[Cite as *State v. Dix*, 2011-Ohio-472.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94791

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN DIX

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523992-C

BEFORE: Keough, J., Stewart, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: February 3, 2011

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KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, John Dix, appeals from the common pleas court's judgment, rendered after a jury verdict, finding him guilty of three counts of attempted murder and two counts of felonious assault, and sentencing him to 18 years in prison. He contends that (1) the trial court erred in denying his motion for a new trial; (2) his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence; and (3) the trial court erred in sentencing. We affirm in part and reverse in part and remand.

I. Facts and Procedural History

{¶ 2} In May 2009, Dix was charged with three counts of attempted murder in violation of R.C. 2903.02(A) and 2923.02, with one- and three-year firearm specifications; two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (A)(2), with one- and three-year firearm specifications; and one count of aggravated riot in violation of R.C. 2917.02(A)(2). The State subsequently dismissed the aggravated riot charge prior to trial.

{¶ 3} The events leading to the charges against Dix began with a fight between two 13-year-old girls. At approximately 8:00 p.m. on April 2, 2009, a grayish- silver SUV driven by Dix's cousin, Brandan Fitzgerald, parked in front of 13-year-old B.L.'s[1] home, located on Jesse Avenue in Cleveland. Dix's sisters, Dominique and Deanna Dix, Deanna's friend, Erin Bell, and Dix's stepdaughter, 13-year-old V.S., were in the SUV.

{¶ 4} V.S. got out of the SUV, knocked on the door of the home, and when B.L. answered, challenged her to a fight. B.L. first shut the door on V.S., but when V.S. knocked again, she came outside and fought with her. Fitzgerald and the other women in the SUV got out of the vehicle and surrounded B.L. and V.S., watching them fight. B.L. heard Fitzgerald tell V.S. to "beat her a--," while the other women encouraged V.S. to "keep fighting." B.L.'s sister, Br.L., who was watching the fight, testified that

when B.L. pulled V.S.'s shirt over her head, Fitzgerald helped take it off so that V.S. could fight more easily.

{¶ 5} B.L.'s father, Jerome Hailey, was also outside watching the fight. He testified that when it ended, Fitzgerald apologized to him and then asked for V.S.'s cell phone. When he responded that the phone was "chalked" (i.e., gone), Dominique Dix threatened Hailey that she would "get somebody over here and f— y'all up and kill y'all."

{¶ 6} B.L.'s mother, Tamika Lewis, who was also outside watching the fight, testified that as the women and V.S. got in the SUV after the fight, she saw two of the women using their cell phones and heard them saying, "We're on Jesse." When the SUV was gone, Tamika walked around the corner to a neighbor's house to find out where V.S. lived. Hailey and B.L. followed in Hailey's pickup truck. As Tamika was speaking with the neighbors, she saw the same SUV that had just been at her house drive by; Fitzgerald was driving and a male was slumped down in the front passenger seat. Tamika estimated that no more than ten minutes had passed since the fight between B.L. and V.S.

{¶ 7} Sensing danger, Tamika immediately got in the front passenger seat of Hailey's truck and told him to drive home. B.L. climbed into the back seat of the truck. Arriving on their street, Tamika and Hailey saw that the

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[1]We use initials to protect the identities of the minors involved in the incident.

SUV had pulled into the driveway of an abandoned house several doors down from their house. Hailey stopped his truck by the apron of the driveway to see what was happening. Tamika testified that she looked out the open passenger window of the truck and saw Dix emerge from the front passenger seat of the SUV with a rifle in his hands. She then saw two other men get out of the rear passenger seat of the SUV. After a moment, Hailey, Tamika, and B.L. heard a click from the rifle and then the men ran down the driveway toward them.

{¶ 8} Hailey immediately put his truck in reverse and backed down the street; the three men ran after the truck, shooting at it. One bullet whizzed by Tamika's chest, another whizzed by the driver's side mirror, and another grazed B.L.'s ear. Two bullets entered houses on the street. The police subsequently collected 19 shell casings from an assault rifle littered across the driveway and the street.

{¶ 9} The day after the incident, Cleveland police detective John Hudelson talked to V.S. at her home regarding the fight between her and B.L. Dix was home and told Hudelson that he did not know anything about the incident. Because Dix is V.S.'s stepfather, Hudelson decided to include him in photo arrays he subsequently showed to the members of B.L.'s family. Detective Hudelson testified that Tamika "immediately" identified Dix from the photo array as the male who had wielded the assault rifle.

{¶ 10} The trial court denied Dix's Crim.R. 29 motion for acquittal and the jury convicted him of all charges. The trial court subsequently denied Dix's motion for a new trial.

II. Motion for New Trial

{¶ 11} During trial, the prosecutor asked Detective Hudelson how he compiled the photo array that contained Dix's picture:

{¶ 12} "Q. How is it that you went about finding a picture of John Dix and others to make a photo array?

{¶ 13} "A. It's easier to go under our record management system. Every time an individual has an encounter with the police, whether it is—"

{¶ 14} Dix's counsel immediately objected and, after sidebar, the trial court instructed the jury that "[t]he objection is sustained. Ladies and gentlemen, you are instructed to disregard the last answer given by Detective Hudelson."

{¶ 15} In his first assignment of error, Dix contends that the trial court erred in denying his motion for a new trial because Detective Hudelson's response to the prosecutor's question improperly alluded to his prior criminal record, thereby denying him a fair trial.

{¶ 16} A ruling on a motion for a new trial is within the trial court's discretion and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Gray*, 8th Dist. No. 94282, 2010-Ohio-5842, ¶17, citing

State v. Schiebel (1990), 55 Ohio St.3d 71, 564 N.E.2d 54, paragraph one of the syllabus; *State v. Williams* (1975), 43 Ohio St.2d 88, 330 N.E.2d 891, paragraph two of the syllabus. The term "abuse of discretion" implies that the court's attitude was "unreasonable, arbitrary, or unconscionable." *Gray*, ¶17, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 17} We find no abuse of discretion in the trial court's ruling. Even assuming for the sake of argument that Hudelson's response referred to Dix's prior criminal history,[2] Detective Hudelson's comment did not relate any specifics about Dix's prior criminal history. Furthermore, the brief colloquy quoted above was the full extent of the testimony at trial regarding any involvement Dix might have had with the police. There was no evidence presented regarding any prior arrests or convictions of Dix and no comment whatsoever by the prosecutor about Dix's prior record. Accordingly, in the context of the entire proceedings, the comment was inconsequential.

{¶ 18} Moreover, the trial judge properly instructed the jury to disregard Detective Hudelson's answer. See *State v. Dockery*, 1st Dist. No. C-000316, 2002-Ohio-2309 (correct procedure when officer improperly testified that police identified defendant using "pictures of individuals that are convicted of

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[2]The State contends that Detective Hudelson's response was not regarding Dix's prior criminal record at all and that if he had been permitted to finish his response, he would have informed the jury that every time an individual has an encounter with the police, whether as a suspect or victim, or regarding a ticket or traffic accident, that person's identifying information is kept on file in the

crimes" was to strike the testimony and instruct the jury to disregard it). "A jury is presumed to follow the instructions, including curative instruction, given it by a judge." *State v. Garner* (1995), 74 Ohio St.3d 49, 59, 656 N.E.2d 623. Accordingly, the trial court did not err in denying Dix's motion for a new trial and his first assignment of error is therefore overruled.

III. Sufficiency of the Evidence

{¶ 19} In his second assignment of error, Dix contends that his convictions for three counts of attempted murder (against Tamika Lewis, Jerome Hailey, and B.L.) were not supported by sufficient evidence.

{¶ 20} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. No. 92266, 2009-Ohio-3598, ¶12. 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 942, paragraph two of the syllabus.

{¶ 21} R.C. 2903.02, prohibiting murder, states that "no person shall purposely cause the death of another." "A person acts purposely when it is his specific intention to cause a certain result * * *." R.C. 2901.22(A). Dix contends there was insufficient evidence that he knew there were three

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Cleveland police department's record management system.

people in the truck and, therefore, insufficient evidence that he had a specific intent to kill three people. He argues that one who fires a weapon multiple times in a continuous sequence, without knowledge of the number of persons within range, acts with a single animus and, therefore, he could have been convicted of only one count of attempted murder. We disagree.

{¶ 22} The Ohio Supreme Court has held that where a defendant commits the same offense against different victims during the same course of conduct, a separate animus exists for each victim. See, e.g., *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶48 (Defendant's conviction for six counts of aggravated arson resulting from fire to one home with six occupants upheld. "Even though appellant set only one fire, each aggravated arson count recognizes that his action created a risk of harm to a separate person."). See, also, *State v. Jones* (1985), 18 Ohio St.3d 116, 118, 480 N.E.2d 408 ("When an offense is defined in terms of conduct towards another, then there is a dissimilar import for each person affected by the conduct.")

{¶ 23} Furthermore, both *State v. Cartellone* (1981), 3 Ohio App.3d 145, 444 N.E.2d 68, and *State v. Scott*, 7th Dist. No. 98 CA 124, 2001-Ohio-3359, which Dix cites to support his argument, can be readily distinguished from this case. In *Scott,* the defendant fired once into a vehicle that contained several persons; one person, not the intended victim, died from the shot. The

defendant was convicted of aggravated murder of the victim and attempted murder of another passenger in the car. He argued on appeal that under the doctrine of transferred intent,[3] he could not be convicted of both offenses. But transferred intent is not the issue here; the issue is whether Dix intended to kill all three passengers in the truck when he shot at it.

{¶ 24} The *Cartellone* case involved three counts of felonious assault, and the issue on appeal was whether the defendant had a separate animus such that he could be punished for all three counts. The defendant had fired successive gunshots from a moving vehicle at the intended victim, who was standing in a driveway, some distance away from two bystanders who were standing behind the front screen door of the house. There was testimony that the defendant had clearly intended the shots to be directed only at the intended victim; hence, this court concluded there was not a separate animus for each count and therefore only one penalty could be imposed for the three counts.

{¶ 25} Here, however, Dix fired multiple shots at a moving vehicle with three people in it. There is no indication that the shots were directed at any one particular occupant of the vehicle; rather, the evidence demonstrated that the shots were generally aimed at the vehicle and all the passengers in it.

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[3]The doctrine of transferred intent is a theory of imputed liability. Under the doctrine, the offender's intent to purposely kill the intended victim may be transferred to the actual victim who dies

{¶ 26} Intent to kill "may be deduced from all the surrounding circumstances, including the instrument used to produce death, its tendency to destroy life if designed for that purpose, and the manner of inflicting a fatal wound." *State v. Eley*, 77 Ohio St.3d 174, 180, 1996-Ohio-323, 672 N.E.2d 640. An intent to kill "may be presumed where the natural and probable consequence of the wrongful act is to produce death." *State v. Edwards* (1985), 26 Ohio App.3d 199, 200, 499 N.E.2d 352. Because Dix's actions were consistent with an intent to kill anyone who was in the truck, there was sufficient evidence to find a separate animus for each count of attempted murder.

{¶ 27} Appellant's second assignment of error is overruled.

IV. Manifest Weight of the Evidence

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

{¶ 29} While the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenge questions whether the State has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 241. When considering appellant's claim that the conviction is against the weight of the evidence, a reviewing court sits essentially as a "thirteenth juror" and may

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as a result of the bullet meant for the intended victim. Id.

disagree with the factfinder's resolution of the conflicting testimony. Id. The reviewing court must examine the entire record, weighing the evidence and considering the credibility of the witnesses, while being mindful that credibility generally is an issue of fact for the trier of fact to resolve. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356. The court may reverse the judgment of conviction if it appears that the jury, in resolving conflicts in the evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 30} Dix contends that his convictions were against the weight of the evidence because the evidence failed to demonstrate that he was one of the men who shot at Hailey's truck. He argues that Tamika Lewis's eyewitness identification of him was nothing more than an "educated guess" because it was dark outside when the incident happened and she caught only a "fleeting glance" of the shooter. He also contends that Tamika fabricated her testimony. We disagree.

{¶ 31} The manifest weight of the evidence demonstrated that Tamika's identification of Dix as the shooter was a reliable identification, rather than merely an "educated guess." The evidence showed that Tamika was in the front passenger seat of Hailey's truck when he stopped by the apron of the

driveway of the abandoned house to observe the SUV. Her window was down and the passenger side of the truck was next to the driveway. Tamika saw Dix get out of the SUV and then stand there for a moment with a rifle. She admitted that she saw him for only a "short instant," but said she remembered his face clearly. She stated, "I could still remember that day today, and I see his face every time * * * in my memories." She testified further that it was still light enough outside for her to see Dix's face clearly. Three days after the incident, she "immediately" identified Dix from a photo array as the shooter.

{¶ 32} Furthermore, common sense dictates that Tamika's identification of Dix was reliable. V.S. is Dix's stepdaughter; Brandan Fitzgerald, the driver of the SUV, is Dix's cousin; and Dominique Dix, who threatened Hailey that she would "get somebody over here and f— y'all up and kill y'all," is his sister. Given the familial relationships between V.S., Fitzgerald, Dominique, and Dix, it is apparent that the "somebody" she was referring to was appellant Dix.

{¶ 33} Finally, although Dix complains that Tamika's testimony was not credible, any credibility issues were for the jury to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. After examining the record, weighing the evidence, and considering the credibility of the witnesses, we

find that the jury did not lose its way in convicting Dix of attempted murder and felonious assault.

{¶ 34} Appellant's third assignment of error is overruled.

V. Allied Offenses

{¶ 35} In his fourth assignment of error, Dix contends that for purposes of sentencing, the three attempted murder convictions should merge into one, and the two felonious assault convictions should merge into that single conviction for attempted murder.

{¶ 36} The General Assembly has expressed its intent to permit multiple punishments for the same conduct under certain circumstances. Under R.C. 2941.25:

{¶ 37} "(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} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 39} Recently, in *State v. Johnson*, __ Ohio St.3d __, 2010-Ohio-6314, __ N.E.2d __, the Ohio Supreme Court overruled *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, which required a comparison of statutory elements solely in the abstract under R.C. 2941.25, and held that the court must consider the defendant's conduct when determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25. *Johnson*, ¶44.

{¶ 40} Thus, "a defendant can be convicted and sentenced on more than one offense if the evidence shows that the defendant's conduct satisfies the elements of two or more disparate offenses. But if the conduct satisfies elements of offenses of similar import, then a defendant can be convicted and sentenced on only one, unless they were committed with separate intent." *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶36 (Lanzinger, J., concurring in part and dissenting in part).

{¶ 41} As discussed above regarding Dix's second assignment of error, Dix had a separate animus toward each occupant of the pickup truck when he shot at it. Accordingly, the attempted murder convictions are not allied offenses and do not merge for purposes of sentencing.

{¶ 42} With respect to the two felonious assault convictions, both of which stated the intended victim was B.L., by shooting multiple shots at B.L., one of which grazed her ear, Dix knowingly caused her serious physical harm.

This conduct satisfied both felonious assault sections he was convicted of: R.C. 2903.11(A)(1) (cause serious physical harm to another) and 2903.11(A)(2) (cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance.) Dix's conduct also necessarily satisfied the elements of attempted murder of B.L.: R.C. 2923.02(A)/2903.02(A) (purposely attempt to cause the death of another). The evidence demonstrated that the charges arose from the same conduct and that Dix committed the attempted murder and felonious assault of B.L. with a single animus. Therefore, the attempted murder count and two felonious assault counts should be merged into a single count for sentencing. Accordingly, we reverse the sentence and remand for the State to elect on which of the offenses Dix will be sentenced.

{¶ 43} Appellant's fourth assignment of error is granted in part and overruled in part.

Affirmed in part; reversed in part and remanded for resentencing.

It is ordered that the parties share equally 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 resentencing.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

MELODY J. STEWART, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR