[Cite as *State v. Andrews*, 2018-Ohio-3050.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106283

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ARION D. ANDREWS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-610660-A

BEFORE: Kilbane, P.J., McCormack, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: August 2, 2018

ATTORNEYS FOR APPELLANT

Mark A. Stanton
Cuyahoga County Public Defender
John T. Martin
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
Brian D. Kraft
Assistant County Prosecutor
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Arion Andrews ("Andrews"), appeals his convictions. For the reasons set forth below, we affirm.

{¶2} In October 2016, Andrews was charged in a 16-count indictment. Counts 1-13 related to a shooting incident on March 8, 2016, and Counts 14-16 related to a shooting incident on April 27, 2016. Counts 1 and 16 charged him with the discharge of a firearm on or near a prohibited premises. Counts 2 and 3 charged him with the improper discharge of a firearm at or into a habitation or school. Counts 4-6 and 14-15 charged him with felonious assault. Counts 7-13 charged him with criminal damaging or endangering.[1] Prior to trial, Andrews sought to suppress the evidence found in his vehicle and at his home. The trial court granted the motion with respect to the evidence found in his vehicle. The trial court denied the motion to suppress as it pertained to evidence found at Andrews's home.

{¶3} Andrews waived his right to a jury trial, and the matter proceeded before the bench. Andrews was convicted of crimes relating only to the March 8, 2016 incident, which was captured on video. The following relevant evidence was adduced at trial.

{¶4} During the evening hours of March 8, 2016, at Addison Townhomes, two unknown males were shot at while standing outside the complex. The complex is a Cuyahoga Metropolitian Housing Authority ("CMHA") property located on Wade Park Avenue in Cleveland, Ohio. The video depicts three males firing in the direction of the complex. Some of the gunshots traversed a public road. Other bullets entered multiple vehicles and two residences. One of the males was using an automatic rifle, and the other two males were firing handguns.

[1]Each of Counts 1-6 carried one- and three-year firearm specifications, each of Counts 7-13 carried a furthermore specification, and each of Counts 14-16 carried one-, three-, and five-year firearm specifications, with a "drive-by" shooting specification.

Witnesses reported to the police that Andrews was seen in the area at the time of the shooting. The video depicts the perpetrators arriving on scene, on foot, from the direction of Andrews's home and later running away from the scene towards Andrews's home. Andrews lived approximately two blocks away from the complex.

{¶5} Police found multiple casings on scene. Thirteen of these casings, which were swabbed for DNA, were of a caliber associated with an AK-47 type weapon. DNA testing revealed Andrews's DNA on all of these casings.

{¶6} CMHA police interviewed Andrews on two occasions in March 2016. During the course of the interviews, CMHA police learned that Andrews's mother had been shot by unknown parties within 24 hours prior to the shooting at the Addison complex. Andrews suspected that Saquan Johnson shot his mother. After Andrews was confronted by the police with the DNA evidence on the 13 shell casings found on scene, Andrews stated that he loaded the clip for the weapon and gave it to his friends who were going to "ride for him." Andrews stated that "ride for him" meant that his friends would go get the guys who did this to his mother. Andrews initially stated that he loaded the gun, but then changed it to only loading the clip.

{¶7} Based on Andrews's statements to the police, the state theorized that Andrews retaliated against Saquan Johnson and the Hough Harlem gang members because he felt that they were responsible for shooting at his mother. Andrews believed that the Hough Harlem gang members gathered at the Addison complex.

{¶8} After the conclusion of trial, the state dismissed Count 5, and nolled Counts 7, 8, 10, 12, and 13, and the trial court dismissed the furthermore clause attached to Count 9. The trial court denied Andrews's Crim.R. 29 motion with regard to Counts 1-4, 6, 9, 11, and 14-16.

The trial court then found Andrews guilty, on complicity grounds, of Counts 1, 2, 3, 4, 9, 11.[2] The trial court found Andrews not guilty of Count 6 and Counts 14-16. The trial court then sentenced Andrews to an aggregate of seven years in prison.

{¶9} Andrews now appeals, raising the following five assignments of error for review, which shall be discussed together where appropriate.

Assignment of Error One

> The warranted search of [Andrews's] purported residence — which revealed the banana clip and which prompted his incriminating statements in the second interview — was based on a search warrant lacking probable cause.

Assignment of Error Two

> There was insufficient evidence to support the conviction in Count 4 — felonious assault of [Perry Fullum].

Assignment of Error Three

> There was insufficient evidence to support the conviction of [Andrews] for any offense.

Assignment of Error Four

> The convictions are against the manifest weight of the evidence.

Assignment of Error Five

> Assuming arguendo, that any assignment of error raised in this appeal was not sufficiently preserved, then [Andrews] received * * * ineffective assistance of counsel at trial.

Motion to Suppress

{¶10} In the first assignment of error, Andrews argues that the search warrant used to search his mother's home lacked probable cause that the premises being searched was Andrews's

[2]The trial court also found Andrews guilty of the each of the accompanying specifications on Count 1, the one-year firearm specification on each of Counts 2, 3, and 4, and the furthermore clause on Count 11.

residence, and even if it were Andrews's residence, there was insufficient evidence to establish that his residence was the location of firearms and ammunition relating to a shooting that had occurred at the Addison Townhomes complex a week prior. Andrews contends that if the banana clip (ammunition) was not introduced into evidence, he would have never admitted to having loaded the ammunition clip for his friends so that they could follow up on the shooting of his mother.

{¶11} The Fourth Amendment to the United States Constitution and Article I, Section 14, of the Ohio Constitution provide protection against unreasonable searches and seizures. *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, 920 N.E.2d 949, ¶ 10, fn. 1. To protect against unconstitutional searches and seizures, a search warrant must be supported by sworn facts that establish probable cause to conduct the search in the mind of a neutral and detached magistrate. *State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶ 35.

{¶12} When examining an affidavit, the United States Supreme Court, in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), instructed magistrates to employ a totality of the circumstances approach in assessing whether probable cause exists to issue a search warrant. This involves:

> [Making] a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him [or her], including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 238.

{¶13} It is also understood that "[m]agistrates may make reasonable inferences when deciding whether probable cause exists." *Castagnola* at ¶ 41, citing *Gates* at 240; *State v. Hobbs*, 133 Ohio St.3d 43, 2012-Ohio-3886, 975 N.E.2d 965, ¶ 10; *State v. Jordan*, 11th Dist.

Lake No. 97-L-211, 1998 Ohio App. LEXIS 4510, 1998 WL 684231, 3 (Sept. 25, 1998) (O'Neill, J., dissenting). Magistrates should consider "how stale the information relied upon is, when the facts relied upon occurred, and whether there is a nexus between the alleged crime, the objects to be seized, and the place to be searched." *Castagnola* at ¶ 34, citing 2 LaFave, *Search and Seizure*, Section 3.7(a), (b), and (d) (5th Ed.2012).

{¶14} In determining the sufficiency of probable cause for an affidavit submitted in support of a search warrant,

> "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

State v. George, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), paragraph one of the syllabus, quoting *Gates* at 238-2390.

{¶15} The probable-cause determination is within the sound discretion of the issuing magistrate and reviewing courts must give great deference to the magistrate's decision. *Id.*, at paragraph two of the syllabus. Thus, "doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *Id.* at 330. On appellate review, our inquiry is limited to determining whether the issuing judge had a substantial basis for concluding that probable cause existed. *Id.* at 329, citing *Gates* at 237, fn. 10.

{¶16} A review of the affidavit for the search warrant at issue in the instant case contained information that the affiant, CMHA Police Detective William Chapman ("Detective Chapman"), learned that Andrews's residence was located at 1386 Russell Road, within the city of Cleveland. Detective Chapman stated that this residence had been shot into earlier on the same day of March 8, 2016. Andrews's mother was inside the house at the time of the shooting

and suffered a gunshot wound. Detective Chapman further stated that surveillance video depicted the shooters fleeing from the crime scene, on foot, and towards the direction of the Andrews's residence. Witnesses at the scene of the shooting at the Addison complex reported to police that Andrews was seen in the area at the time of the shooting. Detective Chapman also stated that Andrews's DNA was found on all of the 13 shell casings collected at the Addison complex that were associated with the automatic rifle.

{¶17} When looking at the totality of these circumstances, we believe that Detective Chapman provided a substantial basis for the issuing judge to find probable cause to issue the search warrant. The police were actively investigating the case, and the search warrant was issued after the police learned that Andrews's DNA was found on all 13 of the shell casings. The search warrant for firearms and ammunition was issued within nine days of the shooting. Given all the foregoing circumstances set forth in the affidavit, including the "veracity" and "basis of knowledge" of Detective Chapman, probable cause was met — that contraband or evidence of a crime would have been found at the Andrews's residence.

{¶18} Accordingly, the first assignment of error is overruled.

Sufficiency of the Evidence

{¶19} In the second assignment of error, Andrews argues the state presented insufficient evidence with regard to Count 4 — felonious assault. In the third assignment of error, Andrews argues there was insufficient evidence to sustain the remaining convictions.

{¶20} The Supreme Court of Ohio delineated the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991):

> 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)

Id. at paragraph two of the syllabus.

{¶21} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* at 319. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 78. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4, 739 N.E.2d 749, citing *Jackson*; *Jenks*.

{¶22} With regard to the felonious assault, Andrews argues that the state failed to prove that he knowingly attempted to cause physical harm to Fullum (the victim), when he was not physically injured. Andrews was convicted of felonious assault in violation of R.C. 2903.11(A)(2), which provides 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."

{¶23} Here, the state presented evidence that Andrews was involved in the March 8, 2016 shooting. The record demonstrates that Fullum's vehicle was shot during the course of this

shootout. Furthermore, the bullet that struck Fullum's car nearly hit him. The bullet went through the armrest in Fullum's vehicle. When the group opened fire, it was foreseeable that a bullet might strike a bystander or a bystander's vehicle that was near the Addison complex and cause or attempt to cause physical harm.

{¶24} With regard to the remaining convictions, Andrews argues there was insufficient evidence that he knew or reasonably should have known that his friends were going on a shooting spree of the Addison complex. We disagree.

{¶25} A review of the record reveals that Andrews stated to the police that he loaded the ammunition clip for his friends because they were going "to ride for him." Andrews took that to mean they are going to get the guy who shot his mother. It is clear from Andrews's statement that he knew the shooting was going to occur and that his friends were going to do the shooting on his behalf.

{¶26} Based on the foregoing, we find that the state offered sufficient evidence to sustain Andrews's conviction for felonious assault, as well as the remaining convictions.

{¶27} Accordingly, the second and third assignments of error are overruled.

Manifest Weight of the Evidence

{¶28} In the fourth assignment of error, Andrews argues that all of his convictions are against the manifest weight of the evidence.

{¶29} A manifest weight of the evidence claim requires a different review than a sufficiency claim. When presented with a challenge to the manifest weight of the evidence, an appellate court, after

> "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 [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, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most "'exceptional case in which the evidence weighs heavily against the conviction.'" *Id.*, quoting *Martin* at 175.

{¶30} In the instant case, the trial court heard evidence that Andrews's mother was shot within 24-hours of the shooting at issue. There was testimony that Andrews believed that the people responsible for the shooting of his mother were Hough Harlem gang members and that Hough Harlem gang members gather at the Addison complex. The video evidence depicted three males firing towards people who were at the Addison complex. Some of the casings on scene contained Andrews's DNA. Andrews lives about two blocks from the crime scene. The shooters arrived on foot and ran away toward the direction of Andrews's home. Andrews ultimately told police that he loaded a clip and handed it to his friends who said that they would "ride for him."

{¶31} Based on the foregoing, we cannot say this is the exceptional case where the trial court lost its way.

{¶32} Accordingly, the fourth assignment of error is overruled.

Ineffective Assistance of Counsel

{¶33} In the fifth assignment of error, Andrews argues that in the event this court finds that any issues were not properly preserved, then trial counsel was ineffective. Andrews does not specify which issue trial counsel failed to properly preserve, but at the same time concedes that defense counsel properly preserved all issues at trial.

{¶34} If an argument exists that can support an assignment of error, it is not this court's duty to root it out. *Citta-Pietrolungo v. Pietrolungo*, 8th Dist. Cuyahoga No. 85536, 2005-Ohio-4814, ¶ 35, citing *Cardone v. Cardone*, 9th Dist. Summit Nos. 18349 and 18673, 1998 Ohio App. LEXIS 2028 (May 6, 1998). Without any specific alleged error and a citation in the record to that error, we cannot address his argument. App.R. 12 and 16.

{¶35} Therefore, the fifth assignment of error is overruled.

{¶36} Judgment is affirmed.

It is ordered that appellee recover of 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 conviction having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

TIM McCORMACK, J., and
ANITA LASTER MAYS, J., CONCUR