

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94493

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

DEONTE SMITH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-525866-B

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

RELEASED AND JOURNALIZED: January 13, 2011

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MELODY J. STEWART, J.:

{¶ 1} A jury found defendant-appellant, Deonte Smith, guilty of one count of felonious assault in violation of R.C. 2903.11(A)(2). His sole assignment of error in this appeal is that the jury's verdict is against the manifest weight of the evidence.

{¶ 2} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in

resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten* (1986), 33 Ohio App.3d 339, 340, 515 N.E.2d 1009. The use of the word “manifest” means that the trier of fact’s decision must be plainly or obviously contrary to all of the evidence. This is a difficult burden for an appellant to overcome because the resolution of factual issues resides with the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact has the authority to “believe or disbelieve any witness or accept part of what a witness says and reject the rest.” *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.

{¶ 3} At the time of the offense, the victim, Tyshawn Harrell, saw Darrell Gray, whom he knew as a cocaine dealer. Gray was selling crack cocaine on the street while waiting for a ride from a friend. The friend drove past Gray and Harrell, but did not see them. Gray borrowed a bicycle and pedaled off after the friend’s car; Harrell followed on foot. As Harrell walked, he saw Smith and codefendant Deshawn Walker and thought they were “up to no good.” Harrell said that he also sold drugs on the street and that drug sellers were at risk of being robbed because they carried large amounts of cash. When Smith and Walker lifted their shirts to expose the waistbands of their trousers, Harrell understood the gesture to indicate that

they carried guns. He made a similar gesture to Smith and Walker even though he did not carry a gun. Harrell then called ahead to Gray and told him that “these two men are crazy.” Gray came back down the street and asked Smith and Walker, “do you know me?” Walker sarcastically repeated the question back to Gray and then said, “f*** you all.” At that point Smith and Walker pulled out their guns and started firing at Gray. Gray brandished his own gun and fired two shots before being shot in the chest. Being unarmed, Harrell fled through some bushes between houses as bullets struck the ground around him. He saw Gray running from the scene before collapsing. At trial, Harrell identified both Smith and Walker as the persons who fired shots at him. Other witnesses claimed to have seen two men, other than Harrell and Gray, running from the scene after shots were fired.

{¶ 4} Smith and Walker fled to their aunt’s house, where they rented a basement room. As they entered the house, they told the aunt to call for an ambulance because Walker had been shot in the arm. Walker stumbled out of the house and collapsed in front of the house. When the police arrived, they spoke with Walker as he was being treated in the ambulance, but he gave them a fake name and said that he did not know who shot him. They learned from the aunt that Smith had been with Walker at the time of the shooting, but he refused to speak with them and went inside the house. About ten minutes after first refusing to speak to the police, Smith relented,

although he appeared “panting or sweating like he was just out.” He said that he and Walker had been walking down the street when a male on a bicycle approached them and said “what’s up, do you know me?” The male fired three shots, and they ran, with Walker being shot in the arm as he ran.

{¶ 5} The officer who interviewed Smith then learned that there had been a nearby shooting. When he arrived on the scene of the shooting he saw a bicycle in the street. His sergeant wondered if the two shootings were connected and instructed the officer to bring Smith in for questioning. When he arrived back at the aunt’s house, he learned that Smith was no longer present but may have gone to another house. He went to the address given by the aunt but found no one home, so he returned to the aunt’s house. He obtained the aunt’s written permission to search the premises and discovered an empty gun holster beneath Smith’s bed.

{¶ 6} Gray died from the gunshot wound to his chest.¹ His father admitted that he arrived on the scene before the emergency responders and took the gun that Gray used. He later turned the gun over to the police, and the police were able to confirm that two shell casings found on the ground near Gray had been fired by Gray’s gun, but the slug recovered from Gray’s body had been fired by a different gun. Although the police secured the area

¹Smith and Walker were charged with Gray’s murder in this case, but found not guilty.

near Gray, they did not secure any other areas because they were unaware of the direction from which the shot that hit Gray had been fired, so no other bullet casings were found. Several witnesses testified to hearing gunshots fired, but none of them actually saw the shots being fired.

{¶ 7} The jury's guilty verdict shows that it must have believed Harrell's testimony and identification of Smith as one of the persons who fired shots at him. This was a rational conclusion from the evidence. Smith and Walker were seen lifting their shirts in a manner that indicated they were armed. Harrell testified that he watched Smith and Walker fire their guns and further testified that bullets struck the ground near him as he ran away. Witnesses in the area testified that they heard between five and seven shots fired. Gray fired two of those shots as evidenced by the two shell casings found by his body. The bullet recovered from Gray's body proved that he had been shot by another party. The jury could rationally find that Smith and Walker fired the remaining shots, some of which were aimed at Harrell.

{¶ 8} In addition to the eyewitness testimony of Harrell, the circumstantial evidence pointed to Smith. Walker and Smith were plainly involved in a gunfight as evidenced by Walker's gunshot wound. When the police arrived at the aunt's house, he refused to speak with them and went inside the house. When Smith emerged from the house, he was panting and

sweating in a way that could have raised the jury's suspicion. By that point, Walker had given the police a false name. Smith told the police that he and Walker had been fired on, presumably by Gray, but that story could not explain who shot Gray in the chest. The jury could find circumstantial evidence of the empty gun holster found beneath Smith's bed.

{¶ 9} Smith argues that Harrell's testimony was unworthy of belief, noting that he did not come forward on the night of the shooting to inform the police that shots had been fired at him, that Harrell's descriptions of his assailants were vague, and that Harrell could not identify Smith from a photo array shown to him by the police, thus casting serious doubt on Smith's in-court identification of Smith.

{¶ 10} Harrell was not an ideal witness — he was an admitted drug dealer with a prior conviction who admittedly could not identify Smith from a photo array shown to him shortly after the shooting. Harrell's inability to pick Smith from a photo array was of no consequence, however, given Smith's statement to the police that he and Walker exchanged words with Harrell and Gray. Those words, "do you know me," were identical in the versions told by both Smith and Harrell. The jury could thus find that Harrell's inability to pick Smith from a photo array was immaterial because Smith conceded that he had been present on the scene at the time of the shooting — a point confirmed by Walker's gunshot wound. Indeed, Smith's statement tended to

bolster Harrell's credibility because it showed that Harrell had accurately recalled the events occurring just before the shooting. Whether Harrell could accurately identify Smith or the clothing he wore was inconsequential in light of Smith's concession that he had exchanged words with Harrell and Gray before the shooting started.

{¶ 11} Smith also points to the absence of any physical evidence to show that he fired shots at Harrell, noting that the police did not recover a gun or shell casings. The absence of a recovered gun or spent shell casings was not fatal to the state's case. Several witnesses testified to hearing multiple gunshots. One witness expressed his conclusion, based on his military training, that the shots he heard had been fired from different directions. This testimony suggested that the witness heard shots fired by Gray from one direction and shots fired by Smith and Walker from another direction. Indeed, the bullet recovered from Gray's body confirmed that a gun other than the one fired by Gray had been involved in the shooting. Ideally, the state would have recovered the guns used by Smith and Walker, but the evidence showed that Smith and Walker ran approximately four blocks back to their aunt's house, so they could have abandoned weapons at any point as they fled. But even without recovering the actual murder weapon, the empty gun holster recovered from beneath Smith's bed was strong circumstantial evidence that he possessed a gun.

{¶ 12} Finally, we find that the jury could have rejected Smith's theory that an occupant of a vehicle could have been responsible for the shooting. Although the testimony did describe a number of vehicles in the area around the time of the shooting, there was no testimony that credibly suggested that anyone other than Smith and Walker had been involved in the shooting. The state had solid evidence to implicate Smith given his statement to the police that he had been on the scene with Harrell and Gray at the time shots were fired. Witnesses testified that they saw two men running from the scene after hearing gunshots. Walker's gunshot wound and evasiveness during police questioning raised suspicions, and the recovery of an empty gun holster from beneath Smith's bed cemented those suspicions. Smith's theory had no plausible evidence to support it, so the jury did not lose its way by finding him guilty of felonious assault.

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 issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR