[Cite as *State v. Scales*, 2010-Ohio-2084.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92559

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN SCALES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART AND REMANDED
FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506147

BEFORE: Stewart, P.J., Dyke, J., and Boyle, J.
RELEASED: May 13, 2010

JOURNALIZED:

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MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, John Scales, appeals the judgment of the Cuyahoga County Court of Common Pleas convicting him of ten counts of felonious assault with firearm and forfeiture specifications and sentencing him to an aggregate term of nine years in prison. After review of the record and applicable law, and for the reasons stated below, we reverse in part.

{¶ 2} The charges in this case arose from a shooting that occurred at the Knights Inn Motel in North Randall on January 4, 2008, during which five males were shot. The victims were attending a birthday party given by a female friend to celebrate her 18th birthday. In the first hotel room there was a tattoo artist and a group of people waiting to get a tattoo. The second room, next door, was reserved for the birthday girl and some of her friends to sleep over, and served as overflow for guests waiting to get tattooed.

{¶ 3} At approximately 9:30 p.m., the victims, brothers DeSean and DeVon Griffin, Anthony Dickenson, Yancy Davis, and Maurice Riddick, were in the second room waiting their turn for a tattoo and talking with some of the female guests. A group of males, led by appellant and his brother, Courtland Scales, came into the room. Appellant confronted DeSean Griffin about a rumor that Griffin was going to "steal on him," or punch him. Griffin stood up and they exchanged words. All of the males in the room stood up.

One of the girls in the room testified that she thought there was going to be a fight so she started to run out of the room. She heard shots being fired and dove down between the bed and the wall. She saw the shooter standing in front of her. She described him as wearing Timberline boots and a red coat and firing a black gun. She identified appellant in court as the man who confronted Griffin, and stated that he stood next to the shooter when the shots were fired.

{¶ 4} Griffin was shot in the chest. He was shot again as he fell down and tried to crawl under the bed. He was shot a total of four times — once in the chest, once in his hand, and twice in the stomach. His brother, DeVon, was shot and fell between the beds. He was shot five times — in his arm, leg, buttocks, stomach, and the back of his head. Riddick was shot once in the abdomen. Davis was grazed by a bullet on his arm. Dickenson was shot in the arm as he tried to run out of the room. He was shot in the back, hip, and neck as he ran down the hall.

{¶ 5} None of the victims would say who shot them. DeVon Griffin testified that he saw appellant with a gun in the waistband of his pants, but could not say if appellant shot the gun. He also saw another gun being passed among the males in appellant's group but could not say if that gun was fired. He admitted to bringing a gun to the party. He said it was

unloaded and kept in his pocket. EMS found a gun under him when they turned him over in the hotel room.

{¶ 6} Warrensville Heights police responded to the call of shots fired and assisted North Randall police. They gave North Randall police a note with a license plate number on it. North Randall police investigated and found the plate belonged to a car owned by appellant. A short time later, the car was located in the parking lot of appellant's girlfriend's apartment building in Bedford. A search warrant was executed on the apartment and police recovered a black jacket, a black and gray shirt or "hoodie," and a burgundy and orange shirt or "hoodie" in a laundry basket. DNA from appellant and his brother was found on the inside neck and cuffs of the garments and gunshot residue was found on the cuffs and around the pockets of the garments.

{¶ 7} Police recovered 11 spent bullet cartridge casings, four fired bullets, and multiple bullet fragments. They also recovered one unfired bullet cartridge from just outside the entrance to the second room. Forensic evidence showed that ten bullets were fired from one gun and one bullet from a different gun, both 9mm pistols. The unfired bullet was also for a 9mm pistol. The gun found under DeVon Griffin was a 32-caliber revolver. It was not loaded when found and was incapable of firing any of the bullets recovered.

{¶ 8} Appellant and his brother were indicted on five counts of attempted murder, and ten counts of felonious assault. All of the counts had one and three-year firearm specifications as well as a vehicle forfeiture specification attached. At the close of the state's case, the trial court granted appellant's motion to dismiss the counts of attempted murder pursuant to Crim.R. 29. The defense rested without presenting any witnesses. The jury returned guilty verdicts on all of the remaining counts and the court imposed a nine-year sentence. Appellant timely appeals his convictions, raising six errors for our review.

{¶ 9} In his first assignment of error, appellant contends that there was insufficient evidence to support his convictions. When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court examines the evidence admitted 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 10} Appellant was charged under two different theories of felonious assault for the five victims, and convicted of all ten counts. The Ohio Revised Code defines the offense of felonious assault as follows:

{¶ 11} "2903.11 Felonious assault

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

{¶ 13} "(1) Cause serious physical harm to another or to another's unborn;

{¶ 14} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶ 15} Appellant argues that the state failed to prove that he fired a weapon. He argues that the state failed to produce the weapon used in the shooting and that none of the eyewitnesses saw him shoot a gun. He contends that the state's evidence establishes at best that he entered a room with a group of males with a gun in his waistband and had words with DeSean Griffin.

{¶ 16} The state alleges that appellant and his brother came into the hotel room, aggressively confronted the victims, open-fired with one or more guns, and shot the victims, causing them serious physical harm. They contend that Courtland Scales was the primary shooter, but that appellant was complicit in the offenses.

{¶ 17} There was eyewitness testimony that placed appellant, wearing a black jacket and carrying a gun in his waistband, in the hotel room, next to his brother. There was testimony that appellant confronted DeSean Griffin and exchanged words, leading one witness to believe a fight was coming and causing her to try to flee the room. Forensic evidence showed that 11 shots were fired from two 9mm pistols. Medical records were produced to document the victims' injuries. At the scene and immediately after the shooting, Warrensville Heights police gave North Randall police a note with the licence plate number of appellant's car. Within hours, appellant's car was found at his girlfriend's apartment and a black jacket and a black and gray hoodie with appellant's DNA and gunshot residue on the cuffs and pocket were recovered. An "orange/burgundy" shirt or hoodie with Courtland Scales' DNA and gunshot residue on the cuff and pocket was also recovered.

{¶ 18} Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found that appellant committed, or actively participated with his brother in committing the offense of felonious assault against each of the five victims. Accordingly, the first assignment of error is overruled.

{¶ 19} Appellant's second assignment of error asserts that his convictions are against the manifest weight of the evidence.

{¶ 20} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. Sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. at 386. Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." Id. at 387 (emphasis deleted). Weight is not a question of mathematics, but depends on its effect in inducing belief. Id.

{¶ 21} In determining whether a verdict is against the manifest weight of the evidence, this court sits as a "thirteenth juror." *Thompkins* at 387. We review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we determine "whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 22} We are mindful that the weight to be given the evidence and the credibility of the witnesses are matters primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any

witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548. We will reverse a conviction on manifest weight grounds only in the exceptional case in which the evidence weighs heavily against the conviction. *Thompkins* at 387.

{¶ 23} Appellant argues that the state's case is based entirely upon circumstantial evidence from witnesses who were admittedly distracted at the time of the shootings and did not say that he fired a weapon. He challenges the law enforcement and scientific evidence as vague, and argues that the state's witness conceded that gunshot residue could be present on garments simply by a person being present when a weapon is fired. He maintains that the crime scene was chaotic and possibly contaminated by EMS personnel and the many teenagers observed at the scene. He argues that the eyewitnesses' testimony is inconsistent and that the police lost some of the evidence.

{¶ 24} We do not find that this is one of the extraordinary cases in which the evidence weighs heavily against conviction. Even given the chaos that resulted from a shooting at a hotel party with an estimated 30 or more people, many of whom were juveniles, in attendance, and acknowledging that the victims did not name names at trial, the witnesses' testimonies and the physical evidence presents a sufficiently clear picture for the jury to find that

the Scales brothers entered the second room at the hotel, confronted DeSean Griffin, and shot both DeSean and DeVon Griffin and their friends.

{¶ 25} The second assignment of error is overruled.

{¶ 26} In his third assignment of error, appellant asserts that the trial court erred in denying his motion for a mistrial after one of the police witnesses testified that drugs were recovered during the execution of a search warrant at appellant's girlfriend's apartment. Appellant argues that the testimony was unfairly prejudicial to him and could not be cured by a simple jury instruction.

{¶ 27} The record reflects that during the search of the apartment the day after the shooting, police discovered crack cocaine with the garments belonging to appellant. He was charged and indicted for drug possession in a separate criminal case. Prior to trial, the court granted defense counsel's motion in limine to exclude evidence of the drugs in the instant case.

{¶ 28} At trial, the lead investigator, Lieutenant Harry Rose, who did not take part in executing the search warrant at the girlfriend's apartment, was asked about the search and the following exchange took place:

{¶ 29} "Q. Do you know what was recovered?

{¶ 30} "A. Some clothing from a laundry basket in the apartment, and some drugs that was in - -"

{¶ 31} Upon objection by defense counsel, the trial court sustained the objection.

{¶ 32} "Court: Sustained. Strike that and disregard it, ladies and gentlemen."

{¶ 33} Following a sidebar, the court again cautioned the jury.

{¶ 34} "Court: Ladies and gentlemen, disregard the statement with respect to any finding of any kind of drugs, and you have to treat it as though you never heard it."

{¶ 35} After denying appellant's motion for a mistrial, the court issued a third curative instruction.

{¶ 36} "Court: Additionally, ladies and gentlemen, earlier this morning when Detective Rose was on the stand, he referred to the fact that drugs were found in Mr. Scales' girlfriend's apartment. There are no drugs involved in this case.

{¶ 37} "As I indicated to you at the time, you may not consider that fact at all in that what was found in that apartment could have belonged to any number of individuals. There are no drugs involved in this case."

{¶ 38} We review the trial court's decision on a motion for a mistrial under an abuse of discretion standard. *State v. Barnes*, 8th Dist. No. 90690, 2008-Ohio-5602; *State v. Garner*, 74 Ohio St.3d 49, 1995-Ohio-168, 656 N.E.2d 623. A mistrial should not be ordered in a criminal case merely

because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected; this determination is made at the discretion of the trial court. *State v. Goerndt*, 8th Dist. No. 88892, 2007-Ohio-4067, citing *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33, 550 N.E.2d 490. A mistrial need be declared only "when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1.

{¶ 39} Curative instructions have been recognized as an effective means of remedying errors or irregularities that occur during trial. *State v. Ghaster*, 8th Dist. No. 91576, 2009-Ohio-2134, citing *State v. Zuern* (1987), 32 Ohio St.3d 56, 61, 512 N.E.2d 585. A jury is presumed to follow the instructions, including curative instructions, given it by a trial judge. *State v. Henderson* (1988), 39 Ohio St.3d 24, 33, 528 N.E.2d 1237.

{¶ 40} In light of the defense motion in limine, there should have been no mention of drugs in this case. However, the reference to drugs found in the girlfriend's apartment was single and fleeting. There was no mention that the drugs were found in appellant's garments or that he had been charged with drug possession. The trial court immediately issued a curative instruction to the jury to disregard the answer given and followed that with two more curative instructions that we presume the jury followed. Given

these facts, we find no abuse of discretion in the trial court's denial of mistrial. Appellant's third assignment of error is overruled.

{¶ 41} In his fourth assignment of error, appellant states that the trial court erred by allowing state witnesses to testify at trial even though their earlier recorded statements had been lost. Appellant argues that he was deprived of the ability to effectively cross-examine the witnesses with the statements they originally provided to investigating officers, thus violating his due process rights.

{¶ 42} Prior to the state calling the first of the victims to testify, both defense counsel objected to any of the victims being allowed to testify because the defense was not given access to the tape-recorded interviews with Lt. Rose. The trial court overruled the objection and allowed the testimony.

{¶ 43} After DeSean Griffin began to testify, appellant joined in a motion for mistrial. The state argued that both attorneys were advised prior to trial that the taped recordings of the three witnesses' interviews had been lost. The state explained that after conducting the initial investigation, Lt. Rose had taken extensive medical leave during which his office had been cleaned out and the cassette tape apparently lost. The chief of police testified that he had personally searched for the cassette tape. As an alternative to the lost recordings, the prosecutor had made available to

defense counsel the summaries of each of the tape-recorded interviews made contemporaneously by Lt. Rose and placed in his report.

{¶ 44} The state's failure to preserve materially exculpatory evidence may constitute a violation of a criminal defendant's due process rights. *California v. Trombetta* (1984), 467 U.S. 479, 488-489, 104 S.Ct. 2528, 81 L.Ed.2d 413, rehearing denied (1989), 488 U.S. 1051. However, the failure to preserve evidence that is merely potentially useful violates a defendant's due process rights only when the police or prosecution act in bad faith. *Arizona v. Youngblood* (1988), 488 U.S. 51, 58, 109 S.Ct. 333, 102 L.Ed.2d 281; *State v. Lewis* (1990), 70 Ohio App.3d 624, 634, 591 N.E.2d 854, appeal dismissed (1991), 58 Ohio St.3d 716, 570 N.E.2d 277, rehearing denied, 59 Ohio St.3d 715, 572 N.E.2d 697. The critical inquiry in this case is whether the evidence lost by the state was materially exculpatory or, if not, whether it was lost in bad faith.

{¶ 45} The burden of proof is on the defendant to show the exculpatory nature of the evidence. *Trombetta*, 467 U.S. at 489-490. To be materially exculpatory, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. The Supreme Court of Ohio has also held that evidence is material "only if there is a reasonable probability that, had the

evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Johnston*, 39 Ohio St.3d 48, 529 N.E.2d 898, paragraph five of the syllabus.

{¶ 46} Appellant has not alleged and has certainly not proven that the tapes contained materially exculpatory evidence. Instead, appellant argues that the earlier statements are needed to possibly impeach the victims as credible witnesses. We therefore view the missing recordings as merely "potentially useful" for the defense.

{¶ 47} As stated above, the failure to preserve even merely "potentially useful" evidence is a due process violation, where the state acts in bad faith. In *State v. Burke* (1995), 73 Ohio St.3d 399, 403, 653 N.E.2d 242, certiorari denied, 517 U.S. 1112, 116 S.Ct. 1336, 134 L.Ed.2d 486, the Supreme Court of Ohio considered whether a criminal defendant's rights were violated when the police lost a tape-recorded statement by one of its own witnesses. The court determined that, in the absence of evidence indicating that the state "deliberately lost, concealed or destroyed the tape," no due process right of the defendant was violated by the loss of a potentially useful audiotape.

{¶ 48} There is no evidence to suggest that the state "deliberately lost, concealed or destroyed the tape" or that the tape was lost due to bad faith on the part of the police or prosecutor. Thus, appellant has failed to sufficiently

demonstrate a due process violation. Additionally, appellant had access to the summaries of the taped interviews and had the opportunity at trial to cross-examine the victims and Lt. Rose about the earlier interviews. Finally, the trial court issued a curative instruction to the jury regarding the missing recordings. Accordingly, the fourth assignment of error is overruled.

{¶ 49} In his fifth assignment of error, appellant asserts that it was prejudicial error for the court not to merge the ten counts of felonious assault to reflect five offenses, one against each victim.

{¶ 50} In *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, the Ohio Supreme Court affirmed its earlier holding that "convictions for felonious assault defined in R.C. 2903.11(A)(1) and felonious assault defined in R.C. 2903.11(A)(2) are allied offenses of similar import, and therefore a defendant cannot be convicted of both offenses when both are committed with the same animus against the same victim." Id. at ¶20.

{¶ 51} Appellant argues that the state failed to show that there was a separate animus for the two counts of felonious assault charged for each victim and, therefore, the counts should merge. The state argues that appellant failed to raise the issue at sentencing and so waives all but plain error, but concedes the failure to merge the offenses in this case amounts to plain error. We agree.

{¶ 52} The Ohio Supreme Court recently addressed the proper procedure for courts of appeals to follow after finding reversible error with respect to sentences imposed for allied offenses of similar import. The court held, "Upon finding reversible error in the imposition of multiple punishments for allied offenses, a court of appeals must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph two of the syllabus. "Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing." Id., paragraph three of the syllabus.

{¶ 53} We therefore sustain appellant's fifth assignment of error. The determinations of appellant's guilt under both subsections of felonious assault remain intact, but we remand to the trial court for a new sentencing hearing consistent with the holding in *Whitfield*.

{¶ 54} Appellant presents his sixth assignment of error, asserting ineffective assistance of counsel, as an alternative to his third and fifth assignments of error. Having decided the merits of both prior assignments of error, we see no need for further review. Accordingly, the sixth assignment of error is overruled.

Judgment affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that the parties bear their own 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 Cuyahoga County Court of Common Pleas 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 resentencing.

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

MELODY J. STEWART, PRESIDING JUDGE

ANN DYKE, J., and
MARY J. BOYLE, J., CONCUR