

[Cite as *State v. Jackson*, 2009-Ohio-2710.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91180

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEVONTE JACKSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-485566

BEFORE: Rocco, J., Gallagher, P.J., and Kilbane, J.

RELEASED: June 11, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender

BY: Erika Cunliffe
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Steven E. Gall
Assistant Prosecuting Attorney
The Justice Center – 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant, Devonte Jackson, appeals from a common pleas court judgment convicting him of attempted murder with a three-year firearm specification and having a weapon while under disability.¹ He complains that he was deprived of due process and of his right to a fair trial because the jury was improperly exposed to extrajudicial information. He further asserts that the evidence was insufficient to support his conviction. Finally, he asserts that prosecutorial misconduct deprived him of a fair trial. We find no prejudicial error in the proceedings below and affirm the judgment.

Factual and Procedural History

{¶ 2} Appellant was charged in four counts of a five-count indictment filed August 29, 2006. He was charged with two counts of felonious assault with one- and three-year firearm specifications, one count of attempted murder with one- and three-year firearm specifications, and one count of having a weapon while under disability. The case proceeded to a jury trial on November 27, 2007. On the second day of trial, November 29, 2007, the court informed counsel that one of the jurors had reported to the bailiff that during the lunch break the previous

¹Appellant was also found guilty of two counts of felonious assault, but these charges and their associated firearm specifications were merged into the attempted murder charge and its three-year firearm specification.

day, he heard a female walking behind him at Tower City say “[t]here’s that jury guy. I’m going to cut him up.” Defense counsel requested a mistrial. The court conducted a colloquy with the juror, who said that this incident “absolutely [did] not” affect his ability to continue with the trial. Defense counsel then inquired whether the juror could continue to provide appellant with a fair trial. The juror said, “Definitely. There’s no way he could have been involved with that. And like I say, it was an ignorant comment * * * *” The other jurors were also questioned individually. Some had not heard about the incident. Those who had heard about it reported that it did not affect their ability to provide the defendant with a fair trial. The court then overruled the motion for a mistrial.

{¶ 3} The state presented the testimony of East Cleveland detectives Kyle Cunningham and Henry McCurdy, police sergeant Michael Cardilli, and East Cleveland Municipal Court bailiff William Plummer. Detective Cunningham testified that in the early morning hours of July 7, 2006, he was working a side job at Fireside Lounge with Plummer. A group of men began fighting. Cunningham and Plummer broke up the fight. The victim in this case, Albert Cummings, was part of the fight; appellant was not.

{¶ 4} Cunningham decided to close down the business for the night and directed people to go outside. Plummer was positioned by the front door to prevent people from coming back inside. Kenny Schubridge told Cunningham that a male wearing a striped shirt had just stepped outside and had a gun.

Cunningham went outside and turned left toward the parking lot.

{¶ 5} Cunningham saw appellant standing over Cummings. He saw appellant shoot down twice. Cunningham drew his gun, identified himself as a police officer, and instructed appellant to put down his gun. Appellant turned toward Cunningham; Cunningham thought appellant was getting ready to shoot. Plummer then shot at appellant. Cunningham believed Plummer's shot struck appellant because he saw appellant stumble. Appellant began to run, still pointing the gun at Cunningham and Plummer. Cunningham advanced toward appellant.

{¶ 6} Cunningham saw appellant stumble and drop the gun, but he picked it up again before Cunningham could get there. Appellant pointed the gun at Cunningham and Cunningham fired at him. Appellant got up and ran again, pointing his gun back at Cunningham and Plummer. Plummer shot at appellant again. Cunningham also fired two shots at appellant. Appellant stumbled and continued to run, but then dropped the gun and collapsed.

{¶ 7} Cunningham later saw the victim, Albert Cummings. He observed that Cummings had been shot in the buttocks.

{¶ 8} At the conclusion of the trial, the jury found appellant guilty of all four charges. At sentencing, the court merged the felonious assault and attempted murder charges, as well as the associated firearms specifications. The court sentenced appellant to three years' imprisonment on the firearms

specification, to be served prior and consecutive to the sentence of five years' imprisonment on the attempted murder charge. The court further sentenced appellant to one year of imprisonment on the charge of having a weapon while under disability, to be served concurrently. The court also imposed a five-year period of post-release control.

Law and Analysis

{¶ 9} In his first assignment of error, appellant asserts that he was deprived of a fair trial by an impartial jury because the jurors were tainted by an extrajudicial event in which one juror overheard someone saying that she was going to "cut him up." "As a reviewing court, we show deference to the trial judge, who sees and hears the events and thus is in a better position to accurately evaluate the situation and determine the appropriate scope of inquiry." *Cunningham v. St. Alexis Hospital Med. Center* (2001), 143 Ohio App. 3d 353, 373. We review the trial court's decision to deny a mistrial for abuse of discretion.

{¶ 10} "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury

capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.” *Smith v. Phillips* (1982), 455 U.S. 209, 217.

{¶ 11} When it learned of the potential threat to a juror, the trial court here separately voir dired each juror to determine whether they knew of this threat, and if so, how it may have affected them. Each juror who had learned of the threat said that he or she did not believe that the defendant was involved, and that the incident did not affect their ability to decide the case fairly. Having determined that there was no prejudicial effect from the threat, the court did not abuse its discretion by denying appellant’s motion for a mistrial. Therefore, we overrule the first assignment of error.

{¶ 12} Appellant next argues that there was insufficient evidence to support his conviction of attempted murder. He asserts that the injury sustained by the victim – two gunshot wounds to the buttocks -- did not evidence any attempt by appellant to purposely cause the victim’s death. In so arguing, however, appellant recognizes that his intent to kill may be inferred from the weapon he used and the manner in which he inflicted the wound. *State v. Grace* (Oct. 11, 1995), Summit App. No. 16950. Appellant used a firearm, an inherently dangerous instrument which is likely to produce death. Moreover, appellant was observed standing over the victim and pointing the gun down at

him. The jury could infer that appellant intended to shoot the victim again, but was interrupted by Cunningham and Plummer. Therefore, we find there was evidence from which a rational trier of fact could have found the essential elements of the crime to have been proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. The second assignment of error is overruled.

{¶ 13} Finally, appellant contends that the prosecutor's misconduct deprived him of a fair trial. During closing argument, the state referred to "unrefuted evidence" that the victim was shot twice and that two spent shell casings were recovered. Appellant equates this argument to a reference to his failure to present any evidence. We simply cannot construe this language as a comment on appellant's failure to testify. "A reference by the prosecutor in closing argument to uncontradicted evidence is not a comment on the accused's failure to testify, where the comment is directed to the strength of the state's evidence and not to the silence of the accused, and where the jury is instructed, as here, to not consider the accused's failure to testify." *State v. Williams* (1986), 23 Ohio St.3d 16, 19-20.

{¶ 14} Appellant also complains that the prosecutor described his attorney as a "magician," and argues that this somehow denigrated counsel. Appellant did not object to this argument, so we review it for plain error. The prosecutor's argument did not suggest any misconduct by appellant's counsel. He simply

argued that the defense attorney was attempting to focus the jury's attention away from the critical evidence. This was not improper argument.

{¶ 15} The third assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR