

[Cite as *State v. Houston*, 2015-Ohio-5422.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102730

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL A. HUSTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-591059-B

BEFORE: E.A. Gallagher, J., Celebreeze, A.J. and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: December 24, 2015

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EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant Michael A. Houston appeals his conviction from the Cuyahoga County Court of Common Pleas. For the following reasons, we affirm.

Facts and Procedural Background

{¶2} On March 6, 2015, appellant was convicted by a jury of felonious assault with a three-year firearm specification. The trial court imposed a four- year prison sentence for the felonious assault conviction to be served subsequent to a three-year prison term for the firearm specification. Houston appeals, arguing that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. Houston further argues that the trial court committed plain error in instructing the jury and that he was denied effective assistance of counsel.

{¶3} The facts of this case are that on the evening of May 8, 2014, Miaya Williams and her friend Tanisha Davis drove to Forest Hills Park to attend a barbecue. Williams parked her car on Thornhill Drive and the two began walking into the park towards a hut where people had gathered. As they approached the hut, Williams saw “Tay Tay” (Delontae Phillips), “Tone” (Antonio Lacey) and “ATL” (Michael Houston) in front of her. She knew Phillips as a family friend and had attended high school with Houston. Williams testified that she was in the middle of the three men with Houston directly in front of her while Lacey and Phillips were off to the sides.

{¶4} Williams observed Phillips brandishing a gun and acting “like he was drunk with it.” She further saw Houston and Lacey with guns in their hands as well. Williams

testified that Phillips was the first to fire his weapon and “then everybody just got to firing.” Williams tried to dive to the ground and did not see Houston fire his gun.

While she was laying on the ground, she heard bystanders indicate that she had been shot.

Williams sustained a gunshot to the right side of her face that resulted in the loss of her right eye and damage to the vision in her left eye.

{¶5} Chantrice Hill was at a friend’s home on Tuscora Avenue on a different side of the park at the time of the shooting. Hill testified that she heard shots coming from the Thornhill Drive side of the park and, as the sound of gunfire grew closer, she observed a silver car traveling down Tuscora Avenue with males firing guns out of the car’s windows into the park. After the car drove away, she heard screaming and ran into the park to find Williams on the ground suffering from a gunshot wound. Hill testified that she reached Williams less than a minute following the shooting and that no men remained at the scene. She did observe men running out of the park as she entered. Hill testified that a female was attempting to care for Williams.

{¶6} Cleveland police officer Dustin Miller responded to the park for a report of shots fired. He was the first officer to arrive and observed people running from the scene in every direction. Miller testified that a female nurse was attending to Williams and none of the remaining bystanders would provide to him the names of the shooters.

{¶7} Cleveland police officer James Reddy also responded to the scene and did not observe anyone with a firearm to be present. Officer Reddy found shell casings on Thornhill Drive approximately 75 feet south of where Williams was shot.

{¶8} Cleveland Police detective Albert Oliver identified Delontae Phillips, Antonio Lacey and Michael Houston as suspects in the shooting after Williams identified the three men from photo arrays. Detective Oliver testified that he was later contacted by Williams regarding threats made against her. Williams testified that she was threatened by a cousin of Antonio Lacey.

{¶9} Finally, Williams testified that after the shooting, Houston attempted to provide her with aid and told her that he was a lifeguard. This testimony was refuted by the other witnesses who testified that she was aided by a female nurse and that no males remained at the scene. The state introduced recorded jailhouse phone calls during which Houston lamented his need for an alibi and asked an unidentified female to testify that she was present at the park that night. In a separate phone call Houston asked a female to “call my attorney and tell him, like, he was the lifeguard on the scene that night. He was the one helping her. He did never have no gun. He did never have anything. You can’t even say he was there that night.” Although it is unclear if Houston was talking to the same female in both calls, in both instances, the female refused to make the statements he asked of her.

Law and Analysis

Sufficiency of the Evidence

{¶10} In Houston’s first assignment of error he argues that the evidence was insufficient as a matter of law to support a finding beyond a reasonable doubt that he was guilty of felonious assault.

{¶11} This court has said that, in evaluating a sufficiency of the evidence argument, courts are to assess not whether the state's evidence is to be believed but whether, if believed, the evidence against a defendant would support a conviction. *State v. Givan*, 8th Dist. Cuyahoga No. 94609, 2011-Ohio-100, ¶ 13, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The relevant inquiry then 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.*

{¶12} Houston was convicted of felonious assault in violation of R.C. 2903.11(A)(1) that provides that no person shall knowingly cause serious physical harm to another. The state concedes that no evidence was introduced to establish that Houston fired the bullet that struck Williams. None of the firearms involved in this offense were recovered and, therefore, no ballistics evidence was introduced. Instead, Houston's convictions were based on accomplice liability, which is governed by R.C. 2923.03, the pertinent parts of which state as follows:

(A) No person, acting with the kind of culpability required for the commission of an offense, shall * * * (2) Aid or abet another in committing the offense * * *.

* * *

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender.

{¶13} “To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal.”” *State v. Doumbas*, 8th Dist. Cuyahoga No. 100777, 2015-Ohio-3026, ¶ 14, quoting *State v. Johnson*, 93 Ohio St.3d 240, 754 N.E.2d 796, (2001), syllabus. An accomplice’s shared criminal intent may be inferred from the circumstances surrounding the crime. *Id.* Mere association with the principal offender or presence at the scene of a crime is insufficient to establish complicity. *Id.* However, “[p]articipation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed.”” *State v. Cartellone*, 3 Ohio App.3d 145, 150, 444 N.E.2d 68 (8th Dist.1981), quoting *State v. Pruett*, 28 Ohio App.2d 29, 34, 273 N.E.2d 884 (4th Dist.1971).

{¶14} The evidence established that a gun battle occurred between the three identified men in front of Williams — Phillips, Lacey and Houston — and the unknown men in a silver vehicle on the street behind Williams. The combined testimony of Williams, Hill and Officer Reddy, who recovered shell casings from the street, established the existence of the unknown males in a silver vehicle on the street and an armed confrontation between those men and Phillips, Lacey and Houston. This is also consistent with the testimony of Tanisha Davis who was beside Williams as they approached the hut from the street and described the gunfire as emanating from the hut and, implicitly, towards Davis, Williams and the street behind them.

{¶15} Although no direct evidence was introduced to establish that Houston fired his weapon during the exchange of gun fire, the state introduced circumstantial evidence from which one could conclude that he participated in the exchange of gunfire. Furthermore, even if Houston did not fire his weapon, the state introduced sufficient evidence to establish that he aided and abetted Phillips and Lacey in their gun battle with the unknown men in the vehicle behind Williams. Houston's conduct exceeded merely being present at the scene of the crime. The testimony of Williams and Davis placed Phillips, Lacey and Houston with guns drawn near the hut in front of the woman with Houston directly in front of Williams. According to Williams, Phillips fired first and "then everybody just got to firing" while Williams dived to the ground and was wounded in the process.

{¶16} On these facts, the state has presented sufficient evidence that Houston was allied with Phillips and Lacey in a confrontation with an unknown group of men in a silver vehicle on the street and, at the very least, he drew a firearm to support or cooperate with the gun fight that injured Williams.

{¶17} We note that it is irrelevant for the purposes of this offense which of the participants in this gun battle fired the bullet that stuck Williams. Criminal conduct constitutes the "proximate cause" of an injury, when the conduct "(1) caused the result, in that but for the conduct, the result would not have occurred, and (2) the result [was] foreseeable." *State v. Gibson*, 8th Dist. Cuyahoga No. 98725, 2013-Ohio-4372, ¶ 36, citing *State v. Muntaser*, 8th Dist. Cuyahoga No. 81915, 2003-Ohio-5809, ¶ 38.

“Foreseeability is determined from the perspective of what the defendant knew or should have known, when viewed in light of ordinary experience.” *Muntaser* at ¶ 38. Results are foreseeable when the consequences of an action are “natural and logical,” meaning “that [they are] within the scope of the risk created by the defendant.” *Id.*, citing *State v. Losey*, 23 Ohio App.3d 93, 491 N.E.2d 379 (10th Dist.1985).

{¶18} In *State v. Catron*, 8th Dist. Cuyahoga No. 101789, 2015-Ohio-2697, this court upheld a felony murder conviction based on a felonious assault charge where two brothers engaged in a gun fight from opposite sides of a street. An innocent bystander was struck by an errant shot from a position that indicated he was likely shot by the defendant’s brother rather than the defendant. This court nonetheless found that the defendant, by drawing his weapon and firing at his brother, created a foreseeable risk that his brother would return fire and cause the death of an innocent third-party bystander. *Id.* at ¶ 16.

{¶19} Similarly, in *State v. Spates*, 8th Dist. Cuyahoga No. 100933, 2015-Ohio-1014, this court upheld a conviction for felonious assault where a friend of the defendant was struck by a bullet in the course of a gun battle between the defendant and another group of men. Although the victim testified that it was impossible for the bullet that struck him to have been fired by the defendant, this court noted that the state’s theory of the case did not require the defendant to shoot the victim to be guilty of felonious assault. *Id.* at ¶ 74. The defendant’s actions including causing the victim to be at the scene, bringing a firearm to the scene and instigating and inviting a confrontation caused

the victim to be in harms way. *Id.* at ¶ 74. As in *Catron*, this court held that even assuming that the victim was shot by an intervening party, it was the defendant who caused him to be in harm's way. *Spates* at ¶ 74.

{¶20} In this instance, evidence was introduced to establish that Houston aided and abetted Phillips, whom Williams testified fired the first shot in the exchange of gun fire. It was entirely foreseeable that Williams would be struck by an errant shot when Houston and his cohorts engaged in a gun battle with both Williams and Davis trapped directly in the cross-fire. Therefore, consistent with *Catron* and *Spates*, the identity of the individual whose bullet struck Williams does not alleviate Houston of liability for felonious assault in this instance.

Manifest Weight

{¶21} In Houston's second assignment of error, he argues that his felonious assault conviction was against the manifest weight of the evidence.

{¶22} A manifest weight challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion at trial. *State v. Whitsett*, 8th Dist. Cuyahoga No. 101182, 2014-Ohio-4933, ¶ 26, citing *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541; *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence but nevertheless conclude that the judgment is against the weight of the evidence.

{¶23} “When considering an appellant’s claim that a conviction is against the manifest weight of the evidence, the court of appeals sits as a ‘thirteenth juror’ and may disagree ‘with the factfinder’s resolution of conflicting testimony.’” *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The reviewing court must examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses’ credibility, 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. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). In conducting such a review, this court remains mindful that the credibility of witnesses and the weight of the evidence are matters primarily for the trier of fact to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraphs one and two of the syllabus. Reversal on manifest weight grounds is reserved for the ““exceptional case in which the evidence weighs heavily against the conviction.”” *Thompkins* at 387, quoting *Martin*, supra.

{¶24} This is not the exceptional case where a reversal on manifest weight is appropriate. The record provides scant reason to question the veracity of the accounts provided by Williams, Hill and Davis. On these facts we cannot say that 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.

Jury Instruction

{¶25} In his third and fourth assignments of error, Houston argues that the trial court erred by providing incorrect jury instructions regarding aiding and abetting and flight.

{¶26} A defendant may not assign as error the giving or omitting any instructions unless he objects before the jury retires and further objects by “stating specifically the matter objected to and the grounds of the objection.” Crim.R. 30(A). The record reflects that Houston failed to object at trial to either of the presently contested jury instructions and, therefore, has waived all but plain error on appeal. *State v. Burns*, 8th Dist. Cuyahoga No. 95465, 2011-Ohio-4230, ¶ 9. “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Crim.R. 52(B).

{¶27} An erroneous jury instruction does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise. *Burns* at ¶ 10, citing *State v. Cooperrider*, 4 Ohio St.3d 226, 227, 448 N.E.2d 452 (1983).

{¶28} For the reasons addressed in Houston’s first assignment of error, a jury instruction on aiding and abetting was appropriate in this instance.

{¶29} In regards to the jury instruction regarding flight, the trial court instructed the jury as follows:

Testimony has been admitted indicating that the defendant fled the scene.

You are instructed the fact that the defendant fled the scene does not raise a

presumption of guilt but it may tend to indicate the defendant's consciousness of guilt. If you find that the facts do not support that the defendant fled the scene or if you find some other motive prompted the defendant's conduct or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose.

However, if you find that the facts support that the defendant engaged in such conduct and if you decide that the defendant was motivated by a consciousness of guilt, you may but are not required to consider that evidence in deciding whether the defendant is guilty of the crimes charged. You alone determine what weight, if any, to give to the evidence of flight.

{¶30} The state argues that the above instruction was appropriate because (1) Houston fled the scene and took his handgun with him, and (2) Houston repeatedly attempted to get witnesses to lie for him and to contact Williams while he was awaiting trial. Because the trial court's instruction pertains only to Houston having "fled the scene," we consider only the first rationale.

{¶31} This court has said that "[f]light from justice may be indicative of a consciousness of guilt." *State v. Santiago*, 8th Dist. Cuyahoga No. 95516, 2011-Ohio-3058, ¶ 30, citing *State v. Taylor*, 78 Ohio St.3d 15, 27, 676 N.E.2d 82 (1997).

However, the "'mere departure from the scene of the crime is not to be confused with deliberate flight from the area in which the suspect is normally to be found.'" *State v. Johnson*, 8th Dist. Cuyahoga No. 99715, 2014-Ohio-2638, ¶ 108, quoting *Santiago* at ¶

30; *State v. Norwood*, 11th Dist. Lake Nos. 96-L-089 and 96-L-090, 1997 Ohio App. LEXIS 4420 (Sept. 30, 1997). Courts have determined the flight instruction to be in error when the facts demonstrated that the defendant did not take affirmative steps to avoid detection or apprehension or the police officers take no steps to locate the suspect. *Johnson* at ¶ 109; *State v. Jackson*, 8th Dist. Cuyahoga No. 100125, 2014-Ohio-3583, ¶ 48. Accordingly, and without more, flight immediately after the crime may be insufficient to warrant an instruction if, for example, everyone near the scene of the crime immediately flees — such as when a crowd disperses upon hearing gunshots. *Johnson* at ¶ 110.

{¶32} The testimony of every witness with the exception of Williams established that Houston immediately left the scene after the shooting. However, this evidence alone did not warrant a flight instruction. Nonetheless, Detective Oliver testified that after Williams identified Houston as involved in the shooting and provided a statement, he issued a warrant for Houston's arrest. Houston subsequently contacted Detective Oliver who provided him with information about turning himself in. Detective Oliver testified that Houston understood that he would either be arrested or could turn himself in. Detective Oliver testified that he later learned that Houston was arrested on the county warrant.

{¶33} Although Houston's arrest after receiving instructions regarding turning himself in could possibly be interpreted as some evidence of an attempt by Houston to evade police apprehension, we find that the trial court's flight instruction did not amount

to plain error even if the evidence was not viewed in that manner. Even assuming that the trial court's instruction was in error, we cannot say that Houston has demonstrated prejudice such that a manifest miscarriage of justice has occurred in this instance. The instruction given allowed the jury to make its own conclusions on flight and to consider whether Houston left the scene and, if so, his motivation for leaving. This court has previously declined to find plain error under such circumstances. *State v. Jackson* at ¶ 50.

As in *Jackson*, the instruction did not change the underlying facts of the case and the instruction was harmless beyond a reasonable doubt. *Id.*

{¶34} Houston's third and fourth assignments of error are overruled.

Effective Assistance of Counsel

{¶35} In his fifth assignment of error Houston argues that his trial counsel provided ineffective assistance of counsel by failing to object to the jury instructions regarding aiding and abetting, flight and transferred intent.

{¶36} In order to establish a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶37} The propriety of the jury instructions regarding aiding and abetting and flight has been addressed in Houston's third and fourth assignments of error. For the

reasons addressed above, we cannot say that Houston has demonstrated ineffective assistance of counsel regarding those instructions.

{¶38} Similarly, we find no error in trial counsel's failure to object to a transferred intent instruction. “[U]nder the doctrine of transferred intent, an offender who intentionally acts to harm someone but ends up accidentally harming another is criminally liable as if the offender had intended to harm the actual victim.” *In re T.K.*, 109 Ohio St.3d 512, 514, 2006-Ohio-3056, 849 N.E.2d 286, ¶ 15. We have previously applied the doctrine of transferred intent to “bad aim” cases. *State v. Majid*, 8th Dist. Cuyahoga No. 96855, 2012-Ohio-1192, ¶ 25, citing *State v. Wheeler*, 8th Dist. Cuyahoga No. 66923, 1995 Ohio App. LEXIS 2146, (May 25, 1995).

{¶39} As addressed in detail above, the state presented sufficient evidence that Houston did participate, or at the very least, aided and abetted Phillips and Lacey in a gun battle that resulted in an errant shot causing serious harm to Williams. The trial court appropriately instructed on the doctrine of transferred intent in this instance. As such, Houston's trial counsel did not err in failing to object to the instruction.

{¶40} Houston's fifth assignment of error is overruled.

{¶41} The judgment of the trial court is affirmed.

It is ordered that appellant recover from appellee 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. 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.

EILEEN A. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
EILEEN T. GALLAGHER, J., CONCUR