

[Cite as *State v. Peacock*, 2015-Ohio-4697.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102567

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DESMOND D. PEACOCK**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED IN PART, VACATED IN PART,  
AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-14-588585-A

**BEFORE:** McCormack, J., E.A. Gallagher, P.J., and Laster Mays, J.

**RELEASED AND JOURNALIZED:** November 12, 2015

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TIM McCORMACK, J.:

{¶1} Defendant-appellant, Desmond D. Peacock, appeals from his convictions of felonious assault, aggravated robbery, kidnapping, theft, and accompanying gun specifications. He argues his convictions were not supported by sufficient evidence and were also against the manifest weight of the evidence. In addition, he argues that, due to a discrepancy between the sentencing transcript and the journal entry regarding merger of some of his offenses, his sentences should be reversed.

{¶2} After a careful review of the record and applicable law, we affirm Peacock's convictions except for the three-year gun specification accompanying the felonious assault count.

In addition, we instruct the trial court to correct its journal entry, nunc pro tunc, to reflect the merger of aggravated robbery and kidnapping. The case is remanded to the trial court for further proceedings consistent with this opinion.

{¶3} Carmen Gambino rode his bicycle home to Ohio City after working a late night shift in downtown Cleveland. While riding on Fulton Road, his bicycle was suddenly sideswiped by a vehicle. First the passenger, then the driver, jumped out of the vehicle. Wielding shotguns, they robbed Gambino of his backpack and cell phone. As the two men drove off, Gambino was able to take a good look at the vehicle's license number. The police traced the license number to a black Chevy Cobalt registered to a woman. That information quickly led the police to a man named Desmond Peacock; his name appeared in an accident report involving the vehicle several years ago, and his physical appearance matched the description of the driver of the Cobalt given by Gambino. The next morning, Gambino identified Peacock as the driver from a photo array. Within days, the police arrested Peacock and searched his house. In the house, they found the victim's backpack and two shotguns. The

police also found the Chevy Cobalt parked a street away from Peacock's house. The passenger of the Cobalt was never identified or found.

{¶4} Peacock was charged with felonious assault, aggravated robbery, and kidnapping — all accompanied by one-and-three-year firearm specifications — and theft. At the jury trial, Peacock testified on his own behalf. He claimed the case was one of mistaken identity. He claimed two other men lived in the house and they, not him, robbed Gambino. Disbelieving his account, the jury found him guilty of all offenses and accompanying gun specifications.

{¶5} At sentencing, the state incorporated into the record a letter signed by over 50 residents from the Ohio City neighborhood. They expressed the deep-seated fear the community suffered from the brutal, late-night armed robbery. The victim, Gambino, spoke about his fear as well, but pleaded for a lenient sentence for Peacock. The trial court sentenced Peacock to four years for his conviction of felonious assault and three years for the three-year gun specification; four years for aggravated robbery and three years for the three-year gun specification. The court also sentenced him to six months for the theft count. All three underlying counts were to be served concurrently. With the two consecutive three-year terms for the gun specifications, Peacock received an aggregate term of ten years for his offenses.

{¶6} On appeal, Peacock presents three assignments of error. The first assignment of error concerns his sentence. The second and third assignments of error concern his convictions. We address the latter two assignments of error first.

{¶7} Under the second assignment of error, Peacock argues the state failed to produce sufficient evidence for his guilt and the trial court erred in denying his Crim.R. 29 motion for acquittal. Under the third assignment of error, he argues his convictions were against the manifest weight of the evidence.

## **I. Trial Testimony**

{¶8} The state presented ten witnesses, including the victim and six police officers who investigated the robbery.

{¶9} The robbery victim was 27-year-old Gambino, a resident of Ohio City. He gave a detailed account of the robbery incident. On August 14, 2014, he rode his bicycle home around 3 a.m. after finishing a night shift at a bar in downtown Cleveland. While he was riding along Fulton Avenue near his home, he was suddenly sideswiped by a vehicle coming from behind. As the vehicle came to a stop, the passenger jumped out and stuck a sawed-off shotgun in Gambino's face. While holding the gun, he pushed Gambino for five or ten feet to an area between two houses, and used his other hand to pull Gambino's cell phone out of his pocket. Gambino fought with him and made his way back to the front of the houses, all the while pushing him away and screaming at him. As Gambino struggled with the passenger, the driver jumped out of the vehicle as well. Holding a full-length shotgun, he demanded Gambino's backpack, saying "you don't want to fuck with us; give us the bag." Gambino surrendered his bag, and the two men fled in their vehicle.

{¶10} While they drove off, Gambino memorized the vehicle's license plate number. He ran across the street to a house for help, and the resident called the police. A tape of the 911 was played before the jury. Within five minutes, the police arrived. Gambino provided the vehicle's license plate number to the police. He was also able to describe the appearances and clothing of the two suspects.

{¶11} The driver, a black male, was close to Gambino's own height of six-three. He had a "heavier-set athletic build" and wore four-inch dreadlocks "all over his head." He wore an oversized, navy T-shirt and black pants. The passenger, also a black male, was shorter,

between five-six and five-eight. He wore an oversized, light grey hoodie and baggy blue jeans. Gambino was unable to see the passenger's face because he had a red bandana over his face. Gambino was, however, able to take a good look at the driver's face because, unlike the passenger, the driver's face was unmasked.

{¶12} Detective Elliot Landrau testified that, thanks to the license plate number provided by the victim, within hours of the robbery, the police learned that the vehicle was a Chevy Cobalt owned by a woman named Latoya Norris. The detective's research further revealed that the vehicle had been involved in an accident several years ago and an individual by the name of Desmond Peacock was identified in the report. Detective Landrau retrieved Peacock's driver's license photo and noted that Peacock's height, weight, and dreadlocks matched the description of the driver provided by the robbery victim.

{¶13} Detective Landrau compiled a photo array, and Detective Cynthia Moore showed it to the victim as a blind administrator, all within 24 hours of the robbery. Gambino identified No. 4 from the photo array as the driver with 100 percent certainty. Desmond Peacock was No. 4.

{¶14} Detective Landrau also interviewed Latoya Norris, the owner of the Cobalt. Peacock turned out to be the father of her two children, and she had given Peacock the Cobalt to drive.

{¶15} Following these leads, the police went to Peacock's residence on East 130th Street a few days later. Peacock gave his consent for the officers to search his house. He indicated he lived with two men, Cedric Nelson and James Hamilton, but did not tell the officers what he later claimed was to be crucial to his defense — that he lived in the upstairs unit of the house. According to Detective Landrau's testimony, prior to the search of the house, Peacock

acknowledged there were some shotguns in the house and they were his, but explained the guns were there for his protection.

{¶16} Inside the house, the police found a sawed-off and a full-length shotgun, as well as the victim's custom-made backpack, in the living room downstairs. A grey hoodie was found in the dining room downstairs. A red bandana was found in a downstairs bedroom. Other items unrelated to the robbery were also found in the house: a .22 caliber rifle in the living room downstairs; a bullet proof vest in an entry closet; and a revolver in an upstairs bedroom dresser.

{¶17} Two days later, the Cobalt was found a street away from Peacock's house. A pouch with shotgun shells was found behind the seats. Several rounds for a .22 rifle were also found in the vehicle.

{¶18} Peacock denied being involved in the robbery. He testified that on the night of the incident, he went to bed around 11 p.m., his usual bedtime, and woke up around 5:30 or 6:00 a.m. the next morning to go to work. He acknowledged he owned the house on East 130th street, but claimed he lived upstairs. He testified that James Hamilton and Cedric Nelson, who paid him rent, lived downstairs, where the shotguns and the victim's backpack were found.

{¶19} Although Peacock testified his house was a two-unit home divided into downstairs and upstairs, two detectives who searched the house testified that the house appeared to be used as a single-family residence. Detective Landrau testified that, although the house had two doors in the front, its upstairs was accessible from downstairs through a staircase in the back of the house. Detective Lawrence Smith also testified that the house was an up-and-down double but it appeared to be used as one unit because "the rear was open." Although Peacock claimed at trial he lived upstairs, he notably did not reveal this to the police officers when he gave them consent to search his house.

{¶20} Detective Landrau testified that although Peacock identified James Hamilton and Cedric Nelson as individuals who also lived in his house, these two individuals were eliminated as potential suspects because neither of them matched the description of either the passenger or driver given by the victim. Regarding the driver, the victim described him as over six feet tall, athletic build, and wearing dreadlocks. Regarding the passenger, the victim had reported to the police that the passenger was short, about five-feet-six. Peacock claimed that Hamilton had access to the Cobalt, but Peacock himself testified Hamilton was six foot and 300 pounds, a “big guy,” which apparently did not match the physique of either the driver or the passenger. It is unclear from the testimony whether the passenger also had dreadlocks: the victim did not indicate at trial whether the passenger had dreadlocks, but Officer Landrau testified that his review of the police report indicated the passenger also had dreadlocks. Crucially, Peacock acknowledged at trial neither Hamilton nor Cedric wore dreadlocks.

{¶21} Peacock also acknowledged at trial that his physical appearance matched the victim’s description of the driver: he was six feet tall with an athletic build. Although Peacock did not have dreadlocks at the time of trial, he admitted he wore four-or-five-inches long dreadlocks around the time of the robbery incident.

{¶22} The victim identified Peacock from a photo array as the driver. He also identified him in court, noting the absence of the dreadlocks. Regarding the reliability of his identification, the victim testified that the area where he was robbed was bright enough for him to get a good look of the driver. Detective Landrau and Officer Paul Swisher, who also testified at trial, confirmed that the area was well lit with street lights.

{¶23} Peacock admitted he had Latoya Norris’s Cobalt but claimed that he did not drive the car because his driver’s license had been suspended. He testified that, instead, Hamilton



drove him around in the Cobalt. On cross-examination, however, he admitted he had been stopped for driving under a suspended license.

{¶24} Also on cross-examination, Peacock admitted that, during phone calls from jail, he told Latoya Norris “I really fucked up this time for real \* \* \*,” and told his mother that he got there “because of [his] own stupidity” and “he put [himself] in [the] situation.”

{¶25} Both the sawed-off and full-length shotguns found in the house were admitted as state exhibits. The victim identified them in court as weapons used in the robbery. Both shotguns were tested to be operable.

## **II. Sufficiency of the Evidence**

{¶26} When considering a challenge of 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).

{¶27} Peacock does not dispute the victim’s account of the assault and robbery, but argues the state failed to prove that he was the person committing the offenses. Peacock is correct that “in order to support a conviction, the evidence must establish beyond a reasonable doubt the identity of the defendant as the person who actually committed the crime.” *State v. Collins*, 8th Dist. Cuyahoga No. 98350, 2013-Ohio-488, ¶ 19, citing *State v. Lawwill*, 12th Dist.

Butler No. CA2007-01-014, 2008-Ohio-3592, ¶ 11. Our review of the record shows, however, that the state presented ample evidence proving Peacock was the driver in the robbery. The direct evidence proving identity in this case included the testimony of an eyewitness — the victim — who not only identified Peacock from a photo lineup with 100 percent certainty, but also identified him in court. The state in addition presented compelling circumstantial evidence regarding identity: the shotguns identified by the victim as used in the robbery, as well as the victim’s unique backpack, were found in the house where Peacock resided; Peacock was given the use of the vehicle involved in the robbery by its owner. Viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found Peacock guilty of the assault and robbery offenses beyond a reasonable doubt. The claim that the evidence was insufficient to support these convictions lacks merit.

{¶28} However, our review of the state’s evidence reveals that there is insufficient evidence for the three-year gun specification accompanying the felonious assault charge.

{¶29} The state indicted Peacock for felonious assault as defined in R.C. 2903.11(A)(2), which states 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.” The indictment against Peacock stated that the deadly weapon utilized in this case was the Chevy Cobalt. The indictment comported with the evidence that Peacock committed felonious assault by sideswiping the victim’s bicycle with his vehicle.

{¶30} However, the state’s evidence did not support a conviction for a three-year firearm specification, defined in R.C. 2941.145 (A). That statute imposes a three-year mandatory prison term when an offender “had a firearm on or about the offender’s person or under the offender’s control while committing the offense and displayed the firearm, brandished

the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.” The statute requires that the defendant must have displayed, brandished, indicated his possession of the firearm, or used it to facilitate the underlying offense. *State v. Mosely*, 166 Ohio App.3d 71, 2006-Ohio-1756, 849 N.E.2d 73, ¶ 22 (5th Dist.).

{¶31} Here, the state’s evidence shows the felonious assault by the deadly weapon of a motor vehicle was committed before the robbery. While the evidence was sufficient to establish appellant displayed and brandished a shotgun during the subsequent robbery, there was no evidence showing the defendant displayed or brandished the firearm while committing the *felonious assault*. The firearm was brandished during the robbery not during the felonious assault.<sup>1</sup> In other words, the evidence supported a conviction for a three-year firearm specification accompanying the aggravated robbery offense but did not support a conviction of the three-year gun specification accompanying the felonious assault charge. Therefore, we vacate Peacock’s conviction for the three-year gun specification contained in the felonious assault count. The second assignment of error is sustained in part, overruled in part.

### **III. Manifest Weight**

{¶32} 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. *Thompkins*, 78 Ohio St.3d at 390, 678 N.E.2d 541. Unlike challenges to the sufficiency of the evidence, which raise a question of law, manifest weight challenges raise

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<sup>1</sup>The state acknowledged the evidence showed that the felonious assault by the use of a vehicle was separately committed prior to the aggravated robbery involving a gun: at sentencing, while advising the court that the kidnapping and aggravated robbery counts would merge, the prosecutor stated that “[t]he felonious assault charge was separately committed prior to the aggravated robbery charge.”

factual issues. When a defendant asserts that his conviction is against the manifest weight of the evidence, 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).

In evaluating a manifest-weight claim, “the 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.

{¶33} In contending that his convictions were against the manifest weight of the evidence, Peacock essentially claims that the jury lost its way in not believing his explanations of the events: although incriminating items were found in his house, his housemates, not him, lived in the part of the house where those items were found; and although he was given the use of the Cobalt by its owner, one of his housemates, not him, was driving the vehicle.

{¶34} A conviction, however, is not against the manifest weight of the evidence solely because conflicting testimony has been presented to the jury. *State v. Harrison*, 10th Dist. Franklin No. 06AP-827, 2007-Ohio-2872, ¶ 33. Although our responsibility on appeal includes a consideration of the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the jury to decide, as the jury is in the best position to judge the credibility and the weight of the evidence. *DeHass*.

{¶35} In this case, the state’s evidence shows the victim’s belongings and the guns involved were found in appellant’s house. Although appellant claimed two other men lived in

the part of the house where incriminating items were found, appellant was the only one living in the house who had dreadlocks and other physical attributes matching the victim's description of the driver. The victim identified appellant both from the photo array, with absolute certainty, and in court as well. Based on all the evidence, we cannot conclude the jury lost its way in resolving the conflicts in the evidence in the state's favor, nor do we find this case to be an exceptional case where the evidence weighed heavily against the convictions. The third assignment of error is without merit.

#### **IV. Discrepancy Regarding Merger**

{¶36} Under the first assignment of error, Peacock claims there was a discrepancy between the sentencing transcript and the journal entry regarding the merger of some of his offenses. He argues the discrepancy warrants a reversal of his sentence.

{¶37} The jury found Peacock guilty of four counts: felonious assault (Count 1), aggravated robbery (Count 2), kidnapping (Count 3), and theft (Count 4). At the sentencing hearing, all agreed that the kidnapping (Count 3) would merge into aggravated robbery (Count 2) because the two offenses were allied offenses. The state then advised the court it elected to proceed on Count 3 for sentencing. Later in the proceeding, the state advised the court that it had misspoken about the count the state elected for sentencing. It clarified that it was Count 2 (aggravated robbery), not Count 3 (kidnapping), that it had elected for sentencing.

{¶38} After the clarification, the court proceeded to sentence Peacock to four years for his conviction of felonious assault and three years for the accompanying gun specification; four years for aggravated robbery and three years for its accompanying gun specification. The court also sentenced him to six months for the theft count. All three underlying counts were to be served concurrently. The court, however, inadvertently stated that Count 1 and Count 2 were merged

for sentencing, when it was Count 2 (aggravated robbery) and Count 3 (kidnapping) that were merged. When the state pointed out the mistake, the court quickly corrected itself, and made it clear that Count 2 and Count 3 were merged.

{¶39} Unfortunately, despite the court's correction, the court's journal entry again misstated that Count 1 and Count 2 were merged for sentencing. Regarding this inadvertent error, Crim.R. 36 provides that "[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time." "Clerical mistake" is defined as "a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment." *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19.

{¶40} Here, it is apparent from the record that the trial court inadvertently stated in its journal entry that Count 1 (felonious assault) and Count 2 (aggravated robbery) were merged for sentencing, as it had made it clear in open court that it was Count 2 (aggravated robbery) and Count 3 (kidnapping) that were merged. This error could be corrected by the issuance of a nunc pro tunc entry to reflect the sentence actually rendered in this case in the open court. *See State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 14 (nunc pro tunc entries are used to reflect what the court actually decided, not what the court might or should have decided); *State v. Steinke*, 8th Dist. Cuyahoga No. 81785, 2003-Ohio-3527, ¶ 47 (although a court speaks through its journal entries, clerical errors may be corrected at any time in order to conform to the transcript of the proceedings). Accordingly, instead of reversing the court's sentence as Peacock requests, we remand this matter for the trial court to issue a nunc pro tunc entry to accurately reflect the court's pronouncement in open court that Count 2 (aggravated robbery) and Count 3 (kidnapping) were merged. The first assignment of error is without merit.

{¶41} Judgment affirmed in part and vacated in part. Case remanded for the trial court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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.

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

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TIM McCORMACK, JUDGE

EILEEN A. GALLAGHER, P.J., and  
ANITA LASTER MAYS, J., CONCUR