[Cite as *State v. Ross*, 2010-Ohio-5243.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94165

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TERRY ROSS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522982

BEFORE: Dyke, J., Blackmon, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: October 28, 2010

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ANN DYKE, J.:

{¶ 1} Defendant-appellant, Terry Ross ("appellant"), appeals his convictions for aggravated robbery, felonious assault, and carrying a concealed weapon. For the reasons that follow, we affirm.

{¶ 2} On April 24, 2009, the Cuyahoga County Grand Jury indicted appellant on four counts: Count 1 alleged aggravated robbery in violation of R.C. 2911.01(A)(1); Count 2 alleged attempted murder in violation of R.C. 2923.02/2903.02(A); Count 3 alleged felonious assault in violation of R.C. 2903.11(A)(2); and Count 4 alleged carrying a concealed weapon in violation of R.C. 2923.12(A)(2). Counts 1, 2,and 3 each included one- and three-year

firearm specifications. Appellant pled not guilty to the charges.

{¶ 3} On September 28, 2009, the matter proceeded to a jury trial. At trial, Clarence Williams testified that on April 2, 2009, he dropped a friend, Gregory Smiley, off at Knowles Street in Cleveland, Ohio. When Williams arrived, a number of males were gathered outside. Two of the men, William Earl and a male known as Ray-Lee, approached Williams and asked him to purchase liquor at a nearby store. Williams agreed and went to the store with the two men. Before purchasing the liquor, Williams pulled out a large amount of cash. Williams believed Earl saw him with the cash.

{¶ 4} Williams returned to Knowles Street and walked up the driveway with the liquor he was intending to give to Alex Brookins. Appellant approached Williams, pulled a gun, pointed it at him, and inquired why Williams was hanging out with a rival gang. In the meantime, Earl took $2,000 in cash from Williams's pocket. Williams then heard someone say, "take him in the backyard." Fearing the men were going to shoot and kill him, he ran away towards the street where his vehicle was parked. As Williams was running, he glanced back and saw appellant firing four or five gunshots in his direction. A couple bullets hit the back passenger side of Williams's vehicle and the back tire. None of the bullets, however, struck him and he was able to enter his vehicle.

{¶ 5} Once inside, Williams immediately drove away. Within seconds, he encountered a police vehicle and informed the officers of the shooting. The officers directed him to the police station located only a block away and Williams

proceeded to the station.

{¶ 6} Officer Michael Delisle testified that he heard over dispatch that an anonymous caller had informed the police that shots were fired on Knowles Street. Consequently, he proceeded to the address and witnessed a number of police already at the scene of the shooting. Also outside were a number of civilian males and females standing in the front yard. Detective Von Harris testified he attempted to interview these witnesses, but they all refused to speak with the police.

{¶ 7} Officer John Donitzen testified that he heard gunshots, and then dispatch informed the officers that the suspect was wearing a blue shirt and jeans. He explained that when he heard the gunshots and call, he was outside in the police parking lot speaking with fellow officers and that his shift had just ceased. Although he was not on duty, he nevertheless responded to the call by proceeding to Terrace, a street near Knowles, in anticipation of seeing the fleeing shooter. When he reached Terrace, appellant, wearing a blue shirt and jeans, ran in front of Officer Donitzen's civilian vehicle. Donitzen immediately notified dispatch that appellant was running through the backyards and provided a brief description. He also followed appellant in his vehicle.

{¶ 8} Officer Delisle testified that, after receiving the call, a male was seen fleeing with a blue shirt and jeans near Lee Road, he proceeded to Lee and saw appellant running. Officer Delisle exited his vehicle in pursuit of appellant. When appellant saw Officer Delisle, he immediately turned around and ran in the

opposite direction away from the officer and towards the woods. Officer Joshua Rogers confirmed that appellant ran in the opposite direction after seeing police. Appellant, however, did not reach the woods before Officers Delisle and Rogers caught, secured, and searched him for weapons. Officer Delisle did not find a gun on appellant, nor did he find any money at that time.

{¶ 9} Nevertheless, Officer Delisle placed appellant under arrest and transported him to the police station. Upon arrival, the officers and appellant encountered Williams. Williams and appellant exchanged words and appellant was taken into the station.

{¶ 10} At the station, the police showed Williams a photo array, and he picked appellant from six photographs. Williams further testified that he was familiar with appellant prior to this incident. Officer Delisle and Rogers also testified that photographs of Williams's vehicle were taken, which depicted a number of bullet holes in the back passenger side of the vehicle and a flat back tire.

{¶ 11} Officer Delisle testified that, at the police station, he swabbed appellant's hands for gunshot residue. Tests later revealed no gunshot residue, but Donna Rose, a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation ("BCI") testified that the absence of gunshot primer residue on appellant's hands does not preclude the possibility that he fired a gun earlier that day. She explained that gunshot residue may not be found on the hands of a shooter because it could have been wiped or washed away.

Also, the residue could have been removed during normal activity, such as putting hands in a pocket. Ms. Rose provided that the more active an individual, the more likely the chance the residue would be removed from the hands. Moreover, Ms. Rose testified that gunshot residue was not found on William Earl's hands either.

{¶ 12} Finally, Williams admitted to being incarcerated at the time of trial for felonious assault as a result of him shooting someone only days after the incident on April 2, 2009. Upon cross-examination, Williams also acknowledged discord with appellant's best friend, William Johnson.

{¶ 13} Following presentation of the state's case-in-chief, appellant moved for acquittal pursuant to Crim.R. 29(A). The trial court denied this request as it also did after appellant rested his case and made a second request for acquittal.

{¶ 14} On October 2, 2009, the jury found appellant not guilty of the attempted murder charge in Count 2, but found him guilty of the remaining three charges: aggravated robbery, felonious assault, and carrying a concealed weapon. The jury also found appellant guilty of the one- and three-year firearm specifications included with the aggravated robbery and felonious assault charges.

{¶ 15} Accordingly, on October 6, 2009, the trial court sentenced appellant to three years imprisonment for the firearm specification in Count 1 to run prior to and consecutive to five years imprisonment for the underlying charge of aggravated robbery. Additionally, the court imposed an eight-year prison

sentence for the felonious assault conviction and ordered merger of the one- and three-year firearm specifications associated with that conviction. The court also sentenced appellant to one year imprisonment for the carrying a concealed weapon conviction and ordered all sentences to run concurrent to each other for a total eight-year prison sentence. Finally, the court imposed five years of postrelease control.

{¶ 16} Appellant now appeals and presents two assignments of error for our review. In the interests of convenience we will address the two errors simultaneously. His first provides:

{¶ 17} "The trial court erred in denying Appellant's motion for acquittal as to the charges when the state failed to present sufficient evidence to sustain a conviction."

{¶ 18} His second assignment of error states:

{¶ 19} "Appellant's convictions are against the manifest weight of the evidence."

{¶ 20} Within these assignments of error, appellant asserts that the state failed to present sufficient evidence and the evidence was against the manifest weight for establishing that he fired the gunshots at Williams. We disagree.

{¶ 21} Under the Due Process Clause of the Fourteenth Amendment, a defendant in a criminal case cannot be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged. *Jackson v. Virginia* (1979), 443 U.S. 307, 316, 99 S.Ct. 2781, 61

L.Ed.2d 560; *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368. In analyzing claims of insufficient evidence, the court must determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319; *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. An appellate court's function, when reviewing the sufficiency of the evidence to support a criminal conviction, is to examine 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. Id.

{¶ 22} On the other hand, in *Thompkins*, supra, the court illuminated a different test for manifest weight of the evidence as follows:

{¶ 23} "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.' It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*. Black's [Law Dictionary

(6 Ed.1990)], at 1594." Id. at 386.

{¶ 24} The 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. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id.

{¶ 25} Thus, the test for sufficiency of the evidence is a quantitative one, while the test in determining whether the evidence is against the manifest weight of the evidence is a qualitative one. *State v. Sanders* (Feb. 16, 1999), Stark App. No. 1998-CA-0235. Furthermore, sufficiency of the evidence is a question of law for the trial court and manifest weight of the evidence is a question of fact for the factfinder. Id. Accordingly, even if a judgment is sustained by sufficiency of the evidence, it may nevertheless be against the manifest weight of the evidence. Id.

{¶ 26} In this case, the jury convicted appellant of aggravated robbery, which is defined in R.C. 2911.01(A)(1). This statue provides in pertinent part:

{¶ 27} "No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly weapon on or about the offender's person or

under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]"

{¶ 28} The jury also found appellant guilty of felonious assault. The elements are provided in R.C. 2903.11(A)(2), which states in relevant part: "No person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

{¶ 29} Finally, the jury convicted appellant of carrying a concealed weapon in violation of R.C. 2923.12(A)(2). This statute imposes criminal liability upon someone who knowingly carries a handgun on their person or ready at hand. Id.

{¶ 30} In the case sub judice, appellant maintains that because the police were unable to find a gun and no gunshot residue was discovered upon his hands, the state is unable to sufficiently establish he was the shooter. Appellant also complains that the police did not find the $2,000 taken from Williams upon appellant. Thus, he maintains that the only link of evidence was Williams's testimony, which is unreliable because he has a criminal record. We find appellant's arguments unpersuasive.

{¶ 31} Not only did Williams testify that appellant shot at him and identified appellant in a photo array, but a review of the evidence indicates that the state provided considerable corroborating evidence to sustain appellant's convictions for felonious assault, aggravated robbery, and carrying a concealed weapon. An anonymous citizen called police on April 2, 2009 to inform them that shots had been fired on Knowles Street. Officer Donitzen confirmed that he, too, heard

these gunshots as he stood in the outside parking lot at the nearby police station. As a result of the anonymous call, police embarked on Knowles Street to find a number of individuals standing outside on the lawn. There they discovered four 9mm spent casing shells.

{¶ 32} The state further established that appellant fled from the scene of the crime as well as from police officers. Officer Donitzen witnessed appellant running through the nearby backyards. As he was running, appellant noticed police officers coming towards him. In response, he immediately turned around and ran in the opposite direction, fleeing apprehension. Nevertheless, Officers Delisle and Rogers apprehended appellant and placed him under arrest.

{¶ 33} Furthermore, later at the station, police investigated Williams's vehicle and discovered a number of bullet holes in the back passenger side of the vehicle and a flat back tire. Officer Delisle testified that he believed the bullet holes were "fresh. There was no rust at all on the exposed metal. And metal tends to rust quite quickly." Thus, there is an abundance of reliable corroborating evidence demonstrating that appellant fired gunshots in the direction of Williams.

{¶ 34} Finally, the absence of a gun, money, or gunshot residue upon appellant's person was adequately explained during trial. Evidence established that appellant was running for awhile and, immediately before being apprehended, ran through a field. As such, appellant could have disposed of the gun and money at this time, prior to his apprehension. Also, as the forensic

scientist, Donna Rose, implied, the level of activity that running from the police entails could have removed the gunshot residue from appellant's hands.

{¶ 35} In light of the foregoing, we find the state presented sufficient evidence to satisfy the elements of the charges, and the convictions were not against the manifest weight of the evidence. Appellant's two assignments of error are overruled.

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.

ANN DYKE, JUDGE

PATRICIA ANN BLACKMON, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR