[Cite as *State v. Wynn*, 2010-Ohio-519.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93057

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERTO WYNN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510316

BEFORE: Blackmon, J., Gallagher, A.J., and Boyle, J.

RELEASED: February 18, 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).

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Roberto Wynn appeals his conviction and sentence, and assigns the following errors for our review:

> **"I. The trial court erred in denying appellant's motion for acquittal as to the charges when the State failed to present sufficient evidence against appellant."**
>
> **"II. Appellant's convictions are against the manifest weight of the evidence."**
>
> **"III. The trial court erred by ordering convictions and consecutive sentences for separate counts of murder and attempted murder and felonious assault because the offenses are allied offenses pursuant to R.C. 2941.25 and they are part of the same transaction under R.C. 2929.14."**

{¶ 2} Having reviewed the record and pertinent law, we affirm Wynn's conviction and sentence. The apposite facts follow.

{¶ 3} On April 25, 2008, five friends, Christopher Basie, Michael Harris, Willie Jackson, Brian Gardner, and DiMarco Spencer, were cruising around an eastside Cleveland neighborhood in Willie Jackson's grey customized Ford van. Upon arriving in the vicinity of 9500 block of Parmalee Avenue, the van came under a barrage of gunfire. Christopher Basie was shot in the head and died at the scene.

{¶ 4} On May 12, 2008, the Cuyahoga County Grand Jury indicted Wynn on one count of aggravated murder with mass murder and three-year firearm specifications attached for the death of Basie. The grand jury also indicted Wynn on four counts of attempted murder of Harris, Jackson,

Gardner, and Spencer. These counts also had three-year firearm specifications attached.

{¶ 5} In addition, the grand jury indicted Wynn on four counts of felonious assault of Harris, Jackson, Gardner, and Spencer with three-year firearm specifications attached. Wynn pleaded not guilty at his arraignment and the matter proceeded to a jury trial, which commenced on February 9, 2009.

Jury Trial

{¶ 6} The State presented the testimony of twenty witnesses.[1] Thirteen-year-old Clifshell Stevenson testified that Wynn is a close friend of her cousin, Decarlin Duncan, and is also familiar with him from seeing him around the neighborhood. Stevenson testified that on the day of the shooting she was on the front porch of her home playing with two friends, while her two younger cousins were playing with chalk on the sidewalk in front of the house.

{¶ 7} Stevenson testified that several big boys came from the backyard of an adjacent house. Moments later, she observed a burgundy van pull up almost in front of her house. Wynn exited the vehicle, proceeded to stand behind a tree on the opposite side of the street, and took a gun out of his

[1]The relevant testimony of some witnesses will be explored in the legal analysis of the opinion.

pocket. As a grey van drove by, Wynn began shooting into the van. Stevenson testified that initially Wynn was having problems getting the gun to fire. Wynn fired three shots into the grey van and then fled in the burgundy van.

{¶ 8} Stevenson testified that when the shooting began, she jumped off the porch, grabbed her younger cousins, dragged them to the porch, and instructed them to keep their heads down. Stevenson testified that at the time of the shooting Wynn, was wearing jeans, a white tee shirt, and a Yankees baseball hat. Stevenson stated that later that evening she saw Wynn walking down the street wearing different clothes.

{¶ 9} Stevenson's nine-year-old cousin, Tanesha Townsend, testified that she was standing in the grass in front of her grandmother's house when the shooting began. Townsend testified that she observed Wynn standing by a tree in front of the house directly across from her grandmother's house. Townsend testified that Wynn took a black gun out of his pocket and began shooting. Townsend stated that after the shooting began, Stevenson grabbed her and her cousin, Cameron, and dragged them to the porch.

{¶ 10} DiMarco Spencer testified that three days prior to the shooting, he was sitting on his front porch when Wynn and two other males robbed him at gunpoint. Spencer testified that Wynn and his companions took his money, cell phone, keys, and van.

{¶ 11} Spencer testified that on the day of the shooting he was riding around with Basie, Harris, Jackson, and Gardner, when he observed two groups of men that were about to fight. Spencer testified that he noticed Wynn in the crowd and pointed him out to his friends as one of the individuals who had robbed him earlier that week. Spencer stated that they did not approach Wynn because they thought he might be armed.

{¶ 12} Spencer testified that he and his companions drove to a friend's house, where they visited for a few minutes, and then left. Spencer testified that moments after leaving the friend's house, he heard gunshots, and when he looked out the window, he saw Wynn standing by a tree shooting at the left side of the van. DiMarco testified that a bullet hit Basie in the head and Basie immediately slumped over. DiMarco unsuccessfully tried to revive Basie, who died at the scene.

{¶ 13} Tyrone Payne testified that on the evening of April 25, 2008, he was at the corner of East 102nd Street and Parmalee Avenue, when he observed Wynn in the middle of the block shouting "clear it out." Wynn shouted "clear it out" to get the little children off the street. Payne testified that moments later Wynn began shooting at a van as it drove down the block. Payne stated that when the van reached where he was standing, he saw that the side window behind the driver's seat and one of the tires had been shot out.

{¶ 14} Sergeant Nathan Willson of the Cleveland Police Department's forensic unit testified that he examined three spent shell casings that were discovered at the scene of the shooting. Sgt. Willson testified that his examination led him to conclude that the casings were fired from a semi-automatic handgun and that they were fired from the same gun. Sgt. Willson also examined the bullet that was taken out of the victim's body, and concluded that it was at one point in a casing similar to the three found at the scene.

{¶ 15} On February 25, 2009, the jury found Wynn guilty of murder, the lesser included offense of aggravated murder, with the three-year firearm specification attached. The jury also found Wynn guilty of two of the four counts of attempted murder with three-year firearm specifications attached. In addition, the jury found Wynn guilty of all four counts of felonious assault with three-year firearm specifications attached to each count.

{¶ 16} On February 27, 2009, the trial court sentenced Wynn to an aggregate prison term of 30 years to life. Wynn now appeals.

Motion for Acquittal

{¶ 17} In the first assigned error, Wynn argues the trial court should have granted his motion for acquittal because the State failed to present sufficient evidence to sustain his conviction. We disagree.

{¶ 18} Crim.R. 29(A), which governs motions for acquittal, states:

> **"The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."**

{¶ 19} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman*:[2]

> **"Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."**[3]

{¶ 20} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks*,[4] 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**

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[2](1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

[3]See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23; *State v. Davis* (1988), 49 Ohio App.3d 109, 113.

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.)"

{¶ 21} After reviewing the evidence in a light most favorable to the State, we find that the evidence, if believed, could convince a rational trier of fact that the State had proven beyond a reasonable doubt each element of the charge of murder, attempted murder, and felonious assault.

{¶ 22} In this case, four witnesses testified that they observed Wynn shooting into the grey van as it drove by on Parmalee Avenue. Two of the witnesses, Stevenson and Townsend, were very familiar with Wynn by virtue of his friendship with their cousin, and by seeing him around the neighborhood. Both Stevenson and Townsend were standing on the opposite side of the street from where the shooting occurred.

{¶ 23} A third witness, Spencer, testified that as the van came under gunfire, he looked through the window and observed Wynn standing beside a tree and shooting into the van. Spencer testified that he recognized Wynn as the individual who had robbed him at gunpoint three days earlier. Spencer also testified that he had seen Wynn earlier that evening among the two groups of men that were about to fight, and had pointed him out to the other occupants of the vehicle.

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[4](1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 24} A fourth witness, Payne, who was familiar with Wynn from seeing him around the neighborhood, testified that he observed Wynn "clearing out" the street in anticipation of the shooting. Payne then observed Wynn shooting into the grey van as it drove down Parmalee Avenue.

{¶ 25} Finally, the physical evidence collected at the scene and the coroner's determination that Basie died as a result of a gunshot wound to his head, corroborates the eyewitnesses' testimonies that Wynn fired multiple shots as the van drove down Parmalee Avenue.

{¶ 26} Based on the testimony of the four eyewitnesses, as well as the physical evidence collected, we conclude there was sufficient evidence to sustain Wynn's convictions for murder, attempted murder, and felonious assault. Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that the State proved all of the essential elements of the instant charges beyond a reasonable doubt. Thus, the trial court properly denied Wynn's motion for acquittal. Accordingly, we overrule the first assigned error.

Manifest Weight

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

{¶ 28} In *State v. Wilson,*[5] 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."**

{¶ 29} As discussed in our resolution of the first assigned error, Wynn's convictions were based on substantial and sufficient evidence. Four pivotal witnesses observed Wynn shooting at the van multiple times. Two of the four witnesses were very familiar with Wynn, the third had seen him around the neighborhood, and the fourth had recently been robbed at gunpoint by Wynn.

{¶ 30} Nonetheless, Wynn maintains that the witnesses were not credible and their testimonies were inconsistent. However, a defendant is not entitled to

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[5]113 Ohio St.3d 382, 865 N.E.2d 1264, 2007-Ohio-2202.

a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial.[6] The determination of weight and credibility of the evidence is for the trier of fact.[7] 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.[8]

{¶ 31} Further, the trier of fact is free to believe or disbelieve all or any of the testimony.[9] 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 fact finder's determination of the witnesses' credibility.[10] Therefore, Wynn's convictions are not against the manifest weight of the evidence. Accordingly, we overrule the second assigned error.

Allied Offenses

{¶ 32} In the third assigned error, Wynn argues the trial court erred when it ordered convictions and a consecutive sentence for separate counts of murder,

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[6]*State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958.

[7]*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.

[8]*State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503.

[9]*State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553.

[10]*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.

attempted murder, and felonious assault, because they are allied offenses and part of the same transaction. We disagree.

{¶ 33} In the instant case, the grand jury indicted Wynn for the aggravated murder of Basie, and the jury found him guilty of the lesser included offense of murder, along with the three-year firearm specification. The trial court then sentenced Wynn to an indefinite term of 15 years to life plus three years for the firearm specification.

{¶ 34} The grand jury also indicted Wynn for the attempted murder of Spencer, Gardner, Jackson, and Harris. In addition, the grand jury indicted Wynn for the felonious assault of the foregoing individuals. The jury found Wynn guilty of the attempted murder of Spencer and Gardner, but not of Jackson and Harris. Further, the jury found Wynn guilty of felonious assault of all four individuals.

{¶ 35} The trial court merged the attempted murder and felonious assault convictions relating to Spencer and Gardner, and sentenced Wynn to ten years plus three years for the firearm specifications. The trial court ordered the sentences served concurrently, but consecutively to the sentence for the murder conviction.

{¶ 36} As it relates to the convictions involving the felonious assault of Jackson and Harris, the trial court sentenced Wynn to two years plus three years for the firearm specifications. The trial court ordered the sentences served concurrently, but consecutively to the murder and attempted murder convictions.

The trial court then merged the firearm specifications relating to Spencer, Gardner, Jackson, and Harris with the firearm specification attached to the murder conviction.

{¶ 37} R.C. Section 2941.25(A) provides as follows:

> **"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."**

{¶ 38} The Ohio Supreme Court has held that felonious assault is an allied offense to attempted murder.[11] We have also held that where there are multiple victims, the defendant could be sentenced for each separate victim.[12]

{¶ 39} Here, a review of the sentences the trial court imposed reveals that the trial court properly merged the attempted murder and felonious assault convictions relating to Spencer and Gardner.[13] Since the jury found Wynn not guilty of the attempted murder of Jackson and Harris, there was nothing to

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[11]*State v. Williams*, __ Ohio St.3d __, 2010-Ohio-147,__ N.E.2d __. See, also, *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677.

[12]*State v. Jordan*, Cuyahoga App. No. 91869, 2009-Ohio-3078, citing *State v. Gregory* (1993), 90 Ohio App.3d 124, 628 N.E.2d 86.

[13]We note the sentence the trial court imposed conforms with the Ohio Supreme Court's recent decision in *State v. Whitfield*, __ Ohio St.3d __, 2010-Ohio-2. __ N.E.2d __. Consequently, a remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant is unnecessary.

merge, thus the trial court correctly sentenced Wynn for the felonious assault convictions relating to these individuals.

{¶ 40} We conclude the sentences the trial court imposed comported with R.C. 2941.25(A) and is not contrary to our prior holdings and the pronouncement of the Ohio Supreme Court regarding allied offenses. Accordingly, we overrule the third assigned error.

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

SEAN C. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR