

[Cite as *State v. Wheeler*, 2010-Ohio-1753.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93011

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

QUBAN WHEELER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART;
REVERSED IN PART;
REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-501039

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

RELEASED: April 22, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Quban Wheeler appeals from his convictions for felonious assault and attempted murder, with firearm specifications, and for having a weapon while under disability.

{¶ 2} Wheeler presents three assignments of error. He asserts the trial court erred in permitting the state to introduce evidence that a prior confrontation occurred between him and one of the victims, his convictions are against the manifest weight of the evidence, and the trial court erred in providing a jury instruction on conspiracy.

{¶ 3} Upon a review of the record, this court cannot find merit to any of his assertions. Consequently, his convictions are affirmed in part. However, since plain error occurred when Wheeler was convicted of allied offenses contrary to R.C. 2941.25(A), this case is reversed in part and remanded pursuant to *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-241, 922 N.E.2d 937.

{¶ 4} Wheeler's convictions result from an incident that occurred just after midnight on August 4, 2007. Buford Robinson, one of the victims, described the incident in the following manner.

{¶ 5} Robinson left work at University Hospital in his green Chrysler automobile after completing his shift. He returned to his home located near East 71st Street and Harvard Avenue, retrieved his two young male cousins, Antonio and Shawn Cook, who had been babysitting his children, and proceeded to drive them to their home.

{¶ 6} As Robinson drove past a gas station near Harvard and Broadway Avenue, he noticed a vehicle pull out and begin to follow him. Robinson recognized the vehicle, a

white SUV, from a previous run-in with the vehicle's driver. Robinson identified the driver as Wheeler.

{¶ 7} According to Robinson, a few months previously, he had driven to a gas station “on 116[th] and Union” because his cousin had found someone who was doing a “hookup with a gas card.” Robinson explained the transaction: “[S]omeone has a stolen credit card, * * * they [use it to] fill up you[r] tank, however much gas you want, and they tell you * * * give them half” of the total amount of the cost; both parties to the transaction thus enjoy a benefit.

{¶ 8} When Robinson arrived at the gas station, his cousin pointed out Wheeler, who drove a white SUV, as the “dude with the gas” card. Robinson arranged with Wheeler to travel to another gas station, and, as they drove there, Robinson told his wife to write down the SUV's license plate number, “just in case something happen[s].”

{¶ 9} Upon their arrival, Wheeler parked the SUV a short distance away, and his female friend exited the truck and pumped some gas into Robinson's car. However, she soon stopped and refused to replace the gas cap until Robinson paid her. Robinson exchanged words with her, causing Wheeler to drive up to the pumps; he seemed angry about the problem. Robinson saw him get out of the truck “grabbing his gun.”

{¶ 10} At that, Robinson simply drove off. He told his wife to “call the police, because [Wheeler] ended up starting following” in his white SUV; a high-speed chase ensued. During the chase, as Robinson turned down a side street, Wheeler “fired like five shots” at Robinson's car. Robinson's wife had the police dispatcher on the line during the

incident; she provided the license plate number of the SUV. Robinson’s wife reported the shots fired at 12:24 a.m. After they escaped, however, Robinson made no further effort to pursue the matter, since the incident had started with a “stolen credit card.”

{¶ 11} Nevertheless, Robinson recognized the white SUV when it began following him the second time. The driver “followed [Robinson] all the way from Harvard and Broadway, to Garfield” Heights, speeding up and slowing again. As Robinson turned on a side street, he saw the SUV “coming around,” beginning to pass on the left. He told his cousins to get down; at that point, shooters in the SUV “started unloading they [sic] magazine.”

{¶ 12} Robinson believed there was more than one person shooting, because, while he could see the SUV’s driver firing through the passenger side window, “shots from [his] back, and all the way up to [his] front” were being fired at the same time. The shots not only struck Antonio Cook, but also pierced Robinson’s car and his tires, causing him to slow and search for cover. Robinson pulled “between some people [sic] garages, and stay[ed] right there” as Shawn Cook called the police. Robinson took over the conversation when the police answered.

{¶ 13} After the police arrived, EMS workers transported Antonio to the hospital, where he received treatment for two gunshot wounds. Robinson provided to the police a description of the SUV and most of its license plate number. He was able to furnish the complete number after he consulted his wife. Police officers recovered “a slug” and casings from the scene and from Robinson’s car that indicated the assailants used more

than one weapon in the attack.

{¶ 14} Carl Biegacki, the police detective assigned to the case, found the license plate number the Robinsons provided was assigned to a white GMC Yukon. That vehicle belonged to Wheeler. Later, Robinson identified Wheeler in a photo array as one of the shooters. Robinson's wife also identified Wheeler as the person who had fired shots at their vehicle during the previous encounter.

{¶ 15} As part of the investigation, Biegacki interviewed Wheeler. Wheeler stated he had not been in Garfield Heights on the night of the incident. He claimed he had not obtained his SUV from the repair shop until after midnight that night, and that he then went to a restaurant.

{¶ 16} Biegacki, however, obtained a surveillance video that showed Wheeler picking up his SUV from the repair shop at 11:38 p.m. on August 3, 2007. Biegacki also checked the records for Wheeler's cellular telephone. The telephone records indicated Wheeler's cellular telephone was in transit during the time of the incident, traveling from Maple Heights to Garfield Heights. No calls had been made between 12:11 a.m. and 12:34 a.m. By 1:07 a.m., a call was made near Wheeler's residence.

{¶ 17} Wheeler subsequently was indicted, charged with four counts of felonious assault, three counts of attempted murder, and one count of having a weapon while under disability; each of the first six counts contained three firearm specifications. Wheeler signed a waiver of his right to a jury trial with respect only to the final count.

{¶ 18} At the conclusion of the evidence, the jury and the trial court found Wheeler

guilty on all counts.¹ The trial court ultimately sentenced Wheeler to a prison term that totaled 14 years.

{¶ 19} Wheeler challenges his convictions with the following assignments of error.

“I. The trial court erred when, over defense objections, it admitted other acts testimony in violation of R.C. 2945.59, Evid.R. 404(B), and Mr. Wheeler’s rights under Article 1, Section 10 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

“II. The verdict and judgment below are against the manifest weight of the evidence.

“III. The lower court erred and denied the appellant due process of law and a fair trial when it charged the jury on conspiracy when the appellant was not indicted for conspiracy.”

{¶ 20} In his first assignment of error, Wheeler argues that the trial court acted improperly when it permitted the state to present evidence concerning the previous altercation between him and the Robinsons. His argument lacks merit.

{¶ 21} The decision whether to admit or to exclude evidence is a matter left within the sound discretion of the trial court; therefore, it will not be reversed absent a demonstration the trial court abused its discretion. *State v. Sage* (1987), 31 Ohio St.3d

¹Following oral argument in this case, the state filed a motion in which it conceded that some of Wheeler’s convictions constitute “allied offenses” pursuant to R.C. 2941.25(A) and *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-241, 922 N.E.2d 937.

173, 510 N.E.2d 343, paragraph two of the syllabus.

{¶ 22} A review of the record reveals the evidence Wheeler challenges was introduced pursuant to Evid.R. 404(B). This rule permits evidence of other crimes, wrongs or acts if such evidence is used for the purpose of establishing “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

{¶ 23} The trial court did not abuse its discretion in this case for several reasons. First, the evidence provided background for the incident, since it established how Robinson knew Wheeler and the SUV Wheeler drove. The challenged evidence further provided Wheeler’s motive for the shooting: he believed Robinson had not only insulted his woman friend, but also “ripped him off.” Additionally, the evidence established Wheeler’s method of operating against Robinson, i.e., drive-by shooting. Finally, the evidence demonstrated a reason for the sureness of the witnesses’ identifications of Wheeler as one of the shooters, and negated any suggestion by the defense that Robinson could not have known it was Wheeler who was shooting at him. *State v. Tate*, Cuyahoga App. No. 82344, 2003-Ohio-6856.

{¶ 24} For the foregoing reasons, Wheeler’s first assignment of error is overruled.

{¶ 25} Wheeler asserts in his second assignment of error that his convictions are against the manifest weight of the evidence.

{¶ 26} With regard to an appellate court’s function in reviewing the weight of the evidence, this court is required to consider the entire record and determine whether in

resolving any 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.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. This court must remain mindful, however, that the weight of the evidence and the credibility of the witnesses are matters primarily for the jury to consider. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶ 27} In this case, the state’s witnesses “presented testimony * * * that: 1) provided a consistent and coherent version of the incident; 2) provided a timeline which was verified by cell phone records and 911 calls; and which, 3) remained unshaken on cross-examination.” *State v. Wilson*, Cuyahoga App. No. 90267, 2008-Ohio-3354, ¶34. Wheeler’s version of his actions on the night of the incident, on the other hand, lacked any corroboration. Moreover, it was directly contradicted by his cellular telephone records.

{¶ 28} Wheeler’s convictions, therefore, find support in the manifest weight of the evidence. Accordingly, his second assignment of error is overruled.²

{¶ 29} Wheeler argues in his third assignment of error that, since the indictment lacked any allegations relating to a conspiracy, the trial court erred in providing an instruction to the jury on conspiracy. He contends R.C. 2923.01 prohibits the application

²In so stating, this court recognizes that, since some of Wheeler’s convictions fall within the purview of R.C. 2945.21(A), the state must “elect which allied offense to pursue” in accord with *State v. Williams*, *supra*, ¶28.

of such an instruction to the offenses charged against him in this case. This court disagrees.

{¶ 30} R.C. 2923.01(A) states:

{¶ 31} “(A) No person, with purpose to commit or to promote or facilitate the commission of * * * murder, * * * shall do either of the following:

{¶ 32} “(1) With another person or persons, plan or aid in planning the commission of any of the specified offenses;

{¶ 33} “(2) Agree with another person or persons that *one or more of them will engage in conduct that facilitates the commission* of any of the specified offenses.”

{¶ 34} (Emphasis added.)

{¶ 35} R.C. 2923.03, Complicity, provides in pertinent part as follows:

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

{¶ 37} “ * * *

{¶ 38} “(3) *Conspire* with another to commit the offense in violation of section 2923.01 of the Revised Code;

{¶ 39} “ * * *

{¶ 40} “(F) Whoever violates this section is guilty of *complicity* in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. *A charge of complicity may be stated in terms of this section, or in terms of the principal offense.*”

{¶ 41} (Emphasis added.)

{¶ 42} R.C. 2923.02, Attempt, states:

{¶ 43} “(A) No 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.”

{¶ 44} In this case, Wheeler was charged with attempted murder and felonious assault, i.e., that, using a gun, he feloniously assaulted the victims when he attempted to murder them. Engaging in a felonious assault upon the victim by shooting a firearm at them obviously facilitates the crime of attempted murder. *State v. Williams*, supra.

{¶ 45} R.C. 2923.03 permits a charge of conspiracy and/or complicity to commit an offense to be stated in terms of the principal offense. Moreover, murder, or the attempt to commit it, is one of the offenses that can be the subject of a conspiracy pursuant to R.C. 2923.01(A).

{¶ 46} Therefore, under the circumstances presented in this case, the trial court did not err in providing a jury instruction on conspiracy. Wheeler’s third assignment of error, accordingly, also is overruled. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶181; *State v. Keenan* (1998), 81 Ohio St.3d 133, 151, 689 N.E.2d 929; *State v. Carte*, Cuyahoga App. No. 91534, 2009-Ohio-4193; see, also, *State v. Shropshire*, Cuyahoga App. No. 85063, 2005-Ohio-3588, ¶30; cf., *State v. Burrell* (Sept. 13, 2000), Cuyahoga App. No. 76890.

{¶ 47} Judgment affirmed in part, reversed in part, and remanded to the trial court

for further proceedings consistent with *State v. Williams*, supra.

It is ordered that appellant and appellee share 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 common pleas court to carry this judgment into execution. Case remanded to the trial court for further proceedings.

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

KENNETH A. ROCCO, PRESIDING JUDGE
MARY EILEEN KILBANE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR