[Cite as *State v. Stephens*, 2010-Ohio-3997.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93252

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ALEXANDER L. STEPHENS

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED;
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519873

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

RELEASED AND JOURNALIZED: August 26, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Alexander Stephens, appeals his felonious assault conviction. Based on our review of the record and pertinent case law, we affirm appellant's conviction, but remand for resentencing.

{¶ 2} At approximately 12:00 p.m. on December 17, 2008, appellant arrived at the apartment of his friend, Alexander Eckl, and was greeted by Eckl's girlfriend, Antonette Rivera. Appellant had been hospitalized the day prior and asked Eckl for a ride to the pharmacy so he could fill his prescriptions. Before leaving for the pharmacy, the three individuals — appellant, Eckl, and Rivera — smoked marijuana and drank alcohol.

{¶ 3} Upon returning from their trip to the pharmacy, the three resumed their recreational activities. At some point, appellant put on a pair of blue latex gloves and picked up a gun he found earlier that week.[1] According to Rivera, appellant was standing approximately two feet away from her when he pointed the gun at her and said, "You think I won't?" Appellant then pulled the trigger, shooting Rivera in the abdomen. After the shooting, appellant kept saying he was sorry and that the shooting was an accident. He carried Rivera and placed her in Eckl's vehicle. The two men drove Rivera to MetroHealth Medical Center, where she was treated for a gunshot wound.

{¶ 4} When the police first questioned Rivera about the shooting, she told the officers that she was walking down Denison Avenue in Cleveland when she was shot in a drive-by shooting. She later admitted that she had fabricated this story in order to protect appellant and divulged who the real shooter was.

{¶ 5} Appellant testified on his own behalf. According to appellant, after the three individuals returned from the pharmacy, they were sitting around Eckl's apartment listening to music, sharing a 40-ounce beer, and

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[1]According to Rivera, appellant did not put on the gloves until just before he picked up the gun. Appellant testified, however, that he had the gloves on for approximately 45 minutes before the incident occurred and did not put the gloves on for the sole purpose of handling the firearm.

smoking marijuana. Appellant testified that he and the other individuals had also taken Percocet that day and were high at the time of the incident. Appellant testified that he had stolen latex gloves from the hospital the day before and put them on when he was walking into the apartment after returning from the pharmacy. He claimed that part of the reason he wore the gloves was because they helped keep his hands warm in the cold weather. He testified that he had the gloves on for approximately 45 minutes before the incident occurred.

{¶ 6} Appellant testified that he picked up the gun to "play" with it and was cleaning it with a paper towel just before Rivera was shot. Although his testimony was unclear, he was adamant that he did not remember pulling the trigger and that shooting Rivera was an accident. He testified that he and Eckl took Rivera to the hospital for treatment, where they told the police officers that Rivera was shot in a drive-by-shooting. Appellant and Eckl then returned to Eckl's apartment and retrieved the gun and latex gloves. Eckl drove appellant to Cleveland's east side, where he threw the gun and the gloves in a sewer.

{¶ 7} Appellant was indicted in a five-count indictment on two counts of felonious assault with one- and three-year firearm specifications, two counts of obstructing justice, and one count of having a weapon while under disability. Before trial, the state dismissed the charge of having a weapon

while under disability, and appellant pled guilty to one count of obstructing justice in violation of R.C. 2921.32(A)(5). Appellant then waived his right to a jury trial and the matter was tried to the bench on March 11, 2009. The remaining counts to be heard by the court were two counts of felonious assault and one count of obstructing justice.

{¶ 8} At the close of the state's case-in-chief, the trial judge granted appellant's Crim.R. 29 motion for acquittal with regard to the remaining obstructing justice charge. The judge then asked the state to choose which count of felonious assault it wished to proceed under. The state chose Count 2, felonious assault in violation of R.C. 2903.11(A)(2). The judge later indicated that she found appellant guilty of both counts of felonious assault. Appellant's trial counsel questioned this stating, "It was my understanding that Count 1 was the deleted * * *." The court responded, "Yes. That was dismissed by — pursuant to State versus Brown."

{¶ 9} The trial judge then sentenced appellant to two years for the remaining count of felonious assault, to be served consecutively to a three-year term imposed for the firearm specification, for an aggregate sentence of five years.[2] This appeal followed wherein appellant argues that his conviction is based on insufficient evidence and is against the manifest weight of the evidence.

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[2]The one- and three-year firearm specifications merged for sentencing.

Law and Analysis

{¶ 10} When an offender chooses to forego his right to a jury trial, the trial court assumes the fact-finding function that is ordinarily left to the jury. *Cleveland v. Welms*, 169 Ohio App.3d 600, 2006-Ohio-6441, 863 N.E.2d 1125, ¶16. When an appellant challenges the sufficiency of the evidence presented to support his conviction, we must review the evidence in a light most favorable to the prosecution and decide whether any rational factfinder could have found the necessary elements of the crime proven beyond a reasonable doubt. *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, ¶31, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 11} When determining whether a conviction is against the manifest weight of the evidence, an appellate court reviews the entire record, "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [court] 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. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 12} Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(2), which states that "[n]o person shall knowingly do either of the following:

{¶ 13} "* * *

{¶ 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 claims the fact that the shooting was accidental negates any proof by the state that he acted with knowledge, as required for a felonious assault conviction. "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

{¶ 16} This case is comparable to *State v. Anderson*, Franklin App. No. 06AP-174, 2006-Ohio-6152. In *Anderson*, the defendant shot a woman in the neck and was found aiding her when the police arrived. Id. at ¶3. Anderson told the police that the woman was involved in a drive-by shooting, but this story was discounted when the officers found no bullet casings or other evidence of a drive-by shooting. Id. at ¶5. Anderson later admitted to shooting the victim, but claimed he was playing with the gun when the victim hit his hand and the gun accidentally discharged. Id. at ¶25. Anderson relied on this accident theory to argue that he did not act with knowledge, and thus he could not be found guilty of felonious assault. In attempting to prove his accident theory, Anderson argued that he had made no threats to the victim, the victim testified that she did not know whether the shooting was accidental, Anderson testified that he did not intend to shoot the victim,

and Anderson attempted to assist the victim before emergency personnel arrived. Id. at ¶53. The court in *Anderson* acknowledged this evidence but held: "[W]e find it irrelevant that appellant may not have intended to cause [the victim's] physical injuries. The mental element of knowledge does not require an inquiry into the purpose for an act, but, as noted above, involves the question of whether an individual is aware that his or her conduct will probably cause a certain result or will probably be of a certain nature." Id. at ¶43.

{¶ 17} Knowledge is a mental state that must be proven by circumstantial evidence. Id. at ¶42. In this case, both appellant and Rivera testified that the shooting was accidental. The evidence presented at trial, however, showed that appellant put on rubber gloves before picking up the firearm; pointed the gun at Rivera; said, "You think I won't?"; pulled the trigger; lied to the police about what happened; and then drove across town to dispose of the evidence in a sewer. Common sense dictates that pointing a firearm at someone and pulling the trigger will result in physical harm. Although he argues that the shooting was purely accidental, appellant's actions on the day in question indicate otherwise.

{¶ 18} Whether to believe appellant's accident theory was within the purview of the trial judge. Since a reasonable factfinder could find that, based on the surrounding facts and circumstances, appellant knowingly

caused physical harm to Rivera by means of a deadly weapon, we cannot find that his conviction was based on insufficient evidence. Accordingly, appellant's first assignment of error is overruled.

{¶ 19} A recapitulation of the evidence is unnecessary in determining whether appellant's conviction was against the manifest weight of the evidence. Although appellant claims the shooting was accidental, his credibility is questionable. He testified that he smoked multiple marijuana cigars with Rivera and Eckl before the shooting, along with drinking alcohol and taking Percocet. Even more troubling is the fact that appellant can remember, in vivid detail, the events of the date in question up until the shooting, but he conveniently does not remember pointing the gun at Rivera or pulling the trigger. Weighing the testimony and considering the credibility of the witnesses, we cannot find that the trial judge lost her way in finding appellant guilty of felonious assault. As such, appellant's second assignment of error is overruled.

Allied Offenses

{¶ 20} We are troubled by the procedure utilized by the trial judge with regard to allied offenses. Since neither party raised this issue below or in this appeal, we must apply a plain error standard of review. To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without

objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16.

{¶ 21} The trial judge in this case recognized that felonious assault in violation of R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2) are allied offenses. *State v. Wilson*, 182 Ohio App.3d 171, 2009-Ohio-1681, 912 N.E.2d 133, ¶46. When offenses are allied, an offender may be tried for both but may be convicted and sentenced for only one. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶143, quoting *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 244, 344 N.E.2d 133. Although the state must elect which offense it wishes to pursue at sentencing, the allied offense statute does not require this decision to be made prior to trial. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶21.

{¶ 22} In this case, the trial court forced the state to choose which offense it wished to proceed under before it determined whether appellant was guilty. After the state chose Count 2, felonious assault in violation of R.C. 2903.11(A)(2), the court adjourned for the day. The following day, the trial judge indicated that she found appellant guilty of both counts of felonious assault. When questioned by defense counsel, however, the judge indicated that Count 1, felonious assault in violation of R.C. 2903.11(A)(1), was dismissed.

{¶ 23} We find this to be the improper procedure to be used in the event an offender is found guilty of allied offenses. It is our opinion that the trial judge should have delivered her verdict with regard to both counts and then *merged* the convictions rather than dismissing Count 1 altogether. *Whitfield* at ¶24. While it is a matter of semantics and the ultimate outcome will be the same, we find this to be plain error and are compelled to reverse this matter for resentencing.

Conclusion

{¶ 24} Although appellant claims that the shooting was accidental, the evidence shows that he put on rubber gloves; picked up the gun; pointed it at the victim; said, "You think I won't?"; pulled the trigger; lied to the police; and then hid the evidence. Based on the totality of the circumstances, the trial judge acted reasonably in finding appellant guilty of felonious assault. We cannot find that his conviction was based on insufficient evidence, nor was it against the manifest weight of the evidence. The trial judge did err, however, when she dismissed one count of felonious assault rather than merging it for sentencing. As such, this matter must be remanded to the trial court to correct the error.

Conviction affirmed; remanded for resentencing.

It is ordered that appellant and appellee 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 common pleas 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.

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR