

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-14-1278

Appellee

Trial Court No. CR0201402082

v.

Devonn D. Palmer

DECISION AND JUDGMENT

Appellant

Decided: November 17, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Frank H. Spryszak, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Devonn Palmer, appeals the judgment of the Lucas County Court of Common Pleas, sentencing him to a total of nine years in prison after a jury found him guilty of aggravated robbery and felonious assault. We affirm.

A. Facts and Procedural Background

{¶ 2} The incident giving rise to this appeal occurred on June 21, 2014. On that evening, a man wearing a dark hooded sweatshirt approached a parked vehicle occupied by Steven Abernathy, Abernathy's girlfriend, Erin Wright, and the couple's one-year-old daughter. As the man approached the vehicle, Abernathy, who was taking his daughter out of the vehicle, noticed that the man was holding a handgun.

{¶ 3} Once he reached the vehicle, the man instructed Abernathy to "give it up." Abernathy, who was holding his daughter with one hand, began to retreat with his other hand outstretched. Moments later, the man shot Abernathy in the leg, causing him to fall to the ground along with his daughter.

{¶ 4} After shooting Abernathy, the man proceeded to the passenger side of the vehicle, where Wright was seated. A struggle ensued as the man attempted to break into the vehicle. Eventually, Wright was able to pull the door shut. Meanwhile, a passerby approached the scene and stopped alongside Abernathy to check to see if he was injured. Apparently spooked by the presence of the passerby, the man fled the scene without further incident.

{¶ 5} Following the incident, a nearby resident approached Wright and told her the name of the robber. Wright then searched Facebook for the person identified by the neighbor and was able to locate the individual, confirming his identity by examining pictures that were attached to his Facebook account.

{¶ 6} One week after the robbery occurred, a detective with the Toledo Police Department, Sherry Wise, met with Abernathy and Wright to administer a photo array. According to Wise's testimony at trial, Abernathy immediately selected the photograph depicting appellant. The same photo array was shown to Wright, who also identified appellant as the perpetrator.

{¶ 7} Appellant was subsequently indicted on one count of aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree, one count of felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree, and a firearm specification as to each count. Following several pretrial hearings, the matter proceeded to a trial before a jury. At the conclusion of the trial, the jury found appellant guilty of both counts, along with the firearms specifications. The trial court merged the two counts at sentencing, and imposed a prison term of six years on the aggravated robbery charge, plus an additional three-year mandatory prison sentence for the firearms specification. The court ordered the sentences to be served consecutively for a total prison sentence of nine years. Thereafter, appellant filed a timely notice of appeal.

B. Assignments of Error

{¶ 8} On appeal, appellant assigns the following errors for our review:

- 1) Appellant's convictions for Aggravated Robbery and Felonious Assault fell against the manifest weight of the evidence.

2) The Trial Court erred in sentencing Appellant to three years on the gun specification where the jury verdict forms only had the elements for the one year specification.

II. Analysis

A. Manifest Weight

{¶ 9} In his first assignment of error, appellant argues that the jury's determination of guilt was against the manifest weight of the evidence.

{¶ 10} When reviewing a manifest weight claim,

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 clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220.

{¶ 11} Appellant's manifest weight argument in this case centers on the identity of the perpetrator. Specifically, appellant characterizes the state's evidence on the issue of identity as "unreliable eyewitness testimony of two victims under the heavy stress of an incident that took mere seconds to happen." Further, appellant contends that the testimony was biased by the neighbor who provided appellant's name to Wright. Despite

his assertions, appellant does not point to any conflicts in the evidence on the issue of identity. Indeed, our review of the record reveals no such conflicts.

{¶ 12} Regarding the identity of the perpetrator, Abernathy testified that appellant was the individual who shot him on the night of the incident. Although the two had never met prior to the incident, Abernathy recognized appellant as the perpetrator because appellant's sweatshirt hood fell off during the shooting, revealing his face. Further, Wright testified that she was able to see the perpetrator's face as he attempted to break into the car in which she was sitting after the shooting. Wright specifically stated that she "got a good look, a very good look." Having seen the perpetrator's face, they were each able to identify appellant at trial. Further, Abernathy and Wright selected appellant's photograph during the photo array administered by detective Wise.

{¶ 13} In light of the uncontroverted evidence produced by the state at trial, we do not find that this is the exceptional case warranting reversal on manifest weight grounds. Accordingly, appellant's first assignment of error is not well-taken.

B. Firearm Specification

{¶ 14} In his second assignment of error, appellant argues that the trial court erred in its imposition of a three-year prison sentence for the firearm specification.

{¶ 15} Under R.C. 2941.145(A),

Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information

charging the offense 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 displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

“SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth 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 offense).”

{¶ 16} According to appellant, a one-year mandatory prison sentence under R.C. 2941.141 should have been imposed in this case because the jury verdict form lists only the elements of the one-year firearm specification, which does not include the requirement that the offender “displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.”

{¶ 17} The state acknowledges that the jury verdict form is missing the additional language. Nonetheless, the state notes that the jury was properly instructed as follows, in relevant part:

The defendant in Count 1 is charged with aggravated robbery.

Before you can find the defendant guilty of aggravated robbery, you must find beyond a reasonable doubt that on or about the 21st day of June, 2014, and in Lucas County, Ohio, that the defendant in committing or attempting to commit a theft offense did knowingly have a deadly weapon, brandished it, indicated that the offender possessed it, or used it.

* * *

If your verdict is guilty of aggravated robbery, you must then separately decide whether or not the State has prove[n] beyond a reasonable doubt that the defendant had a firearm on or about his person or under his control while committing the offense charged in Count 1 of the indictment, and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.

{¶ 18} In a similar case, the Eleventh District held that the trial court properly imposed a three-year mandatory prison sentence for a firearm specification under R.C. 2941.145 despite the jury verdict form merely indicating that the offender had a firearm on or about his person or under his control while committing the offense of felonious assault. *State v. Stone*, 11th Dist. Ashtabula No. 98-A-0102, 1999 WL 1313620, *3 (Dec. 10, 1999). In that case, the court of appeals found that the jury's guilty verdict on the felonious assault count, paired with its verdict on the firearm specification, was sufficient to permit the trial court to sentence appellant to a three-year prison term under

R.C. 2941.145 because the felonious assault count included the element of “pointing a deadly weapon at another,” which the trial court characterized as “the equivalent of displaying, brandishing, or using a firearm during the commission of the offense.” *Id.*

{¶ 19} Likewise, the trial court in the case sub judice instructed the jury that, in order to find appellant guilty of aggravated robbery, it had to find that appellant had a deadly weapon, brandished it, indicated that he possessed it, or used it while committing the offense. Given this instruction, it is clear that the jury concluded that appellant “displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense,” as required under R.C. 2941.145. Thus, we find no error in the trial court’s imposition of a three-year prison sentence under R.C. 2941.145.¹

{¶ 20} Accordingly, appellant’s second assignment of error is not well-taken.

III. Conclusion

{¶ 21} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

¹ Notably, the indictment in this case specifically cites R.C. 2941.145 and includes the additional language therein.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
