[Cite as *State v. Brown*, 2010-Ohio-661.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92814

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID J. BROWN, SR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509535

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

RELEASED: February 25, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

David H. Brown
David H. Brown, LLC
4403 St. Clair Avenue
Cleveland, Ohio 44103

Edwin J. Vargas
The Vargas Law Firm
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Matthew Waters
Assistant County Prosecutor
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, David Brown, appeals his convictions for attempted murder, felonious assault, and having a weapon while under a disability. He raises three assignments of error for our review:

{¶ 2} "[1.] Trial counsel provided ineffective assistance by failing to bifurcate the weapon under disability charge and by stipulating to the Gun Powder Residue Report because the failures deprived Mr. Brown of a fair trial.

{¶ 3} "[2.] The trial court denied Mr. Brown his due process rights by denying Mr. Brown's Motion for Judgment of Acquittal because the evidence is insufficient to support the guilty verdict for attempted murder.

{¶ 4} "[3.] Finding Mr. Brown guilty of attempted murder and felonious assault is against the manifest weight of the evidence."

{¶ 5} After reviewing the record and pertinent law, we find no merit to Brown's assigned errors and affirm.

Procedural History and Facts

{¶ 6} In April 2008, the grand jury indicted Brown with attempted murder, in violation of R.C. 2923.02 and 2903.02(A), two counts of felonious assault, in violation of R.C. 2903.11(A)(1) and (2), and having weapons while under a disability, in violation of R.C. 2923.13(A)(3). The attempted murder and felonious assault charges also had one- and three-year firearm specifications attached. The following evidence was presented at the jury trial.

{¶ 7} The victim, Anthony Doss, testified that in April 2008, he was living with his mother on East 141st Street in Cleveland, Ohio. He became friends with Brown in 2007 when Brown and his wife, Nora, moved into the house across the street. The Browns introduced Doss to Leothia Scott, who worked with Nora. Doss and Scott began dating after that.

{¶ 8} According to Doss, his friendship with Brown and Nora began to deteriorate when Brown asked Doss to take responsibility for a condom that Nora found in their home. The condom belonged to Brown, but Doss agreed to take the blame for it. After that, Doss stated that he did not feel comfortable being around Nora, and so he stopped going to the Browns' home.

{¶ 9} In the middle of the afternoon in April 2008, Doss explained that he was on the sidewalk in front of his house when Brown yelled to Doss from his porch across the street, "I can't help it if you fucked things up with your bitch." Doss became angry at what Brown said about his "woman" and was "ready to start a fight." Doss began to walk toward Brown's house and as he did, he pulled his cell phone off of his belt to put it in his pocket and began to take off his shirt to fight. But when Doss got to the middle of the street, Brown came "down off of his porch, reach[ed] in his back, and pulled out a gun and started shooting." Doss believed Brown shot at him "about six times"; Doss was hit three times, in both legs and in his stomach. Doss said he turned around and "slowly walked" back to his house, and Brown shouted to him, "you don't walk up on nobody, Tone."

{¶ 10} Doss further stated that when he got back to his porch, he could see Troy Clark, who was standing on Brown's porch during the shooting, run "around the side" of Brown's house. Doss also saw Cleveland Blade, standing behind Brown's truck (parked on the same side of the street as Doss's house) with a shotgun, but he did not see Blade shoot the gun.

{¶ 11} Doss spent three-and-a-half weeks in the hospital as a result of being shot. He said that he gave a statement to Detective Legg when he was in the hospital, but that he was on heavy medication for pain at that time. Doss further testified to having three prior drug offenses, and that he spent three years in prison from 2003 to 2006.

{¶ 12} Doss testified on cross-examination that he had not had any alcohol prior to the shooting. Later, when confronted with the fact that his medical records showed he was "inebriated," Doss first admitted to having "a beer," and then admitted to having a "couple cans of beer."

{¶ 13} Shena Davenport testified that in April 2008,[1] she lived on East 141st Street. She lived directly across the street from an apartment building, which was next to Brown's home. Davenport knew Brown from living across the street from him, but not very well. She did not know Doss at all.

{¶ 14} On the day in question, she heard an argument outside her window. She looked outside and saw Doss and Brown arguing. Brown was standing in

[1]Davenport testified that the shooting occurred in May 2007. But she gave her written statement to police regarding the incident in April 2008.

front of the apartment building across the street from her house, and Doss was standing on the sidewalk on the same side of the street as Davenport's. She watched as Doss began to walk across the street toward Brown, and "[a]s soon [as] he started walking across the street[,] [Brown] went in his back of his shirt ***, pulled the gun out and started — pow, pow, pow — started shooting." Davenport said that she heard five shots, and she did not see Doss with a gun. She further stated that she saw Brown's son in the front yard when the shooting occurred.

{¶ 15} Samone Matthews, Doss's brother's girlfriend, testified that prior to the shooting, Brown had been on his front porch with another man and they were "signifying through music" toward Doss, which she explained meant that they were directing rap songs in a negative way toward Doss.

{¶ 16} Matthews explained that she was in the kitchen when she heard the first gunshot. She ran outside and saw Brown pointing a gun at Doss and saw Doss trying to run around a truck that was parked there. She saw Blade near the same truck with a "sniper rifle." She only heard three shots; she did not see Brown shoot the first shot, but she did see him shoot the other two.

{¶ 17} Christopher Doss, Doss's brother, testified that he was also in the kitchen when he heard the shots being fired. He ran out and saw Brown pointing a gun at his brother but did not see Brown shoot the gun. He saw another man "[i]n front of a white truck holding a rifle," but he did not know his name.

{¶ 18} The state further called Troy Clark as a witness. Clark testified that he saw Doss with what looked like a gun when he was beside a truck. The state immediately obtained permission from the court to treat Clark as a hostile witness because Clark's testimony differed from what he originally told police. In his statement to police, Clark said that he never saw Doss with a gun. Clark further told the police in his statement that after the shooting, Brown was walking around in circles in his backyard, and that Brown told Clark to hide the gun. Clark testified that he did not remember telling the police that. Clark said he lied to the police because he was scared. He testified that Brown hid the gun under the back porch. But Clark said he took the gun from under the porch and "threw it behind the garage next door" because he was scared. When police came, he told them where it was.

{¶ 19} Police collected five spent shell casings in front of the apartment building beside Brown's house and found a Ruger P95DC .9 millimeter gun behind a garage two houses down from the apartment building. Test results showed that the shell casings were all fired from the .9 millimeter handgun. Brown's fingerprints were found on the gun and two live bullets remained in the gun when it was found. Police also found a spent pellet on the victim's porch that had blood on it (because it had fallen out of Doss's side where he had been shot). The spent pellet also corresponded to the spent shell casings.

{¶ 20} Detective Darrell Johnson testified that he arrived at the scene about an hour after the shooting. He processed the scene. He took three gunshot

residue samples from Brown, Clark, and Blade. On cross-examination, he explained that he did not take one from Doss, however, because none of the witnesses indicated that Doss had fired a gun or even had a gun that day.

{¶ 21} Brown stipulated to (1) the Bureau of Criminal Identification and Investigation ("BCI") report evidencing that he, Clark, and Blade tested positive for gunshot residue, (2) the Cleveland Forensic Lab report showing that the spent casings from test firing the weapon found matched casings found at the scene, (3) a forensic laboratory report indicating that fingerprints lifted off the gun used in the crime matched Brown's fingerprints, and (4) to Brown's prior misdemeanor conviction for attempted preparation of drugs for sale.

{¶ 22} The state rested and Brown moved for a Crim.R. 29 acquittal, which the trial court denied.

{¶ 23} Brown presented three witnesses on his behalf and testified himself. Nora, Scott, and Brown all testified that on the day of the shooting Scott and Nora were working together and that Scott and Doss were fighting that morning because Scott wanted her belongings from Doss. Scott told Doss to give her gold chain to Brown, but Doss did not know that Scott had talked to Brown.

{¶ 24} Nora also stated on cross-examination that Brown called her at work while he was in the police car and told her that "Lee's boyfriend shot at me." And Brown later admitted to her that he shot at Doss, but said it was in self-defense.

{¶ 25} Robert Blue also testified for Brown. He lived in the apartment building next to Brown (where the shell casings were found). He said he was

talking to Cleveland Blade on his front steps right before the shooting. Brown was outside and Doss was on the other side of the street. Brown and Doss were "having words," and then Doss began to walk across the street toward them. Blue said that Doss completely crossed the street and was standing in front of his apartment building. Doss began to take his jacket off, and Brown stepped off the porch "like he was going to pull off his jacket," but then they both put their jackets back on. Blue said that at that point, Doss said something "menacing" and "made a gesture like he was going to pull something out" of his belt. Blue said when he saw Doss do that, Blue took off running. By the time he got to the back of his apartment building, he heard the shots.

{¶ 26} Brown explained that on the day of the shooting, he and Clark were hanging out and playing music, but it was not "fighting music." Blue and Blade were also there. Around 2:10 p.m., Brown said that Doss came out and said, "what's up, dog?" Brown replied, "same shit, different smell." Doss then said, "I'm crazy. *** I'm tired of people being in my business." Brown said, "happen to bring me the chain?" At that point, Doss said, "I'll shoot your ass," and then Doss fired the first shot. Brown said the shot went right "past Cleveland Blade." Blade ran, Clark grabbed Brown's son, and Brown said he ducked his head and shot "down toward the ground." Brown said the first shot was Doss's, but the next three were his. Brown explained that he was not shooting at Doss, but at the ground. He testified that he never told police that he shot in self-defense because he had the right to remain silent.

{¶ 27} On cross-examination, Brown admitted that he had previously been convicted of two felonies, intimidation and felonious assault.

Verdict and Sentence

{¶ 28} The jury found Brown guilty of all four counts as charged: attempted murder, both counts of felonious assault, having weapons while under a disability, and all of the firearm specifications. The trial court merged Counts 1, 2, and 3 (the attempted murder and felonious assault convictions), as well as the firearm specifications, for purposes of sentencing.

{¶ 29} The trial court sentenced Brown to five years for the merged counts, five years for Count 4 (having weapons while under a disability), and three years for the firearm specifications. It then ordered that the five years for the merged counts be served concurrently to the five years imposed for Count 4, but that they be served consecutive to the three years imposed for the firearm specifications, for an aggregate term of eight years in prison. The trial court further notified Brown that he would be subject to five years of postrelease control upon his release from prison.

Ineffective Assistance of Counsel

{¶ 30} In his first assignment of error, Brown contends that his trial counsel was ineffective for two reasons: (1) for failing to move to bifurcate the weapons under a disability charge; and (2) for stipulating to the gun powder residue test results, claiming that it violated his Sixth Amendment right to confrontation.

{¶ 31} To succeed on a claim of ineffective assistance, a defendant must establish

{¶ 32} "both that 'counsel's representation fell below an objective standard of reasonableness,' and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Smith v. Spisak* (2010), 130 S.Ct. 685, 688, quoting *Strickland v. Washington* (1984), 466 U.S. 668, 688, 694.

A. *Bifurcation*

{¶ 33} Brown first asserts that his trial counsel's failure to bifurcate the having weapons while under a disability charge "undermined" his defense because the "jury knew he was a convicted felon before any testimony was given," and therefore, he "suffered real harm."

{¶ 34} We assume for purposes of argument that Brown is correct that his trial counsel should have bifurcated the having weapons while under a disability charge. We nonetheless find no "reasonable probability" that bifurcating the charge would have changed the outcome of the proceedings. See *Spisak*, 130 S.Ct. at 685.

{¶ 35} Brown was charged with having weapons while under a disability under

{¶ 36} R.C. 2923.13(A)(3), which required proof that he was convicted of "any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse ***." Brown's prior conviction in

2001 was for attempted drug trafficking under R.C. 2923.02 and 2925.03. It was a first degree misdemeanor, not a felony. Therefore, when Brown claims that "[n]ot seeking bifurcation *** "opened the door to [his] felony record," that is simply not the case.[2]

{¶ 37} By not bifurcating the having weapons while under a disability charge, the jury was privy to the fact that in 2001, Brown attempted to prepare drugs for sale, and was convicted of a misdemeanor. That means the jury knew before any testimony was given that Brown allegedly had a gun when he was prohibited from doing so because of a prior misdemeanor attempted drug trafficking conviction. In an attempted murder and felonious assault case (especially where both the victim and the accused were convicted felons), we do not see how Brown was prejudiced by the jury having this information. Thus, we find that the outcome of the trial would not have been different if the jury had not known that Brown had a prior misdemeanor drug conviction and that he was not supposed to have a weapon.

B. *Stipulating to Gun Residue Report*

{¶ 38} Brown next contends that his trial counsel was ineffective for stipulating to the gun powder residue results because it abrogated his Sixth Amendment right to confront all evidence against him and "gave away the opportunity to explain the importance of the test results to the jury." Specifically,

[2]Indeed, what "opened the door to [Brown's] felony record" being heard by the jury was his choice to testify, which he had to do since he claimed self-defense. See Evid.R. 609(A)(2).

Brown argues that "the outcome would have been different if the jury would have been told by a forensic scientist that the positive results for gunshot primer from his samples could have come from Mr. Blades close proximity to the victim in this case."[3] He cites *Melendez-Diaz v. Massachusetts* (2009), 129 S.Ct. 2527, and *Crawford v. Washington* (2004), 541 U.S. 36, in support of his argument.

{¶ 39} The Sixth Amendment to the United States Constitution guarantees an accused the right to confront witnesses against him. *Crawford* at 54. But not all hearsay implicates the Sixth Amendment's core concerns. *State v. Allen*, 8th Dist. No. 82556, 2004-Ohio-3111, ¶29. "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington* and *Hammon v. Indiana* (2006), 547 U.S. 813, 821.

{¶ 40} In *Melendez-Diaz*, a defendant convicted of cocaine trafficking challenged the admission of a lab report (that identified the seized substance as cocaine) into evidence, without the in-court testimony from the lab analyst who tested it. The *Melendez-Diaz* court held that the report was within a "'core class of testimonial statements,'" that were "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Id. at 2532, quoting *Crawford* at 52.

[3]Although not entirely clear, it appears that when Brown said "his samples," he meant Blade's samples, not Brown's.

{¶ 41} The BCI report showed that Brown, Clark, and Blade tested positive for gunshot residue. The report noted that "[t]he presence of gunshot primer residue on a person's hands is consistent with that individual having discharged a firearm, having been in the vicinity of a firearm when it was discharged, or having handled an item with gunshot primer residue on it. The absence of gunshot primer residue on a person's hands does not preclude the possibility of any of the above stated events."

{¶ 42} The gun residue report clearly falls within the ambit of *Melendez-Diaz*. Thus, by stipulating to the report, Brown's counsel essentially waived his confrontation rights.

{¶ 43} We assume for purposes of argument that Brown is correct that his trial counsel was ineffective for stipulating to gun residue report. We nonetheless find no "reasonable probability" that having the lab analyst testify to the report would have changed the outcome of the trial. See *Spisak*, 130 S.Ct. at 685.

{¶ 44} The report noted, inter alia, that a positive test result could indicate that the person *either* shot a firearm, *or* was in the vicinity of a firearm when it was discharged. Brown testified that he shot the gun, but acted in self-defense, claiming that Doss fired the gun first. But no spent shell casings were found except for the ones that were fired from Brown's gun (the five spent shell casings that were recovered matched the .9 millimeter gun that had Brown's fingerprints on it). And all of the spent casings were found in front of the apartment building

— exactly where Davenport (the only objective witness) testified that she saw Brown standing when he shot Doss five times. Finally, Davenport did not see Doss with a gun.

{¶ 45} Moreover, Brown seems to be arguing that a lab analyst could have assisted the jury with understanding that the gun residue on Blade's hands could have come from Blade being near Doss when Doss supposedly shot first. Thus, Brown claims this could have helped his self-defense claim. But Blue — one of Brown's witnesses — testified that Blade was standing beside him on the front steps of the apartment building. This testimony placed Blade closer to Brown when he shot the gun, not Doss.[4] Thus, we cannot find the testimony of the forensic analyst would have assisted the jury in this case such that the outcome of the trial would have changed.

{¶ 46} Accordingly, we overrule Brown's first assignment of error.

Sufficiency of the Evidence

{¶ 47} In his second assignment of error, Brown contends that the trial court erred by denying his motion for acquittal on the attempted murder charge. He argues that the evidence on attempted murder was insufficient to support the verdict against him. We disagree.

[4]It is hard to decipher from reading the transcript where everyone was standing when the shooting occurred. Brown's testimony seemed to try to place Blade near Doss, but it is not at all clear. At trial, Brown used a drawing or board to illustrate where Blade and Doss were standing, but that drawing is not in the record on appeal.

{¶ 48} An appellate court's function in 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. 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. *Jenks* at 273.

{¶ 49} Brown maintains that the state did not prove that he purposely attempted to cause Doss's death because (1) the evidence showed Doss "was about to pull a weapon from his belt"; (2) Brown retreated while he was firing the gun; and (3) the evidence pointed to "the wildly firing and erratic movements by Mr. Brown."

{¶ 50} To the extent that Brown's arguments rely on his claim that he acted in self-defense, those arguments are irrelevant to a sufficiency argument. In a sufficiency argument, this court is reviewing whether, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *Jenks*,

supra, at 273. Self-defense is an affirmative defense that must be proven by the defendant. *State v. Harrison*, 10th Dist. No. 06AP-827, 2007-Ohio-2872, ¶23. Proving self-defense does not negate an element of the offense, rather, it acts as a defense for committing the elements of the offense. Id. Thus, arguing that a defendant acted in self-defense is not an argument that should be made in reference to a sufficiency argument.

{¶ 51} Regarding his other arguments, essentially claiming that the state did not prove that he acted purposefully, and thus, did not present sufficient evidence on attempted murder, we disagree.

{¶ 52} In order to convict a person of attempted murder, the state must prove that the defendant acted purposefully in attempting to take the life of another. R.C. 2903.02. A jury may find intent to kill where the natural and probable consequence of a defendant's act is to produce death, and the jury may conclude from all of the surrounding circumstances that a defendant had a specific intention to kill. *State v. Clark* (1995), 101 Ohio App.3d 389, 405, 655 N.E.2d 795. The state presented evidence that Brown fired his gun at least five times at the victim (through Davenport's testimony), and that the victim was hit by three of those five shots. A natural and probable consequence of shooting at a person is that the person will be shot and killed.

{¶ 53} Accordingly, Brown's second assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 54} In his third assignment of error, Brown contends that his convictions were against the manifest weight of the evidence.

{¶ 55} The *Thompkins* court further "distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386. 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. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? [The court] 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. '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, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 5 N.E.2d 1264, ¶25.

{¶ 56} Brown claims that more witnesses "than just [him] believed the victim in this case was about to pull a weapon from his belt." He contends that this

evidence, plus other evidence showing he fired while retreating, "belie the contention that he was intending to take a life."

{¶ 57} Admittedly, there was a lot of conflicting evidence presented in this case, from both the state's witnesses and Brown's (so much so that we did not put all of it in the fact section of this opinion). Although we do note that the most credible and objective witness, Davenport, only saw Brown shoot at Doss as soon as Doss had stepped into the street, and did not see Doss with a gun. Further, Brown's trial counsel did an excellent job cross-examining the state's witnesses, and thus, the jury was well aware of the biases and infirmities of the state's witnesses and chose to believe them over Brown's.

{¶ 58} We further find that the evidence in support of Brown's self-defense theory was not so convincing that we can say that the jury lost its way in not believing Brown. Brown was required to prove by a preponderance of the evidence that (1) he was not responsible for creating the situation giving rise to the shooting; (2) he had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was the use of such force; and (3) he did not violate any duty to retreat or to avoid the danger. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶72. If the jury found that Brown had failed to prove by a preponderance of the evidence any one of the three elements, then it could not have found he acted in self-defense. Id. at ¶73. Indeed, the jury could have

rejected self-defense on several grounds, including rejecting the entirety of Brown's testimony.

{¶ 59} Brown claims that he acted to protect himself as well as "protect his son who was in the front yard of the home." This contention does not logically make sense since Brown also asserts that he shot "wildly" and "erratically" — not intending to hit Doss. If he was so worried about his son, it does not make sense that he would shoot his gun at least five times "wildly" and "erratically" while his son was playing in his yard. The pictures admitted at trial show that the yards were very small and Brown's house (where his son was playing) was very close to the apartment building next door, where Brown fired his gun — supposedly "erratically" — at least five times.

{¶ 60} We have two different versions of the events that occurred between Doss and Brown. Thus, it was a credibility question for the jury to determine. The rationale for giving such deference to the findings of the trial judge or jury is that they are "best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Thus, after reviewing the entire record, weighing the evidence and all reasonable inferences, we cannot say that this is the exceptional case where 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. *Thompkins,* 78 Ohio St.3d at 387.

{¶ 61} Accordingly, Brown's third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, A.J., and
PATRICIA ANN BLACKMON, J., CONCUR