[Cite as *State v. Linnan*, 2010-Ohio-5145.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94620

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHANE LINNAN
(a.k.a. LINNEAN)

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511283-B

BEFORE: Celebrezze, J., Gallagher, A.J., and Cooney, J.

RELEASED AND JOURNALIZED: October 21, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Shane Linnan (a.k.a. Linnean), appeals his conviction for aggravated riot. After review of the record and pertinent case law, we affirm.

{¶ 2} The relevant facts of this case were set forth in *State v. Hinzman*, Cuyahoga App. No. 92767, 2010-Ohio-771.

{¶ 3} On August 16, 2007, Susan Addleman was working as a bartender at Sheehan's Pub. She testified that appellant arrived at the bar between 8:00 and 8:30 p.m., but he repeatedly left the bar and returned throughout the night. Eugina Chidsey and her boyfriend, Peter Marcoff, III, both of whom were co-defendants in this matter, arrived at the bar between

10:00 and 11:00 p.m. Wendy Hinzman, yet another co-defendant, and her boyfriend, Jason Dillon,[1] arrived at the bar later that evening.

{¶ 4} According to Addleman, the group was drinking heavily throughout the night. Addleman acknowledged that appellant was not sitting at the table with the rest of his co-defendants, but said she saw him walking back and forth between where he was sitting at the bar and where the remaining co-defendants were sitting. Addleman testified that although she served the group several rounds of alcohol, Chidsey also went behind the bar multiple times and served rounds of shots to the group. Addleman testified that this was not considered unusual because Chidsey was also an employee of the bar.

{¶ 5} "At approximately 1:00 a.m. on August 17, 2007, Jim Graziolli ('Graziolli'), the victim, arrived to help Addleman, his girlfriend at the time, close the bar. At approximately 2:15 a.m., Addleman called 'last call,' indicating to customers that they needed to finish their drinks and leave. Addleman testified that all patrons in the bar complied with her request with the exception of appellant's party. After unsuccessfully attempting to get the group to leave, Addleman sought Graziolli's assistance. Graziolli approached the group and asked them to finish their drinks and leave. Graziolli and Dillon both testified that [Hinzman] and Graziolli got into a verbal altercation

[1] Dillon was also charged in this matter, but was acquitted in an earlier trial.

at this point. Once [Hinzman] refused to give up her drink, Graziolli became irritated and decided to wait for Addleman outside.

{¶ 6} "After they had finished their drinks, [Hinzman] and Dillon left the bar. According to Graziolli's testimony, he and [Hinzman] then engaged in another verbal altercation. Graziolli testified that, as he was attempting to walk away from [Hinzman], he was hit in the back of the head with [her] high-heeled shoe. According to Graziolli, he then punched [Hinzman]. In defense of [Hinzman], Dillon jumped on Graziolli's back and wrapped his arms around Graziolli's neck. At some point, Chidsey, Marcoff, and [appellant] emerged from the bar. According to Graziolli, the four repeatedly punched and kicked him.[2]

{¶ 7} "Addleman testified that, shortly after appellant's group had left the bar, she saw 'hands moving' through a window in the bar. Addleman walked outside to investigate further and found all five members of appellant's group hitting and kicking Graziolli. Addleman then told the group that she was going to call 911 and ran inside to grab the phone.

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[2] "This testimony directly conflicts with Dillon's testimony. Dillon testified that after he and appellant left the bar, Graziolli overheard [Hinzman] making comments about Graziolli's behavior inside the bar. Dillon testified that Graziolli and [Hinzman] engaged in another verbal altercation, and Graziolli acted as if he were going to hit [Hinzman]. Dillon testified that, at this point, he was attempting to protect [his girlfriend], and he and Graziolli had a fistfight. According to Dillon, the other members of the group were only trying to get Graziolli off of Dillon and were not actually engaged in any sort of physical altercation with Graziolli."

