

[Cite as *State v. Hayes*, 2011-Ohio-605.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94697

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

DONTEZ HAYES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-528835

BEFORE: Rocco, J., Kilbane, A.J., and Jones, J.

RELEASED AND JOURNALIZED: February 10, 2011

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KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant Dontez Hayes appeals from his convictions for felonious assault with firearm specifications, improper discharge of a firearm into a habitation (“improper discharge”) with firearm specifications, and having a weapon while under disability (“HWUD”).

{¶ 2} Hayes presents three assignments of error. He claims that his convictions are not supported by either sufficient evidence or the manifest weight of the evidence, and that the trial court erred in sentencing him on all counts.

{¶ 3} Since a review of the record demonstrates Hayes’s convictions are based upon sufficient evidence and are not against the manifest weight of the evidence, and none of them are allied offenses pursuant to R.C. 2941.25(A), his claims are rejected. His convictions and sentences, consequently, are affirmed.

{¶ 4} According to the testimony presented at Hayes’s trial, his convictions resulted from an incident that occurred in the late morning on July 17, 2009. Several young people at that time were seated on a wall located at the corner of E. 111th Street and Miles Avenue in the city of Cleveland, waiting for another to emerge from his nearby house. Among them were Eleaser Johnson, Valencia Merritt, and Valencia’s sister Forestine Merritt.

{¶ 5} Each of these young people testified that they were planning to walk to a store, but Johnson’s brother remained behind to attend to a chore. As they waited for Johnson’s brother, they noticed a vehicle drive by.

{¶ 6} Johnson exclaimed, “[T]here go Biscuit,” which was Hayes’s nickname. Seeing Hayes alerted Johnson, because he knew the Merritts had engaged in an altercation with some of Hayes’s family members the previous day.

{¶ 7} The two young women with Johnson watched the vehicle, debating whether Johnson’s identification of the driver was correct. All three of them saw the vehicle halt at the stop sign, then proceed briefly before coming to another stop. They saw Hayes open his door, lean out of his vehicle holding a small black gun, and begin shooting at them.

{¶ 8} Johnson and the two women fled. Johnson testified he ran south on E. 111th Street to his house; the women fled alongside the house that stood on the corner. After approximately six shots, the firing ceased.

{¶ 9} Moments later, when they were certain Hayes was gone, the women returned to Johnson’s house, where his mother had placed a call to 9-1-1. Valencia spoke to the person on the line. According to her testimony, Valencia informed the 9-1-1 operator about the altercation with Hayes’s family the night before, stated that Hayes had driven past her and Forestine at least once before on that morning, and described Hayes’s vehicle as being gold in color.¹

{¶ 10} Cleveland police officer Richard Tusing arrived at the scene shortly after the incident. He obtained statements from the witnesses, gathered spent shell casings, and caused photographs to be taken of the area. The house located on the southeast corner of the intersection, which belonged to Diane Turner, had been pierced with three bullets.

¹Although introduced as a prosecution exhibit at Hayes’s trial, the 9-1-1 tape is not included in the record on appeal.

{¶ 11} Hayes subsequently was indicted on eight counts, charged with six counts of felonious assault, one count of improper discharge, and one count of HWUD. The first seven counts each contained a one-, three-, and five-year firearm specification. After Hayes executed a waiver of his right to a jury trial with respect to only Count 8, his case proceeded to trial.

{¶ 12} The state presented the testimony of Johnson, the two Merritt sisters, Turner, and Tusing. Thereafter, the trial court granted Hayes’s Crim.R. 29 motions for acquittal as to Counts 4 and 6.² Hayes elected to present no evidence.

{¶ 13} After deliberating, the jury returned guilty verdicts on Counts 1, 2, and 5; the jury found Hayes not guilty on Count 3.³ The trial court pronounced Hayes guilty on Count 8.

{¶ 14} When the case was called for sentencing, the trial court “merged” the one- and three-year firearm specifications. The court then imposed on the three- and five-year firearm specifications prison terms to be served prior to and consecutively with concurrent five-year terms on each of the underlying counts, for a total of 13 years.

{¶ 15} Hayes presents the following three assignments of error.

²The named victims of these two counts neither testified nor were mentioned by the other witnesses in their testimony.

³The victim named in this count did not testify at trial.

{¶ 16} “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.

{¶ 17} “II. Appellant’s convictions are against the manifest weight of the evidence.

{¶ 18} “III. The trial court erred by ordering convictions and a consecutive sentence for separate counts of felonious assault with firearm specifications 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.”

{¶ 19} In his first and second assignments of error, Hayes argues the trial court acted improperly in denying his motion for acquittal as to all of the charges, and, further, the jury’s verdicts of guilt are not supported by the weight of the evidence adduced at trial. This court disagrees.

{¶ 20} A defendant’s motion for acquittal should be denied if the evidence is such that reasonable minds could reach different conclusions as to whether each material element of the crimes has been proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372, 683 N.E.2d 1096; *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492; *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184. The trial court is required to view the evidence in a light most favorable to the state. *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

{¶ 21} The test to be applied when reviewing a claim that a conviction is against the manifest weight of the evidence was set forth in *State v. Thompson*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, citing *State v. Martin*, supra. The test is “much broader” than the test for sufficiency; i.e., this court reviews the entire record to determine whether in resolving any 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, 485 N.E.2d 717.

{¶ 22} Moreover, this court must remain mindful that the weight of the evidence and the credibility of the witnesses are matters primarily for the jury to assess. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶ 23} In this case, the jury found Hayes guilty of felonious assault and improper discharge; subsequently, the trial court found him guilty of HWUD. R.C. 2903.11, felonious assault, provides in pertinent part:

{¶ 24} “(A) No person shall knowingly do either of the following:

{¶ 25} * *

{¶ 26} “(2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance.”

{¶ 27} R.C. 2923.161(A)(1), improper discharge, prohibits a person from “knowingly discharg[ing] a firearm at or into an occupied structure that is a permanent or temporary habitation” of a victim. R.C. 2923.13(A), HWUD, prohibits a person who has been convicted of certain offenses from knowingly having, carrying, or using “any firearm.”

{¶ 28} Johnson and the two Merritt sisters all testified Hayes stopped his vehicle, opened his driver’s side door, leaned out so that he was looking at their group, and began shooting at them. Hayes’s face was a familiar one to each of them.

{¶ 29} Johnson and Forestine both saw Hayes holding a black gun just before the shooting started; Valencia saw Hayes holding a “black object” before she fled. All of them heard four or more gunshots, and Valencia testified she felt a bullet pass near her. Turner testified she heard gunshots outside her home, and, afterward, discovered three bullet holes in the exterior of the house. Hayes stipulated to the fact of his prior conviction.

{¶ 30} From the evidence presented, reasonable minds could conclude all of the elements of each of the crimes had been proven beyond a reasonable doubt. *State v. Whitley*, Cuyahoga App. No. 84129, 2004-Ohio-6629; *State v. Brady*, Cuyahoga App. No. 92510, 2010-Ohio-242. Moreover, the witnesses provided consistent accounts of the incident that found support in the physical evidence left at the scene. Minor variations in their descriptions of the color of Hayes’s vehicle did not render their testimony unbelievable.

{¶ 31} Hayes’s first and second assignments of error, accordingly, are overruled.

{¶ 32} In his third assignment of error, Hayes argues his convictions for felonious assault were allied offenses pursuant to R.C. 2941.25, and should have merited only one term of incarceration for sentencing purposes pursuant to R.C. 2929.14(D).⁴ This assignment of error lacks merit.

{¶ 33} R.C. 2941.25 provides:

{¶ 34} “(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.

{¶ 35} “(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.”

{¶ 36} In *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314, at paragraph one of the syllabus, the Ohio Supreme Court recently has held that in addressing an argument such as

⁴In presenting this argument, Hayes fails to challenge the propriety of his conviction and the sentence imposed for violation of R.C. 2923.161, Improper discharge, with firearm specifications. See *State v. Brady*, Cuyahoga App. No. 92510, 2010-Ohio-6014; cf., *State v. Elko*, Cuyahoga App. No. 83641, 2004-Ohio-5209.

Hayes’s, a reviewing court must consider the “conduct of the accused” to determine whether the crimes were “allied offenses of similar import subject to merger under R.C. 2941.25.”

{¶ 37} Thus, even if the defendant’s conduct occurs in a “single transaction,” should the court find that the offenses were committed with a “separate animus,” the defendant may be convicted of more than one of the offenses. *Id.*, ¶151. See, also, *State v. Wynn*, Cuyahoga App. No. 93057, 2010-Ohio-519. Consequently, in a case such as this one, in which Hayes’s conduct constituted an attempt to injure multiple victims, the trial court did not err in convicting and sentencing him for each offense involving each separate victim. *State v. Jones* (1985), 18 Ohio St.3d 116, 480 N.E.2d 408.

{¶ 38} A review of the record demonstrates the trial court “merged” all of the five-year firearm specifications, also “merged” all of the three-year firearm specifications,⁵ and sentenced Hayes to concurrent terms for each of his convictions relating to separate victims. Since this sentence comported with statutory requirements, Hayes’s third assignment of error also is overruled. *Wynn*.

⁵ The Ohio legislature specifically authorizes cumulative punishment for both R.C. 2941.145 and R.C. 2941.146. *Carter v. Carter* (C.A. 6, 2003), 59 Fed. Appx. 104, 109. Although it is not explicit in his appellate brief, Hayes raised at oral argument the issue of whether separate punishments under both R.C. 2941.145 and R.C. 2941.146 violated his constitutional rights. This issue was not presented to the trial court. *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277. Assume arguendo this court is required to address this issue, it would be rejected based upon the analyses set forth in both *Johnson* and *Carter*.

{¶ 39} Hayes's convictions and sentences are 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.

KENNETH A. ROCCO, JUDGE

MARY EILEEN KILBANE, A.J., and
LARRY A. JONES, J., CONCUR