[Cite as *State v. Tinsley*, 2010-Ohio-2083.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92335 and 92339

STATE OF OHIO

PLAINTIFF-APPELLEE/
CROSS-APPELLANT

vs.

SAMUEL TINSLEY

DEFENDANT-APPELLANT/
CROSS-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510067

BEFORE: Blackmon, J., Kilbane, P.J., and Cooney, J.

RELEASED: May 13, 2010
JOURNALIZED:

ATTORNEY FOR APPELLANT/CROSS-APPELLEE

Susan J. Moran
55 Public Square
Suite 1616
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE/CROSS-APPELLANT

William Mason
Cuyahoga County Prosecutor

Kristen L. Sobieski
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), 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).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Samuel Tinsley appeals his felonious assault convictions and assigns the following errors for our review:

> **"I. The state failed to present sufficient evidence to sustain appellant's convictions for felonious assault."**
>
> **"II. The appellant's convictions for felonious assault are against the manifest weight of the evidence."**

{¶ 2} Appellee state of Ohio cross appeals and assigns the following error for our review:

> **"I. The trial court erred in requiring the state to prove a culpable mental state in order to convict a defendant of a seven-year firearm specification pursuant to R.C. 2941.1412."**

{¶ 3} Having reviewed the record and pertinent law, we affirm Tinsley's convictions and dismiss the state's cross appeal. The apposite facts follow.

{¶ 4} On May 7, 2008, the Cuyahoga County Grand Jury issued a five-count indictment against Tinsley and his codefendant, Andre Gray. Counts 1 and 2 charged Tinsley and Gray with felonious assault, with a furthermore clause alleging that the victims were peace officers. In addition, Counts 1 and 2 had one, three, and seven-year firearm specifications attached.

{¶ 5} Count 3 of the indictment charged both men with carrying a concealed weapon with ammunition ready at hand. Count 4 charged possession of criminal tools and Count 5 charged carrying a concealed weapon, which was unloaded.

{¶ 6} Tinsley and Gray pleaded not guilty at the arraignment, and several pretrials followed. Subsequently, Tinsley and Gray executed jury waivers and requested a joint bench trial.

Bench Trial

{¶ 7} At the joint bench trial, the state presented the testimony of seven witnesses including Cleveland Metropolitan Housing Authority ("CMHA") Police Officer Gregory Drew. Officer Drew testified that on April 5, 2008, at approximately 10:00 p.m., he and fellow officer, Jeffrey Holdeman, responded to complaints of fights in CMHA's King Kennedy Estates.

{¶ 8} Officer Drew testified that as they were in the process of clearing the area and interviewing residents, he heard approximately six gunshots, saw a muzzle flash, and heard bullets whizzing past his head. Officer Drew stated that people began screaming, running, and diving for cover.

{¶ 9} Officer Drew saw two males, who were later identified as Tinsley and Gray, running from the area where the gunshots originated. While in pursuit, Officer Drew requested back-up assistance. Gray fell as he was running, but got up, and entered the driver's side of a blue SUV that was parked nearby. Tinsley, who was holding his waistband as he was being pursued, entered the passenger's side of the vehicle.

{¶ 10} Officer Drew caught up with Tinsley and Gray and ordered them out of the vehicle. Neither man cooperated, so Drew forcibly removed them

from the vehicle. Officer Drew recovered two handguns, one loaded and the other unloaded.

{¶ 11} Tinsley and Gray were arrested and subsequently tested positive for gunshot residue. Three spent .45 caliber shell casings were found in the vicinity where the gunshots originated.

{¶ 12} Sergeant Nathan Willson of the Cleveland Police Department Forensic Unit testified that the three shell casings that were found in the vicinity where the gunshots originated matched the .45 caliber handgun that was found in the vehicle.

{¶ 13} Tinsley testified that on April 5, 2008, he was visiting his aunt at the King Kennedy Estates. He testified that when he exited his aunt's apartment, he encountered three individuals, who had given him problems in the past. He testified that because he feared for his safety, he pulled out his handgun and fired three shots in the air to scare the individuals away. Tinsley denied pointing the gun at anybody.

{¶ 14} The trial court found Tinsley guilty of both counts of felonious assault of a peace officer, with the one- and three-year firearm specifications, but acquitted him of the seven-year firearm specification. The trial court also found Tinsley guilty of carrying a concealed weapon, with ammunition ready at hand, and possession of criminal tools. The trial court acquitted Tinsley of carrying an unloaded concealed weapon.

{¶ 15} The trial court imposed concurrent five-year sentences for the two counts of felonious assault, with the one- and three-year firearm specification merging, but being served prior to and consecutive to the underlying sentence. The trial court also imposed concurrent one-year and six-month sentences for the respective charges of carrying a concealed weapon and possession of criminal tools. The trial court also ordered these sentences to be served consecutively to the sentences for the two counts of felonious assault for a total of nine years.

Sufficiency of Evidence

{¶ 16} In his first assigned error, Tinsley argues the state failed to present sufficient evidence to sustain his convictions for felonious assault. We disagree.

{¶ 17} Tinsley argues that the state failed to offer sufficient evidence to satisfy the mental-culpability element of "knowingly." In support of his argument, he urged that no independent evidence existed that he knew that a group of police officers, or even residents, were present when he fired his weapon.

{¶ 18} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus. *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State*

v. Jenks (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"**

{¶ 19} At trial, Officer Drew testified that he stated to his partner, "they shot at us." Officer Drew also testified that he heard approximately six gunshots, saw a muzzle flash, and heard bullets whizzing past his head. Officer Holdeman also testified that he heard a round of four or five shots pass over his head.

{¶ 20} In addition, at trial, Exhibit 2, an audio recording of Officer Drew requesting back-up assistance was played. The following exchange took place when the audiotape was played:

"Q. Do you recognize that voice?

A. That is my panic-stricken voice, yes.

Q. Now, you stated that when you called over the radio, you say that you told them you were on a chase or that people had shot at you, is that correct?

A. That's correct.

*** * ***

Q. Okay. The words you can understand that you're saying, explain to the Court what you were doing, what you were saying, what was going on at that point.

A. Well, obviously, you know, the adrenaline just kicked in, and then I was scared for my life. I'm trying to call for help, I'm trying to chase the males, trying to let people know that, Come back here. Come back to the estate. They just shot at us." Tr. 105-106.

{¶ 21} Additionally, Sergeant Willson provided testimony regarding the trajectory necessary for a bullet to travel upward in the air. Sergeant Willson testified that the gun would have to be angled upward. He opined that no gunshot damage to trees or building were discovered; thus, he ruled out that the gunshots were aimed upward.

{¶ 22} His testimony supports the evidence that Officers Drew and Holdeman were standing in the line of fire; consequently, the trajectory of the bullets belies Tinsley's assertion that he fired the shots in the air.

{¶ 23} Morever, firing a weapon randomly in the direction of individuals who are arguably within the range of the shooter is sufficient to demonstrate an attempt

to cause physical harm. *State v. Grisson*, 10th Dist. No. 08AP-952, 2009-Ohio-5709, citing *State v. Phillips* (1991), 75 Ohio App.3d 785, 792, 600 N.E.2d 825. The firing of the gun alone is sufficient evidence of intent to cause physical harm. Id. See, also, *State v. Gray*, 10th Dist. No. 04AP-938, 2005-Ohio-4563.

{¶ 24} As to knowingly causing or attempting to cause physical harm to a police officer and whether Tinsley knew that they were police officers, we uphold the trial court's reliance on accepted case law that an assailant does not need to know that the victim is a police officer in order to be guilty of R.C. 2903.11. *State v. Mundy*, 9th Dist. No. 05CA0025-M, 2005-Ohio-6608, citing *State v. Carter*, 9th Dist. No. 21474, 2003-Ohio-5042 (holding State not required to prove that defendant had knowledge or awareness that the victim was a peace officer before the jury could find defendant guilty of felonious assault of a peace officer).

{¶ 25} Tinsley suggests we look closely at *In re A. C. T.*, 158 Ohio App.3d 473, 2004-Ohio-4935, 816 N.E.2d 1098, involving an assault on a teacher. There is no question that *A.C.T.* suggests that it is a close call as to whether the defendant knew that the teacher was present when the blow was struck. It was not until the defendant struck the teacher that she realized what had occurred. *A.C.T.* holds that when the contact is incidental or accidental, the mental culpability of "knowingly" is not met.

{¶ 26} We decline to follow *A.C.T.* Tinsley never claimed that his actions were incidental or accidental. Instead, he claimed that he was shooting to scare the thugs away; consequently, he knew that he was firing his weapon. The trial court believed the state's evidence that Tinsley was firing at the officers and the crowd. The trial court correctly ruled that whether Tinsley knew they were officers for purposes of R.C. 2903.11 is irrelevant. As stated earlier, mens rea exists when one randomly fires into a crowd, and if the police are in the crowd, the accused is guilty of felonious assault on a police officer.

{¶ 27} Therefore, viewing the evidence in a light most favorable to the state, we find that a rational trier of fact could have concluded that Tinsley knowingly attempted to cause physical harm to the officers. As such, we find there was sufficient evidence to sustain Tinsley's convictions for felonious assault; thus the trial court properly overruled Tinsley's Crim.R. 29(A) motion for acquittal. Accordingly, we overrule the first assigned error.

Manifest Weight

{¶ 28} In the second assigned error, Tinsley argues his convictions were against the manifest weight of the evidence. We disagree.

{¶ 29} In *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court recently addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."**

{¶ 30} Both Officers Drew and Holdeman testified that Tinsley was shooting directly at them. Both testified that gunshots passed directly by them. The transcript of the audiotape of Officer Drew requesting back-up assistance, reveals a panic-stricken officer relaying that they have just been shot at and that they needed immediate assistance.

{¶ 31} Nonetheless, Tinsley maintains that the witnesses' testimonies were inconsistent. However, a defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958. The determination of weight and credibility of the evidence is for the trier of fact. *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, citing *State v. DeHass* (1967), 10 Ohio

St.2d 230, 227 N.E.2d 212. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimonies are credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503.

{¶ 32} Further, the trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the factfinder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, at ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, at ¶17. Therefore, Tinsley's convictions are not against the manifest weight of the evidence. Accordingly, we overrule the second assigned error.

Reversal of Acquittal

{¶ 33} In its cross-appeal, the state argues Tinsley's acquittal on the seven-year firearm specification should be reversed.

{¶ 34} We will not address the state's assigned error because we do not have jurisdiction to consider the appeal pursuant to R.C. 2945.67. *State v. Mayfield*, Cuyahoga App. No. 81924, 2003-Ohio-2312. R.C. 2945.67 provides that a prosecuting attorney may appeal as a matter of right any decision of a trial court in a criminal case except the final verdict of the trial court in a

criminal case. *In re: Sebastian Lee* (2001), 145 Ohio App.3d 167, 169, 762 N.E.2d 396.

{¶ 35} In the instant case, the trial court reached a final verdict of acquittal on the seven-year firearm specification, and the state is statutorily precluded from appealing that verdict. Id. We cannot review an acquittal without putting the defendant in double jeopardy. Id.; see, also, *State v. Ginnard* (Jan. 23, 1992), Cuyahoga App. No. 61964.

{¶ 36} Moreover, the state has not followed the procedure outlined in App.R. 5(C), which states:

> **"Motion by prosecution for leave to appeal. When leave is sought by the prosecution from the court of appeals to appeal a judgment or order of the trial court, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the errors that the movant claims occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by the parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3 and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the motion and a copy of the notice of appeal to the clerk of the court of appeals who shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the defendant who, within thirty days from the filing of the motion, may file affidavits, parts of the record, and brief or memorandum of law to refute the claims of the movant."**

{¶ 37} The record reveals that leave to appeal was not obtained. In the instant case, since a final verdict rather than a substantive legal issue is challenged, we are without jurisdiction. *State v. Gump*, Cuyahoga App. No. 85693, 2005-Ohio- 5689. Accordingly, we dismiss the state's cross appeal.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBAN, P.J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS
IN JUDGMENT ONLY