Addleman took the phone back outside and proceeded to call 911. Addleman testified that, while she was attempting to call 911, Chidsey put her hands around Addleman's throat and threatened her. According to Addleman, once the group realized that she was contacting the authorities, they all fled." *Hinzman* at ¶4-6.

{¶ 8} According to Dillon, appellant was not a part of his group on the night in question, and he and appellant did not know each other. Dillon also testified that appellant did not engage in the physical altercation with Graziolli and that he only knew appellant via seeing him at court proceedings.

{¶ 9} Appellant, Hinzman, Marcoff, Chidsey, and Dillon were indicted in a five-count indictment. Only two counts related directly to appellant — Count 1, felonious assault in violation of R.C. 2903.11(A)(1), and Count 5, aggravated riot in violation of R.C. 2917.02(A)(1) and/or (A)(2), and/or (A)(3). Appellant pled not guilty, and the matter proceeded to a jury trial. The jury found appellant guilty of aggravated riot; he was acquitted of felonious assault. Appellant was sentenced to one year of community control sanctions. This appeal followed.

{¶ 10} Appellant raises six assignments of error for our review. First, he argues that the indictment in this case was invalid on its face. He then argues that the trial court erred when it refused to allow him to review the

transcript of the grand jury proceedings. He also argues his conviction is based on insufficient evidence and is against the manifest weight of the evidence. Finally, appellant argues that he was denied the effective assistance of trial counsel and that the trial court erred in providing the jury with a flight instruction.

Law and Analysis

Defective Indictment and Unanimity

{¶ 11} In his first assignment of error, appellant argues that "[t]he indictment for aggravated riot was invalid on its face and resulted in prejudice to the defendant." He also argues that he was denied his right to a unanimous jury verdict.

{¶ 12} The indictment charged appellant with aggravated riot in violation of "R.C. 2917.02(A)(1) and/or (A)(2) and/or (A)(3)." Appellant argues that subsections (A)(1) and (A)(2) require the mens rea of purpose while R.C. 2917.02(A)(3) requires knowledge. He relies on this to argue that he could have been found to have possessed both mental states, and thus he cannot know under which subsection he was convicted. We find this argument unpersuasive.

{¶ 13} In order for a criminal defendant to be convicted, the jury must return a unanimous guilty verdict. Crim.R. 31(A). The issue in this matter is whether this right was impermissibly interfered with when the jury was instructed as to multiple subsections of Ohio's aggravated assault statute. The critical inquiry

then is whether this case involves "alternative means" or "multiple acts." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶48.

{¶ 14} Alternative means denotes an offense that can be committed in multiple ways. Id. at ¶49. In such cases, the jury is required to unanimously decide the defendant is guilty, but is not required to unanimously agree on the means by which the crime was committed "so long as substantial evidence supports each alternative means." Id. "In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved by beyond a reasonable doubt." Id.

{¶ 15} In contrast, multiple acts cases are those where several acts are alleged, and any of those acts could constitute the crime charged. Id. at ¶50. In those cases, the jury must unanimously agree on which act constituted the crime. Id. In order to ensure a unanimous verdict in these cases, either the state must elect the act it will rely upon for the conviction, or the trial court must instruct the jury that it must agree that the same act was proven beyond a reasonable doubt. Id., quoting *State v. Jones* (2001), 96 Hawaii 161, 170, 29 P.3d 351.

{¶ 16} In clarifying the difference between alternative means and multiple acts cases, the Ohio Supreme Court considered *State v. Johnson* (1989), 46 Ohio St.3d 96, 545 N.E.2d 636. "In *Johnson*, we held that if a single count of an indictment can be divided into two or more 'distinct conceptual groupings,' the jury must be instructed specifically that it must unanimously find that the

defendant committed acts within one conceptual grouping in order to reach a guilty verdict." *Gardner* at ¶52.

{¶ 17} In *Hinzman*, appellant's co-defendant argued that she was denied the right to a unanimous jury verdict with regard to her aggravated riot conviction. We noted that the indictment, as it related to aggravated riot, involved alternative means. *Hinzman* at ¶40. We then recognized that R.C. 2917.02(A)(3) requires one of the offenders to possess a deadly weapon. Id. at ¶41. Although the jury was never provided the definition of a deadly weapon, they were also never instructed with regard to R.C. 2917.02(A)(3). Id.

{¶ 18} "When instructing the jury as to the aggravated riot charge, the court stated: 'Before you can find any one or all of the Defendants guilty, you must find, beyond a reasonable doubt, that on or about the 17th day of August 2007 in Cuyahoga County, Ohio, the Defendants participated, with four or more others, in the course of disorderly conduct with the purpose to commit or facilitate the commission of an offense of violence, with the purpose to commit or facilitate the commission of a felony and/or with the purpose to commit or facilitate the commission of an offense of violence, to wit, felonious assault.'

{¶ 19} "In clarifying this jury charge, the court later informed the jury that it could also convict the defendants of aggravated riot if they found that the group engaged in disorderly conduct with the purpose to commit assault rather than felonious assault. Although the court had told the jury that the defendants were charged pursuant to all three subsections of the aggravated riot statute, any

mention of a deadly weapon was noticeably missing from the jury's charge. As such, it is obvious that the jury did not convict appellant or her co-defendants pursuant to R.C. 2917.02(A)(3) and no error occurred with regard to the omission of the deadly weapon definition.

{¶ 20} "As stated above, this is an alternative means issue. See [*State v.*] *Skatzes*[, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215] at ¶53-55 * * *. Accordingly, the jury was only required to unanimously agree that appellant was guilty; they were not required to delineate under which subsection appellant was being convicted. *Gardner* at ¶49-50, 889 N.E.2d 995. This is appropriate so long as sufficient evidence existed to convict appellant under either R.C. 2917.02(A)(1) or (A)(2). *Gardner* at ¶49. In order to determine whether such evidence was present, we must analyze subsections (A)(1) and (A)(2) of Ohio's aggravated riot statute." *Hinzman* at ¶42-45.

{¶ 21} R.C. 2917.02(A)(1) and (A)(2) prohibit an offender from participating with four or more individuals in a course of disorderly conduct for the purpose of committing a felony or an offense of violence. Although Dillon testified that he did not know appellant and appellant was not part of the physical altercation, the testimony of Graziolli and Addleman indicated otherwise. In fact, Addleman testified that just before she called 911, she was pleading with the group to stop beating Graziolli. Addleman testified that appellant was the individual standing closest to her at this time and that she looked him in his eyes and begged him to stop. She also testified that appellant would run over, kick Graziolli, run away,

and then repeat this behavior. As such, sufficient evidence existed to find appellant guilty under R.C. 2917.02(A)(1) and (A)(2), and his first assignment of error must be overruled.

Grand Jury Testimony

{¶ 22} In his second assignment of error, appellant argues that the trial court erred when it refused to disclose the transcript of the grand jury proceedings. The Ohio Supreme Court has recognized a very limited exception to the secrecy that is normally afforded grand jury proceedings. *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶66. A defendant is not entitled to review the transcript of the grand jury proceedings "'unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy.'" Id., quoting *State v. Greer* (1981), 66 Ohio St.2d 139, 420 N.E.2d 982, at paragraph two of the syllabus.

{¶ 23} The determination of a particularized need is within the discretion of the trial court, and thus we must apply an abuse of discretion standard of review. Id. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 24} An offender can demonstrate particularized need by showing that failure to disclose the transcript will deny him a fair trial. *Fry* at ¶66, citing *State v. Sellards* (1985), 17 Ohio St.3d 169, 173, 478 N.E.2d 781. Appellant relied on

the fact that the case was originally indicted on different charges and without the inclusion of Dillon to argue that he was entitled to view the transcript of the grand jury proceedings. He further argued that, without the transcript, he would be unable to adequately cross-examine the witnesses in this case, and thus he would be denied the effective assistance of counsel.

{¶ 25} Appellant's argument is similar to the argument made in *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032. In *Hancock*, the court found that the offender failed to show particularized need when he made a general argument that the witnesses in the grand jury proceedings may have made statements that were inconsistent with statements made by the same witnesses. Id. at ¶72. The Court noted that, "[t]he motion failed to identify the witnesses, officers, or statements to which it referred."

{¶ 26} A similar argument was also made in *State v. Coley*, 93 Ohio St.3d 253, 2001-Ohio-1340, 754 N.E.2d 1129. In *Coley*, the defendant was originally indicted in a noncapital murder case but, after the case was resubmitted to the grand jury, he was indicted for capital murder. Id. at 261. The court in *Coley* noted that new evidence had been obtained and that was why the state wanted to resubmit the matter to the grand jury. Id. at 262 ("Coley failed to show a particularized need for the grand jury testimony. The subsequent capital indictment was based on additional investigation and new evidence, not on improper motives such as placating a newspaper or police department.").

{¶ 27} Appellant relies heavily on the fact that new charges were added to the indictment when the case was reindicted. At trial, appellant argued that he was originally indicted for felonious assault and, after the second set of grand jury proceedings, he was indicted for felonious assault and aggravated riot. What appellant neglects to recognize is that his case was resubmitted to the grand jury after Dillon came forward and told the police that he was responsible for the fight with Graziolli. Because aggravated riot requires the participation of the offender and four or more other individuals, it makes absolute sense that appellant was not indicted for aggravated riot until after Dillon, who then became the fifth defendant, came forward. Appellant failed to make a showing of particularized need, and the trial court properly denied his motion to view the transcript of the grand jury proceedings. Appellant's second assignment of error is overruled.

Sufficiency and Manifest Weight of the Evidence

{¶ 28} In his third and fourth assignments of error, appellant argues his conviction was based on insufficient evidence and was against the manifest weight of the evidence. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. When deciding whether a conviction was based on sufficient evidence, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether 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, 273, 574 N.E.2d 492; *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 29} The United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The Court held in *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal. Id. at 43. Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated that "[t]he court, reviewing 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id. at 175.

{¶ 30} As addressed in appellant's first assignment of error, both Graziolli and Addleman testified that appellant was in the bar on the night in question. They also testified with absolute certainty that appellant was one of the

individuals who attacked Graziolli. Addleman testified that she knew appellant from a different establishment and that, at one point, she looked him in the eyes and begged him to stop beating Graziolli. Viewing this evidence in a light most favorable to the state, we find that the jury could have, and did, find appellant guilty of aggravated riot beyond a reasonable doubt.

{¶ 31} Dillon testified that he did not know appellant, that appellant was not involved in the physical altercation, and that he only knew appellant through the court proceedings. This testimony was directly contradicted by the testimony of Graziolli and Addleman. Both Graziolli and Addleman were extensively cross-examined, and any inconsistencies in their testimony were thoroughly discussed before the jury. Which witnesses to believe was entirely within the purview of the jury, and we should not disturb that judgment on appeal.

{¶ 32} We cannot find that the jury clearly lost its way in this case or that a manifest injustice occurred. Based on the foregoing analysis, appellant's conviction is not based on insufficient evidence, nor is it against the manifest weight of the evidence. Appellant's third and fourth assignments of error are overruled.

Ineffective Assistance of Counsel

{¶ 33} In his fifth assignment of error, appellant argues that he was denied his right to the effective assistance of counsel. In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed

and deficient; and 2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 34} Appellant first claims that his counsel was ineffective in failing to argue that the court was collaterally estopped from considering issues previously litigated in Dillon's trial. A collateral estoppel theory was addressed in *Hinzman* at ¶62-63, where we held that because the case in which Dillon was acquitted involved different parties than the instant matter, collateral estoppel did not apply. We stated, "In this case, Dillon was acquitted in a trial separate from each of his co-defendants; therefore, his acquittal has no bearing on whether the jury in this matter could find that appellant and four other individuals engaged in the actions prohibited by Ohio's aggravated riot statute. In fact, the jury heard Dillon's version of events, exclusive of the fact that he was acquitted, and chose to disregard it in finding appellant and the remaining co-defendants guilty." Id. at ¶63. Since the outcome of Dillon's trial cannot have collateral estoppel or res judicata effect in the instant matter, appellant's counsel was not ineffective in failing to make such an argument.

{¶ 35} Appellant also argues that his counsel was ineffective for failing to request a jury instruction on disorderly conduct as a lesser included offense of aggravated riot. "[A] trial court is required to instruct a jury on a lesser-included offense, 'only where the evidence presented at trial would reasonably support

both an acquittal on the crime charged and a conviction upon the lesser-included offense.'" *State v. Daniels*, Cuyahoga App. No. 93545, 2010-Ohio-3871, ¶30, quoting *State v. Benson*, Cuyahoga App. No. 87655, 2007-Ohio-830. As addressed in our analysis of appellant's third and fourth assignments of error, sufficient evidence existed to find appellant guilty of aggravated riot. As such, a jury instruction on a lesser included offense was not warranted, and thus appellant's counsel was not ineffective in failing to request one.

{¶ 36} Finally, appellant argues that his trial counsel was ineffective for failing to object when the jury was not instructed regarding R.C. 2917.02(A)(3). The trial court had dismissed the charges against Hinzman as they related to the alleged deadly weapon. As such, the jury was not provided the definition of a deadly weapon, nor were they charged with regard to the aggravated riot provision requiring the presence of a deadly weapon. As addressed in our analysis of appellant's first assignment of error, we find that the jury did not consider R.C. 2917.02(A)(3), and thus they could not convict appellant under that subsection. As such, appellant's counsel was not ineffective in failing to object to the trial court's omission of a jury instruction related to that subsection.

{¶ 37} We have reviewed the record in this case in its entirety. Nothing in the record suggests that appellant's counsel was deficient. Appellant has failed to establish that he was denied the effective assistance of counsel, and his fifth assignment of error is overruled.

Flight Instruction

{¶ 38} In his sixth and final assignment of error, appellant argues that the trial court erred in providing the jury with a flight instruction. Flight from justice may be considered by the jury to show that the offender was conscious of his guilt. *State v. Taylor*, 78 Ohio St.3d 15, 27, 1997-Ohio-243, 676 N.E.2d 82. Whether to provide the jury with a flight instruction is within the trial court's discretion; therefore, we must apply an abuse of discretion standard as defined above. *State v. Hudson*, Cuyahoga App. No. 91803, 2009-Ohio-6454, ¶52.

{¶ 39} "Flight from justice 'means some escape or affirmative attempt to avoid apprehension.'" Id., quoting *State v. Wesley*, Cuyahoga App. No. 80684, 2002-Ohio-4429. Appellant argues that the state did not present sufficient evidence to show that he and his co-defendants fled the scene. He specifically argues that he "merely departed" the scene of the crime, and thus a flight instruction was improper. We disagree.

{¶ 40} Addleman testified that she was pleading with appellant and his co-defendants to stop beating Graziolli, but they refused. She testified that it was not until she went back inside the bar, grabbed the phone, and told the attackers she was calling 911, that appellant and his co-defendants fled. Based on this testimony, the trial court could properly determine that a flight instruction was warranted. Nothing suggests that the trial court acted arbitrarily, and thus we cannot find that the trial court abused its discretion. Appellant's sixth assignment of error is overruled.

Conclusion

{¶ 41} The indictment in this case was not invalid, nor was appellant denied his right to a unanimous jury verdict. The trial court did not err in refusing to provide appellant with a copy of the transcript of the grand jury proceedings. Appellant's conviction was not based on insufficient evidence, nor was it against the manifest weight of the evidence. Finally, appellant was not denied the effective assistance of counsel, and the trial court did not abuse its discretion in providing the jury with a flight instruction.

Judgment affirmed.

It is ordered that appellee recover from appellant 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

SEAN C. GALLAGHER, A.J., and
COLLEEN CONWAY COONEY, J., CONCUR