

[Cite as *State v. Spates*, 2015-Ohio-1014.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100933

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRANDON SPATES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-576749-A

BEFORE: Keough, J., Celebrezze, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: March 19, 2015

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, Brandon Spates, appeals his convictions. For the reasons that follow, we affirm.

{¶2} In August 2013, Spates was indicted on two counts of aggravated menacing (Counts 1 and 4), two counts of felonious assault (Counts 2 and 3), one count each of discharge of a firearm on or near prohibited premises (Count 5), having a weapon while under disability (Count 6), and tampering with evidence (Count 7). Counts 2, 3, and 5 contained one- and three-year firearm specifications. Spates elected to bifurcate the weapon while under disability charge, trying that count to the bench. The remaining counts were tried to the jury and the following evidence was presented.

{¶3} In the late evening of July 29, 2013, Spates was observed driving a black Buick speeding up and down East 133rd Street near Woodworth Avenue. Taqwaya Martin, Dalesha Bugg, Ouida Shields, and Jermaine White, whose street name is “Polo,” were standing outside when Spates stopped the car in the street in front of Martin’s grandmother’s house. According to Martin, Spates was not acting like himself — yelling and starting an argument with Polo.

{¶4} Shields testified that Spates appeared hyper, agitated, and was threatening to “kill people.” Even though Spates was told that Polo did not want any problems and did not have anything against him, Spates kept saying that he was not threatened by Polo. According to witnesses, Spates announced he was going to get his friends and that he would be back. After this confrontation, Shields left the scene with Bugg and Polo.

{¶5} Christian Hardrick testified that he received a phone call from a distressed sounding Spates, who said he was coming over to pick him up. When Spates arrived, he was riding in a black Buick LaCrosse being driven by another friend named Chris. According to

Hardrick, it was his understanding that they were going to fight some guys on Woodworth who said something to Spates.

{¶6} Martin testified that while she was at the store, she saw Spates's vehicle go by with a white Honda following. By the time she arrived back to her grandmother's house, Spates was already there with his friends. Martin walked up to Spates and told him to "get that from over here" and in response, Spates put a gun to her head. Martin testified that she was "fired up" when she saw the gun because Spates's actions were completely out of his character. She could not describe the gun because she felt she blacked out from the situation, but knew it was a handgun.

{¶7} Hardrick testified that when he heard yelling and saw guys coming from the house on East 133rd, he and Chris exited the car, thinking they were about to fight. Instead, Hardrick was able to get Spates back in the car and they drove off. Hardrick denied seeing Spates with a gun.

{¶8} As they drive down Hayden Avenue, near Glenside Road, Spates got out of the car and ran toward Woodworth. Chris and Hardrick parked the car on Glenside and then ran around the corner to Woodworth. As they approached the corner, they saw Spates standing at the end of East 135th yelling out "where you all at" and "what you all do now." Spates and Chris were standing together when their attention turned toward East 135th. Hardrick testified he heard words being exchanged, followed by gunfire from East 135th. He saw Spates remove a gun from his hip and point it across the street toward East 135th. Hardrick described the gun as a handgun, but not a revolver. According to Hardrick, the gun did not fire, but Spates and Chris were attempting to shoot toward East 135th and people were shooting from East 137th. Hardrick opined that the gun must have been jammed.

{¶9} Hardrick turned away from Spates and was attempting to run away when he heard three consistent shots from the distance and then he was shot in the right shoulder. As he looked back toward where Spates and Chris were, he saw them running away toward East 133rd. He yelled at them that he was hit, but they kept running, which made him upset.

{¶10} Prior to the shooting, Hardrick considered Spates to be like a brother to him, however that relationship changed because “no brother would had let me lay there period.” Hardrick testified that he was emotionally hurt when Spates left him because Spates was the reason why he was there. He did not want to testify because he “wanted to leave him hanging,” which is why he had to be arrested to come to court and testify.

{¶11} According to Hardrick, Tiffany Jones came out of her apartment building and took some marijuana from him prior to the police arriving. When the police responded they asked him who shot him. He pointed to the direction of East 137th because the bullet entered from the front of his shoulder, causing him to stumble backwards, and he was facing toward East 137th when he was shot. According to Hardrick, it would have been impossible for Spates to shoot him because Spates was behind him. Hardrick denied having a firearm on him that night or that he was firing a gun.

{¶12} Dalesha Bugg testified that after the earlier confrontation with Polo, she left with Shields and Polo. They dropped Polo off at his sister’s house because “he had to go do something,” and she and Shields went to the store. As they were sitting in Shields’s truck in a parking lot on Woodworth Avenue between East 135th and 137th, she saw Spates with a gun with two other guys. Bugg called out Spates’s name, telling him not to shoot. According to Bugg, she and Spates were “eye to eye” and the gun Spates was holding was a “black 9 with a

clip.” She testified that she did not see Spates point the gun at anyone, but was pointing the gun across Woodworth.

{¶13} Bugg stated that after she heard about 8 or 9 gunshots, she ran and hid in the bushes. According to Bugg, the shots all sounded different because Spates and his friend who was shot were standing “maybe 2 feet apart shooting toward the field.” She further testified that “they were looking for the boys, Polo and them.” Although she denied seeing Polo there, she admitted it was dark out when the shooting occurred. After the shots, she did not see where Spates went, but saw his friend on the ground holding his stomach. On cross-examination, she admitted she did not see who shot Hardrick, however “someone told her that Spates shot his own friend.”

{¶14} Ouida Shields testified that after leaving East 133rd, she drove Polo, the father of her child, to East 137th and she saw him walk through the field to go to the store on the corner of East 137th and Woodworth. Shields parked her truck in a lot facing Woodworth between 135th and 137th, and she and Bugg walked through the field to the store. According to Shields, she and Bugg saw Polo and told him that he should leave because Spates stated he was going to get his friends. Shields testified that when she and Bugg left the store, she saw Polo in the field area between East 135th and 137th.

{¶15} When they got back to her truck, she saw three men running with guns in their hands through the field. She testified that Spates ran up to the truck and Bugg jumped out telling Spates not to shoot her. According to Shields, Spates told Bugg to get out of the way because some people “about to die.” After Bugg ran off, Spates ran up to the truck pointing the gun and asking “where is the n* * * as at now?” Shields told the jury that Spates was looking

for Polo. Spates then ran towards Woodworth while firing his gun. She testified that she heard a lot of gunshots in front of her, but did not see anyone get shot.

{¶16} After the gunshots stopped and the police and ambulance arrived, Shields tried calling Polo. When she could not reach him, she thought Polo was the one who was shot because the ambulance responded to the corner of Woodworth and East 137th, which was the area where she last saw Polo. She was finally able to reach Polo on his phone and he told her that he was on East 133rd and Shaw Avenue.

{¶17} Shields drove over to Shaw and picked up Polo and his friend, Steve. After leaving, she noticed a car with its lights off speeding up behind them. She looked in her rearview mirror, and realized the car was Spates's car and he was pointing something at them. She thought she heard Spates shooting at her car. Shields continued to drive over to Woodworth where she knew the police were. When she pulled into the driveway area, the police immediately ordered the occupants of Shields's vehicle out of the truck. Shields told them about the black Buick following them and the driver pointing the gun out the window at them.

{¶18} Carolyn Woodson testified that she lives on Woodworth and knows Spates. During the late hours of July 29, 2013, she heard guys arguing next to her building. She recognized some of the individuals, including Spates and Polo. She stated that Spates walked away, but about 20-30 minutes later, she heard arguing again. She looked outside and saw a couple of guys running toward her parking lot, whom she recognized had been with Spates earlier. Then she saw Polo and Steve with another person running across the street and stopping under a light. Woodson saw Polo's hand go up and saw a spark, then saw a guy fall to the ground holding onto his shoulder. She testified that she only heard one gunshot that evening.

{¶19} Woodson testified that Spates was not around when the shooting occurred. She admitted that she did not tell the officers that evening that she saw Polo shoot the victim because she was fearful of Polo. She testified that after the shooting Polo and his friends threatened both her and her neighbor Tiffany Jones.

{¶20} Jones testified that she lives on Woodworth and considers Spates a brother. That evening, she heard arguing outside of her house. She saw Polo and his friends standing outside her building and Spates walking and saying, “You all going to kill me. I’ll die tonight.” She then heard the sound of gunshots with three or four shots coming from the field across the street on East 137th. She saw Hardrick get shot in the arm in her driveway, but did not see the shooter. She stated the last time she saw Spates was on East 135th and Woodworth when he was arguing with someone. After Hardrick was shot, she took a bag of marijuana from him; she denied taking a gun from him.

{¶21} East Cleveland Police Officer David Perlmutter testified that he responded to a disturbance on East 133rd on July 29, 2013. Upon arrival he learned that 20 or 30 seconds prior to his arrival, there were males on the street waving guns. Moments later he received a radio broadcast from then Officer John Donitzen of shots fired. Officer Perlmutter drove north on East 133rd and then turned onto Woodworth. He testified that he did not see anything until he received a call for a “male down” at East 137th and Woodworth. When he arrived, he observed a male with a gunshot wound to his right shoulder. According to Officer Perlmutter, Woodson and Jones, who were with the victim, were “sketchy” — meaning that they were not sure who did what or what they saw. Neither identified who shot the victim.

{¶22} After taking statements from both Woodson and Jones, Officer Perlmutter walked the crime scene perimeter that was established on Woodworth from the corner of East 137th

midway to East 135th. He walked the entire perimeter looking for prints, weapons, shell casings, and tracks, but did not locate any evidence. He admitted that he did not search the area directly off East 135th.

{¶23} Thereafter, he patrolled the area and as he drove closer to Hartford Road, he saw headlights in his rearview mirror and heard a car horn. He pulled over and spoke with the occupants of a white SUV. As a result of the conversation, he looked in his rearview mirror and saw a black Buick heading southbound on East 133rd at a high rate of speed turning onto Hartford.

{¶24} Officer Perlmutter pursued the vehicle and observed the vehicle speed up dramatically. He activated his lights and sirens, but lost sight of the vehicle for about five seconds on Hartford. As he was making the turn, Officer Perlmutter observed the vehicle turn onto Milan Avenue and then pull over.

{¶25} The driver of vehicle was identified as Spates and was arrested without incident. Both the vehicle and Spates were searched, and nothing was discovered. Officer Perlmutter testified that it was discovered that Spates was directly involved in the shooting that happened on East 137th and Woodworth.

{¶26} Deputy Sheriff Donitzen testified that on the night of July 29, 2013, he was an officer with the East Cleveland Police Department and received a radio call for a disturbance where a person pointed a gun at a female on East 133rd. Upon arrival, he received information from Officer Perlmutter that the suspect had left the scene in a black four-door vehicle. Deputy Donitzen patrolled the area for the suspect.

{¶27} As he was driving north on East 135th, he heard several gunshots coming from East of his location toward East 137th and Hayden. When he traveled up East 135th he did not see anyone in the field nearby or see anyone running from Woodworth near East 135th.

{¶28} Deputy Donitzen testified that he approached the victim and observed a gunshot entrance wound on the front deltoid area of the victim's right shoulder and an exit wound on his rear deltoid of right shoulder. Donitzen testified that the victim stated that he was walking north across Woodworth when a group of unknown males were firing guns between the area of East 135th and 137th.

{¶29} East Cleveland police officer Joe Dunlap testified he and his partner responded to the area of East 137th and set up a crime scene perimeter based on the information received by Officer Donitzen. During his search for evidence, no gun or shell casings were discovered. However, he observed a white SUV stop nearby. After talking with the occupants of the vehicle, he learned that the person brandishing a firearm on East 133rd was also involved in the shooting on Woodworth.

{¶30} The state's final witness was East Cleveland Detective D. Shaun Thompson. He testified that he had the opportunity to interview Spates after he was arrested. Spates told Thompson that he received a call from Tiffany Jones telling him that there was a commotion outside of her apartment. He went over to her apartment to make sure her door was locked and then he left. Spates later received another phone call from her, so he went back over to her house, made sure she was okay, and then left again. Spates denied being there when the shooting occurred and stated he was unaware that anyone was shot. Detective Thompson stated that Spates was adamant that a gunshot residue test be performed on his hands, however, the test was not performed because no testing kits were available.

{¶31} Spates further explained that he was speeding through the streets to avoid a traffic light. However, according to Detective Thompson, there is no traffic light in the area.

{¶32} Detective Thompson testified that he tried to contact the witnesses, but it took several weeks for him to speak to any of them. When he eventually spoke with Bugg, he learned that the shots were fired from a different location than where they searched earlier. Although he searched this new area, nothing was discovered. He also believed he received false information from Woodson.

{¶33} Detective Thompson told the jury that a 9mm semiautomatic handgun loaded with two bullets was located the morning after the shooting in a field between Hartford and Milan. The gun was brought into the station and based on the pencil test performed, the gun was deemed operable. DNA tests performed on the firearm were inconclusive. Detective Thompson admitted that he did not recover the gun; thus he had no knowledge of the condition of the gun or whether it was jammed when it was found.

{¶34} At the request of the state, the jury was given a lesser included instruction on Count 5 — a third-degree felony of discharging a firearm on or near prohibited premises. The jury found Spates guilty of Counts 1, 2, 4, the lesser included offense as instructed on Count 5, and Count 6. He was found not guilty of Count 3, felonious assault. The court found Spates guilty of Count 7. After merging all allied offenses, Spates was sentenced to an aggregate prison term of 15 years.

{¶35} Spates appeals, raising three assignments of error, which will be addressed out of order.

I. “Pencil Test”

{¶36} In his third assignment of error, Spates contends that the court erred in permitting testimony of tests performed on the firearm and for permitting the admission of the firearm as an exhibit. Under this assignment of error, Spates argues that the court erred in allowing Detective Thompson to testify as an expert in firearms because the state did not comply with Crim.R. 16(K). He also asserts that the detective's testimony regarding the "pencil test" should have been excluded because the performance of the test was not disclosed during discovery or prior to trial. Finally, Spates asserts that because the pencil test was the only evidence that the gun was operable, he was prejudiced by the discovery violation.

{¶37} Detective Thompson testified that a firearm was recovered from the Hartford area. He stated that when it came into his possession, it was test fired. At that point, defense counsel made an objection and a conversation, which is not contained in the record, occurred at side bar. Thereafter, Detective Thompson testified that the firearm is tested to determine whether it is operable and in this instance, the "pencil test" was conducted. Detective Thompson explained that the test is conducted by simply putting a pencil into the barrel of the gun and pulling the trigger. He explained that the pin in the firearm hits the pencil, and if it is operable, the pencil will pop out. He testified that he observed another officer perform the pencil test, and that the pencil ejected from firearm when the trigger was pulled.

{¶38} Spates first contends that Detective Thompson's testimony should have been excluded because the state failed to comply with the written report requirement under Crim.R. 16(K). We first note that Detective Thompson was not called to testify as an expert. However, insofar as Spates contends that Detective Thompson's testimony regarding the pencil test was considered expert testimony, this court previously addressed this issue and concluded that an

officer testifying based on his perceptions was proper lay witness opinion testimony pursuant to Evid.R. 701. *In re C.B.*, 8th Dist. Cuyahoga No. 95256, 2010-Ohio-5620.

{¶39} The officer in *C.B.* testified about performing the pencil test to determine the operability of a firearm that was located in a suspect's vehicle. This court determined that the officer's "testimony was a report of his personal observations surrounding the incident and his examination of firearms. It was not empirical analysis of the gun for which expert analysis was required." *Id.* at ¶ 14. Furthermore, this court concluded that the officer's pencil test method of demonstrating the operability of the firearm was straight forward and easily understood. *Id.* at ¶ 16. Therefore, the court held that the officer's testimony was sufficient to demonstrate operability.

{¶40} Much like the officer's testimony in *C.B.*, Detective Thompson's testimony was a report of his personal observations surrounding the examination of the recovered firearm. He testified that based on his training and experience, operability of a firearm can be determined by placing a pencil into it and pulling the trigger. In this case, he observed the pencil test being performed on the recovered firearm. His testimony was confined to his own experiences, training, and perceptions, which were offered to assist the jury in understanding whether the firearm was determined to be operable. Relying on our precedent in *C.B.*, Detective Thompson's testimony was properly allowed as lay witness opinion testimony under Evid.R. 701.

{¶41} Spates next contends that the court erred in allowing Detective Thompson to testify regarding the pencil test because the state failed to disclose during discovery that a pencil test was performed on the firearm prior to trial.

{¶42} Crim.R. 16(B)(4) provides that the state shall, upon a written demand for discovery by the defendant, provide to the defense “results of physical or mental examinations, experiments or scientific tests.” While the record contains an objection when Detective Thompson began his testimony regarding the pencil test, the record is silent as to the basis for the objection, including any alleged discovery violation. Only after the jury heard Detective Thompson’s testimony, the court admitted the firearm into evidence, and a discussion regarding operability ensued, did the defense raise the issue that the pencil test was not disclosed prior to trial.

{¶43} Therefore, assuming that the objection made during Detective Thompson’s testimony properly preserved this issue on appeal, we find no abuse of discretion by the trial court in allowing Detective Thompson to testify regarding the pencil test despite any alleged discovery violation.

{¶44} Violations of Crim.R. 16 constitute reversible error “only when there is a showing that (1) the prosecution’s failure to disclose was a willful violation of the rule, (2) foreknowledge of the information would have benefitted the accused in the preparation of his defense, and (3) the accused suffered some prejudicial effect.” *State v. Joseph*, 73 Ohio St.3d 450, 458, 653 N.E.2d 285 (1995). The granting or overruling of discovery motions in a criminal case rests with the sound discretion of the trial court. *State v. Shoop*, 87 Ohio App.3d 462, 469, 622 N.E.2d 665 (3d Dist.1993). Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court’s decision was arbitrary, unreasonable, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶45} On appeal, Spates contends that the disclosure of the pencil test would have allowed him to investigate the unreliableness of the test and prepare a proper rebuttal. Spates contends he was prejudiced because this test was the only physical evidence of an operable

firearm. Spates does not make any assertion that the state willfully withheld this information from defense.

{¶46} Although we agree that any tests performed on the firearm should have been disclosed prior to trial through the discovery process, Spates has failed to withstand his burden that this alleged discovery violation necessitates a reversal of his convictions.

{¶47} Evidence of the pencil test was not necessarily required to prove operability. While the “pencil test” was the only direct evidence that the firearm was operable, R.C. 2923.11(B)(2) specifically provides that, in determining the operability of a firearm, the trier of fact may rely on circumstantial evidence, which may include the representations and actions of the individual who has control over the firearm. It is not necessary for the state to produce the gun or offer direct, empirical evidence that the gun is operable. *State v. Murphy*, 49 Ohio St.3d 206, 551 N.E.2d 932 (1990). “[W]here an individual brandishes a gun and implicitly but not expressly threatens to discharge the firearm at the time of the offense, the threat can be sufficient to satisfy the state’s burden of proving that the firearm was operable or capable of being readily rendered operable.” *State v. Thompkins*, 78 Ohio St.3d 380, 384, 678 N.E.2d 541 (1997). Instead, proof of operability may be established through the testimony of lay witnesses who were in a position to observe the weapon and surrounding circumstances. *Murphy* at 209.

{¶48} Accordingly, even if the trial court abused its discretion in allowing Detective Thompson to testify regarding the pencil test, the admission was harmless because other testimony was presented that would allow the jury to conclude that the firearm was operable including Martin’s testimony that Spates placed a gun to her head and that both Bugg and Shields saw Spates shoot the firearm. Spates’s third assignment of error is overruled.

II. Sufficiency of the Evidence

{¶49} In his second assignment of error, Spates contends that the evidence was insufficient to sustain a finding of guilt because the state failed to present evidence to establish beyond a reasonable doubt the elements necessary to support his convictions for felonious assault in violation of R.C. 2903.11(A)(1) and (A)(2)¹ and discharge of a firearm on or near prohibited premises pursuant to R.C. 2923.162(A)(3) and (C)(2).

{¶50} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. 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. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

A. Felonious Assault — R.C. 2903.11(A)(1)

{¶51} In Count 2, Spates was charged with felonious assault in violation of R.C. 2903.11(A)(1), which provides in relevant part that “[n]o person shall knowingly cause serious physical harm to another.” The indictment named “Christian Hardrick” as the victim.

{¶52} Spates contends that the evidence was insufficient to demonstrate that Spates knowingly caused physical harm to Hardrick because there was no direct evidence that he shot

¹The jury found Spates not guilty of Count 3, felonious assault in violation of R.C. 2903.11(A)(2). Therefore, our analysis will only focus on Spates’s conviction for felonious assault in violation of R.C. 2903.11(A)(1) as charged in Count 2.

Hardrick. However, the State proceeded under the theory of natural consequences of Spates's actions and intervening causes to prove that Spates was responsible for the harm caused to Hardrick.

{¶53} The jury received the following instructions on natural consequences and intervening causes:

Natural consequences. The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act or failure to act. The defendant is also responsible for the natural and foreseeable consequences or results that follow in the ordinary course of events from the act or failure to act.

Intervening causes. The defendant is responsible for the natural consequences of the defendant's unlawful act or failure to act even though serious physical harm was also caused by the intervening act or failure to act of another person or agency.

{¶54} “It is a fundamental principle that a person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts.” *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 143, quoting *State v. Johnson*, 56 Ohio St.2d 35, 39, 381 N.E.2d 637 (1978). An accused need not foresee the precise consequences of his conduct. *State v. Smith*, 4th Dist. Ross No. 06CA2893, 2007-Ohio-1884, ¶ 29. “To be actionable it is only necessary that the result is within the natural and logical scope of risk created by the conduct.” *Id.*, citing *State v. Losey*, 23 Ohio App.3d 93, 96-97, 401 N.E.2d 379 (10th Dist.1985).

{¶55} In *Smith*, the Fourth District discussed intervening causation and when a defendant is responsible for intervening actions. If the defendant has brought the intervening agency into play in response to the danger the defendant has caused, the defendant is subject to liability, unless the intervening response is abnormal and unforeseeable. *Id.* at ¶ 20, citing LaFave Substantive Criminal Law (2003), 2d Ed., Section 6.4(C).

{¶56} In *State v. Johnson*, 4th Dist. Scioto No. 13CA3580, 2014-Ohio-4443, the court applied and analyzed the concepts of natural and foreseeable consequences and intervening causes as discussed in its prior opinion in *Smith*. In that case, Johnson was charged with felonious assault of a prison guard. The incident began when Johnson pushed the prison guard and then punched him three or four times in the head. The victim then grabbed Johnson and tried to gain control of the situation by taking Johnson to the ground. When they fell to the ground, Johnson landed on top of the victim. The victim struck his head, shoulder, and arm on the ground, causing multiple injuries including a closed-head injury and a shoulder injury requiring surgery.

{¶57} On appeal, Johnson argued that he did not knowingly cause serious physical harm to the victim because the injuries were a result of the altercation that ensued after Johnson punched the victim. Specifically, he claims that the victim's actions constituted an unforeseen intervening act that caused the serious physical harm suffered by the victim.

{¶58} The Fourth District disagreed and concluded that Johnson could have reasonably foreseen that his unprovoked attack on a prison guard would result in the guard attempting to restrain Johnson by taking him down to the ground. *Id.* at ¶ 20. Accordingly, the victim's injuries were consequently reasonably foreseeable to Johnson and they would not have occurred if Johnson had not started the altercation by punching the victim. *Id.*

{¶59} Applying the principles and reasonings of the Fourth District to the case before this court, Hardrick's injury was reasonably foreseeable to Spates and would not have occurred if Spates had not started the altercation by threatening various individuals, announcing he was going to get his friends, brandishing a gun, and then instigating and inviting a confrontation. It is without question that Spates set into motion the sequence of events that evening.

{¶60} Assuming that another individual actually shot Hardrick, which constitutes an intervening act, it was a reasonable and foreseeable consequence of the initial instigation and invitation by Spates, including waving a firearm around, shouting obscenities, and threatening that people were going to die. Because the shooting was instantaneous, there was no break in the chain of causation to relieve Spates from criminal liability for felonious assault related to the serious physical injury incurred by Hardrick when he was shot.

{¶61} As the jury was properly instructed, despite the existence of another possible cause of Hardrick's injury, Spates was "responsible for the natural consequences of his actions and the multiple causes are not a defense." *Johnson*, 4th Dist. Scioto No. 13CA3580, 2014-Ohio-4443 at ¶ 23, quoting *State v. Nichols*, 11th Dist. Lake No. 2005-L-017, 2006-Ohio-2934, ¶ 50.

{¶62} Therefore, viewing the evidence in the light most favorable to the state, sufficient evidence existed to support Spates's conviction for felonious assault in violation of R.C. 2923.11(A)(1).

B. Discharge of a Firearm

{¶63} In Count 5, Spates was found guilty of discharge of a firearm on or near prohibited premises pursuant to R.C. 2923.162(A)(3) and (C)(2).

{¶64} R.C. 2923.162(A)(3) provides that "no person shall * * * discharge a firearm upon or over a public road or highway." The jury further found that the violation "created a substantial risk of physical harm to any person or caused serious physical harm to property." R.C. 2923.162(C)(2).

{¶65} Spates contends that his convictions are not supported by sufficient evidence because no shell casings were recovered matching the firearm that Spates allegedly possessed.

However, the lack of physical evidence is not fatal to the state's case during Crim.R. 29 consideration.

{¶66} In this case, both Shields and Bugg testified that they saw Spates shooting a firearm. Bugg testified that when she first saw Spates with a gun, he was pointing the gun across Woodworth. Later, she saw him shooting across Woodworth. Shields also testified that she saw Spates running toward the field and shooting across Woodworth. Furthermore, Hardrick's testimony established the presence of other individuals across Woodworth near East 137th.

{¶67} The act of shooting in an area where individuals are located and in the range of the shooter creates a substantial risk of physical harm. *State v. Ingram*, 3d Dist. Allen No. 1-08-53, 2009-Ohio-1302, ¶ 16; *State v. Windom*, 10th Dist. Franklin No. 97APA03-370, 1997 Ohio App. LEXIS 6006 (Dec. 30, 1997) (given the proximity of the victims to one another, who were standing in a group, it was reasonable to infer that the defendant's conduct of firing a gun at the group created a substantial risk of serious physical harm to all of the persons in the group).

{¶68} Accordingly, viewing the evidence in the light most favorable to the state, sufficient evidence exists that Spates was firing a weapon across Woodworth, a public road, in the direction of other individuals, thus creating a substantial risk of physical harm. His conviction for discharge of a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3) and (C)(2) is supported by sufficient evidence.

{¶69} Spates's second assignment of error is overruled.

III. Manifest Weight of the Evidence

{¶70} In his first assignment of error, Spates contends that his convictions for felonious assault, discharge of a firearm on or near prohibited premises, and weapons under disability are against the manifest weight of the evidence.

{¶71} ““A manifest weight challenge * * * questions whether the prosecution met its burden of persuasion.”” *State v. Ponce*, 8th Dist. Cuyahoga No. 91329, 2010-Ohio-1741, ¶ 17, quoting *State v. Thomas*, 70 Ohio St.2d 79, 80, 434 N.E.2d 1356 (1982). 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*, 33 Ohio App.3d 339, 515 N.E.2d 1009 (9th Dist.1986), paragraph one of the syllabus. The discretionary power to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. *Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541. A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶ 21.

{¶72} We are mindful in reviewing this assignment of error that the inconsistencies in the evidence were before the jury for its consideration, and while we sit as the “thirteenth juror” in evaluating Spates’s manifest weight challenge, we must give deference to the jury’s superior position to consider the demeanor and weigh the credibility of the various witnesses. *State v. Thompson*, 8th Dist. Cuyahoga No. 90606, 2009-Ohio-615.

A. Felonious Assault

{¶73} Under the state's theory that Spates is responsible for the natural and foreseeable consequences of his actions and that an intervening cause does not relieve him of culpability, the jury did not lose its way in finding Spates guilty of felonious assault.

{¶74} The witnesses testified that Spates was shooting in the direction of East 137th from East 135th. Hardrick testified that he was between these two streets when he was shot in the shoulder. Although Hardrick testified that it would have been impossible for Spates to shoot him, the state's theory of the case did not require Spates to shoot Hardrick to be guilty of felonious assault. Spates's actions caused Hardrick to be at the scene and because of Spates's additional acts of bringing a firearm to the scene, instigating and inviting a confrontation, caused Hardrick to be in harms way. Assuming that Hardrick was shot by an intervening party, it was Spates who caused Hardrick to be in harm's way.

{¶75} Accordingly, Hardrick's conviction for felonious assault in violation of R.C. 2923.11(A)(1) was not against the manifest weight of the evidence.

B. Discharge of a Firearm on or near Prohibited Premises

{¶76} The jury heard substantial testimony that Spates possessed a firearm and was shooting it across Woodworth. Although Hardrick testified that he did not believe Spates fired the weapon because he did not see flames coming from the firearm and that he believed it was jammed due to the actions of Spates and Chris, he also testified that he could not honestly say if he heard any shots fired from Spates's gun. Based on the foregoing, this is not the "exceptional case in which the evidence weighs heavily against the convictions" such that a new trial should be ordered. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541.

C. Weapons While Under Disability

{¶77} Spates was charged with having a weapon while under disability in violation of R.C. 2923.13(A)(3), which provides, in relevant part, that “no person shall knowingly acquire, have, carry, or use any firearm” if the person has been convicted of a relevant drug offense. Following the jury verdict, the trial court found Spates guilty of the charge.

{¶78} In this case, the trier of fact did not lose its way in convicting Spates of having a weapon while under disability because Martin, Bugg, Shields, and Hardrick all saw Spates with a firearm prior to any actual shooting. According to the witnesses, Spates made threats while brandishing the firearm, and pointing the gun at both Martin and Bugg. Additionally, both Bugg and Shields testified that they saw Spates fire the weapon. Finally, the journal entry evidencing Spates’s prior conviction for drug trafficking was admitted into evidence. Accordingly, Spates’s conviction for having a weapon while under disability was not against the manifest weight of the evidence.

{¶79} Spates’s first assignment of error is overruled.

{¶80} 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 convictions 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.

KATHLEEN ANN KEOUGH, JUDGE

FRANK D. CELEBREZZE, JR., A.J., CONCURS;
MELODY J. STEWART, J., CONCURS IN JUDGMENT ONLY