[Cite as *In re F.D.*, 2015-Ohio-2405.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102135

IN RE: F.D.
A Minor Child

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga Court of Common Pleas
Juvenile Division
Case No. DL 14106501

BEFORE: Jones, P.J., E.A. Gallagher, J., and Boyle, J.

RELEASED AND JOURNALIZED: June 18, 2015

ATTORNEYS FOR APPELLANT

Timothy Young
State Public Defender

BY: Charlyn Bohland
Assistant State Public Defender
250 East Broad Street
Suite 1400
Columbus, Ohio 43215

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor

BY: Jonathan M. McDonald
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, SR., P.J.:

{¶1} Juvenile delinquent-appellant, F.D., appeals his adjudication of delinquent on one count of felonious assault with one- and three-year firearm specifications. Criminal liability is predicated upon two components: the voluntary commission of a prohibited act and the requisite mental culpability or mens rea required for the offense. R.C. 2901.21. In this case, we are called upon to determine whether a young juvenile, playing with a loaded gun, who shot his girlfriend in the face and hand, was properly convicted of felonious assault with firearm specifications. After a thorough review of the record, we affirm.

{¶2} F.D. was charged with felonious assault, a violation of R.C. 2903.11(A)(2), a second-degree felony if committed by an adult, with one- and three-year firearm specifications, stemming from an incident that occurred in May 2014. Fifteen-year-old F.D. was in his bedroom after school with his girlfriend, 15-year-old K.G., and their friend, A.R. F.D. removed a handgun from his closet. He told police that the gun did not belong to him, a friend had lent it to him to see if he (F.D.) wanted to buy it. F.D. and K.G. began playing with the gun. They opened the gun's chamber, but they could not figure how to close it so they watched a video on one of their phones and then took turns opening and closing the gun.

{¶3} The gun had five bullets in it. K.G. testified that she removed two bullets, F.D. took out three bullets, and then he put one bullet back in. F.D. started waving the

gun near A.R.'s face. K.G. testified that F.D. "pointed it at [A.R.]" and "started waving it at her. And I told him he shouldn't do that."

{¶4} F.D. started "clicking the gun" by pulling the trigger. A.R. testified that she saw F.D. aim the gun and pull the trigger "in the air" above where K.G. was lying on the mattress. After F.D. had "clicked" the gun three times, K.G. said "it's only two shots left." F.D. said "okay," and pulled the trigger. The gun discharged. The bullet hit K.G. in her jaw, exited through her chin, and hit her finger.

{¶5} A.R. called 911. K.G. testified she remembered someone telling her to tell the police that the bullet came through the window and struck her. She was taken to the hospital for treatment. F.D. gave the gun to A.R. and told her to hide it, which she did.

{¶6} F.D. told responding detective William Higginbotham that K.G. was sitting on a stool in his bedroom and a bullet came through the window and struck her in the side of the face. He later confessed that the gun belonged to a friend who lent it to him. F.D. told the detective that he "thought he had another turn to point it up and play with it and make it clack [sic] but instead it went off on the last time." F.D. insisted the shooting was an accident.

{¶7} The police recovered the firearm. The serial number on the firearm had been partially scratched off and the police were unable to trace its origin or history.

{¶8} K.G. testified that she believed that the shooting was an accident. A.R. testified that she thought the shooting was an accident because F.D. would not intentionally shoot K.G.

{¶9} K.G. underwent surgery on her jaw after which it was wired shut for a month and a half. The doctors were unable to remove remnants of the bullet from her hand.

{¶10} The trial court adjudicated F.D. delinquent of felonious assault with the gun specifications and committed him to the Ohio Department of Youth Services for a minimum period of one year for felonious assault up until his 21st birthday and one year for the firearm specifications, to be served consecutively.

{¶11} F.D. now appeals, raising two assignments of error for our review.

> I. The juvenile court violated F.D.'s right to due process of law when it adjudicated him delinquent of felonious assault in the absence of sufficient, credible, and competent evidence, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Section 16, Ohio Constitution; and, Juv.R. 29(E)(4).
>
> II. The juvenile court violated F.D.'s right to due process when it adjudicated him delinquent of felonious assault, when the evidence demonstrated that the incident was an accident, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution; and, Article I, Section 16, Ohio Constitution.

{¶12} In the first assignment of error, F.D. argues that his adjudication was not supported by sufficient evidence. In the second assignment of error, he contends his conviction was against the manifest weight of the evidence.

{¶13} When assessing a challenge to the sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "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." *Id.* A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶14} While the test for sufficiency of the evidence requires a determination as to 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. *Id.* Also unlike a challenge to the sufficiency of the evidence, a manifest weight challenge raises a factual issue:

> "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."

Id. at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶15} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. When examining witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the

finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 18.

{¶16} F.D. was adjudicated delinquent of felonious assault, a violation of R.C. 2903.11(A)(2), which states, in part, that "[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." *Id.* F.D. claims that the state proved only that he "recklessly" caused serious physical harm to K.G. but because there was no indication that he pointed the gun at K.G., the state did not show he "knowingly" caused her physical harm.

> A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

R.C. 2901.22. Knowledge is a state of mind that must be proved from the surrounding facts and circumstances. *State v. Anderson*, 10th Dist. Franklin No. 06AP-174, 2006-Ohio-6152, ¶ 42, citing *State v. Dotson*, 2d Dist. Clark No. 97-CA-0071, 1997 Ohio App. LEXIS 6092 (Nov. 21, 1997). The mental element of knowledge does not require an inquiry into the purpose for an act, but, involves the question of whether an individual is aware that his or her conduct will probably cause a certain result or will probably be of a certain nature. *Anderson* at ¶ 43.

{¶17} At trial, F.D. requested the trial court to consider the misdemeanor offense of reckless assault. In order for the court to convict F.D. of assault, the court would

have to find that F.D. recklessly caused serious physical harm to K.G. R.C. 2903.13(B).

R.C. 2901.22(C) states:

> A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

{¶18} The Committee Comment accompanying the legislative enactment of R.C. 2901.22 distinguishes between "knowingly" and "recklessly" as follows:

> "Knowledge" is cast in this section in terms of an awareness of the probability that one's conduct will cause a certain result or be of a certain nature, or that certain circumstances exist. * * *
>
> A person is said to be reckless under the section when, without caring about the consequences, he obstinately disregards a known and significant possibility that his conduct is likely to cause a certain result or be of a certain nature, or that certain circumstances are likely to exist. * * *
>
> Basing the definition of knowledge on probability and the definition of recklessness on likelihood is intentional. Something is "probable" when there is more reason for expectation or belief than not, whereas something is "likely" when there is merely good reason for expectation or belief.

{¶19} To support his argument that the trial court should have adjudicated him delinquent of assault, F.D. cites *State v. Pack*, 110 Ohio App.3d 632, 674 N.E.2d 1263 (7th Dist.1996). In *Pack*, the prosecutor argued that the elements of "knowingly" could

encompass the defendant's "reckless" conduct. The Seventh District found error in the fact that the trial court failed to instruct the jury that proof of reckless conduct is insufficient to prove the elements of felonious assault as set forth in R.C. 2903.11(A)(2).

> The prosecution's reference to the word "reckless" as well as the specific facts of this case lead us to conclude that, had the jury been given the definition of "reckless" with the instruction that proof of "recklessness" is not sufficient to prove the "knowingly" standard found in R.C. 2903.11(A)(2), the result herein would have been different.

Pack at 637. In this case, however, the trial court was aware of the possible culpable mental states.

{¶20} F.D. also cites *Nash v. Eberlin*, 258 Fed. Appx. 761, (6th Cir.2007), in which the defendant had a loaded gun that discharged while the defendant's son struggled with the defendant to recover the gun. *Id.* at 766. Two shots were fired during the struggle that struck the floor and a wall. Because no one was injured, the defendant could only be convicted under the "attempt to cause physical harm" variation of felonious assault. The court held that bringing a gun to an argument and having it go off at a downward trajectory during a struggle, without the gun ever having been pointed at anyone, could not constitute a felonious assault. *Id.*

{¶21} Here, however, the evidence at trial was that F.D. pointed the gun at A.R.'s face and above G.K.'s head while in a small bedroom and engaged in an overt act directed toward executing or accomplishing the assault through the use of a deadly weapon by purposefully pulling the trigger of the gun. *See State v. Kline*, 11 Ohio App.3d 208, 214, 464 N.E.3d 159 (6th Dist.1983).

{¶22} The state cites *State v. Stephens*, 8th Dist. Cuyahoga No. 93252, 2010-Ohio-3997, where this court affirmed the felonious assault conviction of a defendant who shot his friend in the stomach. The evidence at trial showed that the defendant put on rubber gloves before picking up the firearm; pointed the gun at the victim; said, "You think I won't?"; pulled the trigger; lied to the police about what happened; and then drove across town to dispose of the evidence in a sewer. *Id.* at ¶ 17. The defendant argued the shooting was an accident but this court found that since knowledge is a mental state that must be proven by circumstantial evidence, the defendant's actions on the day of the shooting indicated the shooting was not an accident. *Id.*

{¶23} The state also cites *Anderson*, 10th Dist. Franklin No. 06AP-174, 2006-Ohio-6152, where the defendant shot the victim in the neck, lied to police, and later admitted he was playing with the gun when the victim hit his hand and the gun went off. The defendant argued that the shooting was an accident, claiming that he had made no threats to the victim, the victim testified that she did not know whether the shooting was accidental, and he tried to assist the victim before emergency personnel arrived. *Id.* at ¶ 53. The court found it irrelevant that the defendant may not have intended to shoot the victim because the mental element of knowledge did not require an inquiry into purpose, rather, it involved the question of whether the defendant was aware that his conduct would probably cause a certain result or be of a certain nature. *Id.* at ¶ 43.

{¶24} Although the facts in *Anderson* and *Stephens* are distinguishable from the case at bar, the cases are instructive. In this case, the mens rea of knowingly does not require that we consider F.D.'s purpose, that is whether he purposely shot K.G. F.D. did not have to intend to shoot, or purposefully shoot, his girlfriend to satisfy the mental element of knowingly.

{¶25} "It is common knowledge that a firearm is an inherently dangerous instrumentality, use of which is reasonably likely to produce serious injury or death." *State v. Norris*, 8th Dist. Cuyahoga No. 91000, 2009-Ohio-34, ¶ 20, citing *State v. Widner*, 69 Ohio St.2d 267, 270, 431 N.E.2d 1025 (1982). Ohio courts have consistently held that shooting a gun in a place where there is a risk of injury to one or more persons supports the inference that the offender acted knowingly. *In re W.E.*, 6th Dist. Lucas No. L-11-1076, 2011-Ohio-6191, ¶ 15.

{¶26} The evidence presented at trial was that F.D. and K.G. were playing with a loaded gun. They could not figure out how to close the loaded gun so they watched a video and then took turns opening and closing the firearm. They were both sitting on F.D.'s mattress in a small bedroom when they unloaded the gun and F.D. put one bullet back in the gun. At some point during this, F.D. pointed the gun at A.R.'s face and waved it around. He pulled the trigger three times. He pointed it above where K.G. was lying on the bed. K.G. told F.D. he could shoot the gun once more before it went off, he said "okay," and shot the gun. The gun discharged, hitting K.G. in the face and hand.

{¶27} In the chaos after the event, someone instructed K.G. to tell the police a bullet had come through the window and struck her. F.D. told A.R. to get rid of the gun and then lied to the police about how K.G. got injured. It was only after the police discredited F.D.'s story that he admitted he had shot K.G., but insisted the shooting was an accident.

{¶28} In their briefs on appeal, the parties contest whether F.D. ever pointed the gun at K.G. F.D. claims that there was no witness testimony that he ever pointed the gun at K.G. The state argues that circumstantial evidence proved he must have pointed the gun at K.G. because she was shot in the face and there was no testimony that the bullet ricocheted off the wall, floor, or other surface. We agree with both parties: no witness testified F.D. pointed the gun directly at G.K. and circumstantial evidence could lead a reasonable fact finder to believe that he directly pointed the gun at K.G. Notwithstanding that conclusion, whether F.D. pointed the gun directly at K.G. is not dispositive of the element of knowingly.

{¶29} F.D., who was unfamiliar with a loaded gun he unlawfully had in his possession, unloaded it and then loaded it with a single bullet, waved the gun around, pointed it at A.R., pointed it above where K.G. was lying, and pulled the trigger multiple times. Although he might have thought he had one more "click" before the gun would discharge, his mistake does not absolve him of responsibility in this matter. A reading of the definitions of "knowingly" and "recklessly" as set forth in R.C. 2901.22(B) and (C) as well as the Committee Comment cited above leads us to conclude that the evidence

presented at trial was sufficient to support a finding of "knowingly" as required by R.C. 2903.11(A)(2).

{¶30} In light of these facts, a reasonable fact finder could find that, based on the surrounding facts and circumstances, F.D. knowingly caused physical harm to K.G. by means of a deadly weapon. Therefore, we cannot find that his conviction was based on insufficient evidence.

{¶31} In claiming that his conviction was against the manifest weight of the evidence, F.D. points to testimony that he, the victim, and A.R. consistently maintained that the shooting was a tragic accident. But what K.G. and A.R. thought F.D. meant by shooting K.G. is irrelevant to our analysis.

{¶32} Accident is defined as a "mere physical happening or event, out of the usual order of things and not reasonably (anticipated) (foreseen) as a natural or probable result of a lawful act." 4 Ohio Jury Instructions 75, Section 411.01(2). Accident is not an affirmative defense. *State v. Taylor*, 5th Dist. Richland No. 2005-CA-0112, 2006-Ohio-4064, ¶ 35, citing *State v. Poole*, 33 Ohio St.2d 18, 294 N.E.2d 888 (1973). Rather, it is a factual defense that denies that the accused acted with the degree of culpability or mens rea required for the offense, when that involves purposeful conduct. *Taylor* at *id.*, citing *State v. Bayes*, 2d Dist. Clark No. 00CA0032, 2000 Ohio App. LEXIS 6180 (Dec. 29, 2000). By raising the defense of accident, F.D. denied that the act was intentional or purposeful. *See State v. Fears*, 86 Ohio St.3d 329, 715 N.E.2d 136 (1999). But, again, intent and purpose are not dispositive in this case. The state had to

prove beyond a reasonable doubt that K.G. knowingly caused serious physical harm to K.G. by shooting her. The state has met that burden.

{¶33} *Taylor* is instructive. In *Taylor* at ¶ 38, the court found that

> [a] homicide is not excusable on the basis of accident unless it appears from the evidence that at the time of the killing the offender was acting in a lawful manner and without negligence. * * * A person causing the death of another while engaged in unlawful activity is criminally responsible even if the firearm discharges accidently.

Moreover, whether to believe F.D.'s accident theory was within the purview of the trial court. *Stephens*, 8th Dist. Cuyahoga No. 93252, 2010-Ohio-3997, at ¶ 18. The court could reasonably find that F.D.'s shooting K.G. was no accident, he pulled the trigger multiple times on a gun that he loaded himself, in a small bedroom, with two other people in it.

{¶34} We do not find that this is the rare case where the trial court lost its way in finding F.D. delinquent or that the adjudication was against the manifest weight of the evidence.

{¶35} The ease of access to illegal firearms in this district is alarming. This case involved three 15-year-old kids who appeared to not give a second thought to playing with a loaded handgun on a May afternoon after school. The record in this case showed that, had the bullet hit K.G. just a bit higher, she likely would have died from her injuries. As it is, she will be permanently scarred. F.D. will spend the last two years of his youth in juvenile detention. Until something can be done to decrease youth access to illegal firearms, increase education about firearm safety, and diminish the glorified

culture of guns, tragic events such as this involving our community's children will continue to occur.

{¶36} The assignments of error are overruled.

{¶37} 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 be sent to said court to carry this judgment into execution.

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

LARRY A. JONES, SR., PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MARY J. BOYLE, J., CONCUR