of the predicate offense, and it does not raise the felony level of the offense. Neither is a firearm specification a separate criminal offense that requires proof of a culpable mental state separate from commission of the predicate offense. *State v. Cook*, Summit App. No. 24058, 2008-Ohio-4841; *State v. Gilbert*, Cuyahoga App. No. 90615, 2009-Ohio-463. Rather, a firearm specification is merely a penalty enhancement that attaches to some predicate offense.

{¶ 13} R.C. 2941.145 provides that an offender may be sentenced to an additional three year term of imprisonment where the indictment specifies that “the offender had a firearm on or about the offender’s person or under the offender’s control while committing the offense, and either displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used the firearm to facilitate the offense.”

As the Court of Appeals in *Cook* noted, “by its own terms, the statute requires that an underlying offense occur for the firearm specification to be applicable.” *Id.* at ¶9. It cannot stand alone, and is not itself a separate offense. *Id.* Therefore, a firearm specification does not require its own mens rea. *Id.* at ¶8.

{¶ 14} Simply put, the holdings in *Lozier* and *Colon* do not apply to firearm specifications because they are neither

elements of the predicate offense to which they are attached nor separate criminal offenses. Therefore, convictions for firearm specifications do not require proof of a culpable mental state. *Cook; Gilbert*.

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

SECOND ASSIGNMENT OF ERROR

{¶ 16} "THE JUDGMENT OF THE TRIAL COURT ON THE FIREARM SPECIFICATION SHOULD BE REVERSED BECAUSE IT IS AGAINST THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE AT TRIAL."

{¶ 17} A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 18} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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."

{¶ 19} A weight of the evidence argument challenges the believability of the evidence; which of the competing inferences suggested by the evidence is more believable or persuasive. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 20} "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins, supra*.

{¶ 21} Defendant argues that his conviction on the firearm specification is not supported by legally sufficient evidence and is against the manifest weight of the evidence because the firearm he allegedly used during the robbery was never found and the State did not produce sufficient evidence to demonstrate that the firearm used was operable. We disagree.

{¶ 22} R.C. 2941.145 permits imposition of a mandatory three year prison term where the indictment specifies, and the jury finds:

{¶ 23} " . . . that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished

the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offenses.”

{¶ 24} R.C. 2923.11(B) defines “firearm” and provides:

{¶ 25} “(1) ‘Firearm’ means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. ‘Firearm’ includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.

{¶ 26} “(2) When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm.”

{¶ 27} Both a firearm’s existence and its operability may be inferred from the surrounding facts and circumstances. It is not necessary to admit the firearm used during the crime in evidence in order to establish a firearm specification. *State v. Murphy* (1990), 49 Ohio St.3d 206; *State v. Knight*, Greene App. No. 2003CA14, 2004-Ohio-1941. A victim’s belief that the weapon is a gun, together with the intent on the part of the accused to create and exploit that belief for his own criminal purposes, is sufficient to prove a firearm

specification. *State v. Greathouse*, Montgomery App. No. 21536, 2007-Ohio-2136.

{¶ 28} Actions alone, without verbal threats, may be sufficient circumstances to establish the operability of a firearm. For example, the evidence was sufficient to prove a firearm specification when masked men waived their guns and announced "this is a robbery." *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, at fn.3. See also: *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. In *State v. Melton*, Montgomery App. No. 22591, 2009-Ohio-535, the defendant forced his way into the victim's home, told her to "shush," then pulled out a gun and proceeded to steal items of jewelry from the bedroom.

Because the victim believed the gun was real, she feared for her safety and complied with the defendant's demands. This court found the evidence was sufficient to support the firearm specification. *Id.* at ¶18, 36. Furthermore, because the victim in *Melton* was the only witness to testify on this issue, we found that the evidence was uncontroverted and the verdict was not against the manifest weight of the evidence. *Id.* at ¶37.

{¶ 29} The same applies in this case. Both Gullette and Morris testified that Defendant pulled out a small black handgun when he confronted Gullette outside Gebhardt's market.

Gullette explained that Defendant stuck the gun in his side and began going through Gullette's pockets, looking for money.

When Gullette pushed Defendant's hand away, Defendant raised the gun up to Gullette's head. Both Gullette and Morris believed Defendant would either hit Gullette in the head with the gun or shoot him with it. Gullette testified that he let Defendant take the money because Defendant was holding a gun up to his head. Even as Defendant fled, Morris did not yell for help because "he's still got the gun . . . I didn't want to be shot."

{¶ 30} Gullette and Morris both believed that the gun Defendant used during this robbery was real, and they complied with his actions because they feared being shot. The uncontested circumstantial evidence in this case is legally sufficient to prove the existence and operability of the firearm Defendant used to commit this robbery. *Melton*. Furthermore, because only Gullette and Morris testified on this issue, the guilty verdict on the firearm specification is not against the manifest weight of the evidence. *Id.*

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

The judgment of the trial court will be affirmed.

FROELICH, J. And FRENCH, J. concur.

(Hon. Judith L. French, Tenth District Court of Appeals, sitting  
by assignment of the Chief Justice of the Supreme Court of Ohio.)

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