

[Cite as *State v. Hamilton*, 2009-Ohio-3595.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91896

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTONIO HAMILTON

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED; REVERSED
AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510174

BEFORE: Dyke, J., Rocco, P.J., and Celebrezze, J.

RELEASED: July 23, 2009

JOURNALIZED:

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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).

ANN DYKE, J.:

{¶ 1} Defendant Antonio Hamilton appeals from his convictions for two counts of aggravated robbery, felonious assault, and firearm specifications. For the reasons set forth below, we affirm defendant's convictions but reverse the sentences on the firearm specifications and remand the matter for resentencing on a single firearm specification and for the trial court to identify the aggravated robbery count for which defendant was convicted.

{¶ 2} On May 8, 2008, defendant and co-defendant Lafette Fryerson were indicted pursuant to a three-count indictment in connection with an alleged attack upon Thomas Mitchell. Counts 1 and 2 charged him with aggravated robbery pursuant to R.C. 2911.01(A)(1) (with a deadly weapon), and R.C. 2911.01(A)(3) (inflicting serious physical harm), and Count 3 charged defendant with felonious assault under R.C. 2903.11(A)(1) (inflicting serious physical harm). All charges contained one- and three-year firearm specifications. Defendant and Fryerson pled not guilty and the matter proceeded to a jury trial on June 9, 2008.

{¶ 3} The state's evidence indicated that on August 25, 2007, Mitchell, his girlfriend Kym Hagler, and friend Cornelius Jones, went to a birthday party for Glenda Jones on Finney Avenue in Cleveland. Defendant and Fryerson were already at the party when Mitchell's group arrived. Defendant, Glenda's boyfriend, Jones, and Mitchell began to play cards outside. Glenda's boyfriend suggested that they play for money, defendant agreed and eventually placed a stack of bills on the table. Glenda's boyfriend slammed the table with his hand and caused drinks on the

table to spill. Defendant got up and Jones reminded him that he had left his money on the table. The group cleaned up the spill and resumed their game. Glenda's boyfriend again slammed the table, causing drinks to spill. The group began to argue with him and defendant went in the house.

{¶ 4} The state's evidence further indicated that defendant exited the house a few moments later, demanding to know where his money was, and complaining that he was missing a \$100 bill. Defendant approached the people at the party and demanded that they empty their pockets. A younger man at the party fled, and defendant and Fryerson chased after him.

{¶ 5} Defendant and Fryerson returned to the party a short time later and continued to demand return of the money. Defendant approached Mitchell and said that he was going to search Hagler's purse. Mitchell said that they had now gone too far. Fryerson then punched Mitchell on the side of his head. Mitchell lunged toward Fryerson and the two then fought on the ground. Defendant fired shots into the air. Jones started to intercede but defendant then fired two shots toward him. Fryerson went through Mitchell's pockets and took his money and his wallet. Fryerson returned the wallet but the money was not recovered.

{¶ 6} An individual later identified as Glenda, called the police. On the recorded call with the dispatcher, shots are heard, and a man identified as Fryerson states "I am a big ----- and I knock big ----- out."

{¶ 7} After the altercation, Mitchell's face was bloodied and his leg was injured. He declined medical treatment at the scene but his friends helped him

home. He was later diagnosed as sustaining a rupture to the quad tendon of his left leg. Mitchell's injury required a surgical repair, and also caused him to miss work and eventually lose his job.

{¶ 8} Defendant was convicted of all charges. The trial court merged Counts 1 and 2 but did not identify the count for which defendant was convicted. The court sentenced him to a total of 22 years of imprisonment. He now appeals and assigns four errors for our review. For the sake of convenience, we shall address the assignments of error out of their predesignated order.

{¶ 9} In his fourth assignment of error, defendant asserts that his convictions are not supported by sufficient evidence.

{¶ 10} "Sufficiency is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 11} "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 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 12} The essential elements of aggravated robbery are set forth in R.C. 2911.01, which states in relevant part, as follows:

{¶ 13} “(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 14} “(1) Have a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

{¶ 15} “* * *

{¶ 16} “(3) Inflict, or attempt to inflict, serious physical harm on another.”

{¶ 17} The essential elements of felonious assault are set forth in R.C. 2903.11, which provides in relevant part, as follows:

{¶ 18} “(A) No person shall knowingly do either of the following:

{¶ 19} “(1) Cause serious physical harm to another * * *.”

{¶ 20} Pursuant to R.C. 2901.01(A)(5), “serious physical harm” includes the following:

{¶ 21} “(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶ 22} “* * *

{¶ 23} “(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.”

{¶ 24} R.C. 2923.03 sets forth the essential elements of the offense of complicity and states:

{¶ 25} “(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶ 26} “(2) Aid or abet another in committing the offense.”

{¶ 27} Pursuant to R.C. 2923.03(F), a charge of complicity may be stated in terms of the complicity statute or in terms of the principal offense. Accord *State v. Herring*, 94 Ohio St.3d 246, 251, 2002-Ohio-796, 762 N.E.2d 940.

{¶ 28} In this matter, the state presented evidence that defendant demanded his money from Mitchell and Fryerson then punched Mitchell on the side of his head. Defendant fired shots as Fryerson and Mitchell fought and defendant fired two shots at Jones when he tried to help Mitchell. At this time, Fryerson went through Mitchell’s pockets and took his money and his wallet. Approximately \$140 was taken from Mitchell at this time. The call to police indicated that shots were fired at the party, and a man identified as Fryerson stated “I am a big ----- and I knock big ----- out.” Mitchell’s face and lip were bloodied following the altercation, and he was incapacitated, causing him to lose work and eventually lose his job.

{¶ 29} This evidence, if believed, establishes that defendant used the weapon to aid and abet Fryerson in stealing Mitchell’s money. It further establishes that defendant aided and abetted Fryerson in the forcible taking of Mitchell’s property and in causing serious physical harm to Mitchell. The state’s evidence was sufficient to establish the essential elements of aggravated robbery with a deadly weapon,

aggravated robbery through the infliction of serious physical harm, and felonious assault. It further establishes that defendant used an operable firearm in commission of these offenses. A rational trier of fact could have found the essential elements of the offenses proven beyond a reasonable doubt.

{¶ 30} This assignment of error is without merit.

{¶ 31} In his first assignment of error, defendant asserts that aggravated robbery and felonious assault are allied offenses of similar import which should have been merged.

{¶ 32} Ohio courts have repeatedly determined that aggravated robbery and felonious assault are not allied offenses of similar import. See *State v. Preston* (1986), 23 Ohio St.3d 64, 491 N.E.2d 685; *State v. Allen* (1996), 115 Ohio App.3d 642, 685 N.E.2d 1304; *State v. Collins*, Cuyahoga App. No. 89529, 2008-Ohio-578; *State v. Sowell* (May 27, 1993), Cuyahoga App. No. 62601.

{¶ 33} This claim is therefore without merit.

{¶ 34} In his second assignment of error, defendant asserts that the trial court subjected him to double jeopardy and violated his right to due process by convicting him of both aggravated robbery with a deadly weapon under R.C. 2911.01, and a firearm specification for this count.

{¶ 35} In *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535, the Supreme Court of the United States held that the double jeopardy clause was not violated where the defendant was convicted of both a charge of “armed criminal action,” a sentence enhancement, and a charge of first-degree

robbery, the underlying felony, where the legislature specifically authorizes cumulative punishment under two statutes. Similarly, in *State v. Vasquez* (1984), 18 Ohio App.3d 92, 94, 481 N.E.2d 640, the court held that the double jeopardy clause does not preclude the imposition in a single trial of cumulative punishment for aggravated robbery and a firearm specification. Accord *State v. Mosley*, 166 Ohio App.3d 71, 2006-Ohio-1756, 849 N.E.2d 73; *State v. Crain*, Lake App. No. 2001-L-147.

{¶ 36} By application of this authority, the convictions for aggravated robbery with a deadly weapon, and the enhancing firearm specification do not violate defendant's right to due process and do not subject him to double jeopardy.

{¶ 37} This assignment of error is without merit.

{¶ 38} In his third assignment of error, defendant asserts that the trial court subjected him to double jeopardy and violated his right to due process by imposing consecutive firearm specifications in this matter.

{¶ 39} R.C. 2929.14(D)(1)(a)(ii) imposes a mandatory three-year prison term when a defendant is convicted of a firearm specification pursuant to R.C. 2941.145. However, pursuant to R.C. 2929.14(D)(1)(b), a court is not authorized to "impose more than one prison term on an offender [for a firearms specification] for felonies committed as part of the same act or transaction." See, also, *State v. Covington*, Franklin App. No. 06AP-826, 2007-Ohio-5008.

{¶ 40} In *State v. Moore*, 161 Ohio App.3d 778, 2005-Ohio-3311, 832 N.E.2d 85, the court observed that the analysis to be applied is distinct from the "separate

animus” test for allied offenses. The court noted that “transaction” has been defined as “a series of continuous acts bound together by time, space, and purpose, and directed toward a single objective,” and “a series of criminal offenses which develop from a single criminal adventure, bearing a logical relationship to one another, and bound together by time, space, and purpose directed toward a single objective.” *Id.*, citations omitted.

{¶ 41} In this matter, the record indicates that the offenses were a series of continuous acts with a single objective and were also part of a single criminal adventure, with a logical relationship to one another, which were bound together by time, space, and purpose. The trial court erred in imposing two separate and consecutive sentences for the firearm specifications and they are, therefore, reversed and the matter is remanded for imposition of a single firearm specification.

{¶ 42} This assignment of error is well-taken.

{¶ 43} Defendant’s convictions for aggravated robbery and felonious assault are affirmed. The sentences for the firearm specifications are reversed and the matter is remanded for resentencing on a single firearm specification. The trial court is to identify the aggravated robbery count for which defendant was convicted. See *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149.

It is ordered that appellant and appellee equally share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for resentencing.

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

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR