[Cite as *State v. Thomas*, 2010-Ohio-894.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-090060 TRIAL NO. B-0802074
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
HOSEA THOMAS,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 12, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Bruce K. Hust, for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

SYLVIA SIEVE HENDON, Judge.

{¶1} Defendant-appellant, Hosea Thomas, appeals his convictions for murder, felonious assault, and having a weapon while under a disability. For the following reasons, we affirm the convictions.

I. The Shootings

{¶2} Thomas got into a fight with members of a rapper's entourage inside Club Ritz in the Roselawn area of Cincinnati. After getting hit in the head with a bottle, Thomas left the club with Mose Patrick Brown. Thomas's brother Padron picked them up in the parking lot and drove away.

{¶3} Thomas told Padron that he and the rapper had argued and that he had been struck in the head with something. As Padron drove past one of the entourage's two passenger vans, Thomas told Padron that the rapper and his group were in it, and Thomas began firing a handgun at the van.

{¶4} Several people in the rapper's van were shot. Philant Johnson was shot in the head and killed. Elijah Walker Edmunds, Jr., was shot in the arm, and a bullet grazed his face. Ronald Hausley was hit in the chest and arm. Three other passengers in the van, Clifford Harris, Montiel Green, and Claybourne Evans, were not injured.

{¶5} As a result of the shootings, Thomas and Padron were charged with two counts of murder[1] and seven counts of felonious assault,[2] as well as

[1] R.C. 2903.02(A) and (B).
[2] R.C. 2903.11(A)(2).

accompanying firearm specifications. In addition, Thomas was charged with two counts of having a weapon while under a disability.[3]

{¶6} Padron entered a guilty plea to a reduced charge of manslaughter. At the jury trial in Thomas's case, Padron testified for the state. Thomas presented an alibi defense.

{¶7} The trial court granted Thomas's motion for a judgment of acquittal with respect to two felonious-assault charges. The jury found Thomas guilty of the remaining charges and specifications. The trial court merged the murder counts and imposed an aggregate prison sentence of 66 years to life.

II. Jury Instructions on Felonious Assault

{¶8} Thomas was charged with felonious assault under R.C. 2903.11(A)(2), which provides, "No person shall knowingly * * * cause or attempt to cause physical harm to another * * * by means of a deadly weapon." At the close of the evidence at trial, the court instructed the jury, with respect to the five remaining felonious-assault counts, that it was required to find that "the defendant [had] knowingly caused or attempted to cause physical harm to [the victim] by means of a deadly weapon, to wit: a firearm." The court then separately defined the terms "knowingly," "cause," "physical harm to persons," and "deadly weapon."

{¶9} In his first assignment of error, Thomas argues that the trial court erred by failing to separately define the term "attempt" in its felonious-assault instruction. Thomas contends that the jury may have been confused by the instruction as it

[3] R.C. 2923.13(A)(2) and (3).

pertained to Harris, Green, and Evans, the uninjured victims. But Thomas does not articulate how the asserted error misled the jury to his prejudice.

{¶10} Since Thomas did not object or request a specific instruction, he has waived all but plain error.[4] An erroneous jury instruction does not constitute plain error unless, but for the error**,** the outcome of the trial clearly would have been different.[5]

{¶11} Ohio courts have held that a trial court's failure to define "attempt" in its felonious-assault instruction is not per se plain error. In *State v. Butler*,[6] the appellant had unsuccessfully tried to strike the victim with his car. The Tenth Appellate District held that even if it accepted the appellant's assertion that "legal attempt is different from a common definition of attempt," the appellant had failed to demonstrate plain error where, as here, the jury had been instructed on the elements of felonious assault, and the terms "knowingly," "cause," "physical harm," and "deadly weapon" had been separately defined.

{¶12} In *State v. Hightower*,[7] the appellant had fired a gun at the victim, who was in a car. The Eighth Appellate District held that the trial court's failure to define "attempt" did not amount to plain error where the evidence showed that the victim had not been injured, and "[t]he jury could not have failed to realize that an unsuccessful attempt to cause harm was involved."

{¶13} In this case, the state presented evidence that Thomas had repeatedly fired a gun directly into an occupied van at close range, that two of the surviving occupants had been physically harmed, and that three occupants had escaped injury.

---

[4] Crim.R. 30(A).
[5] See *State v. Coley*, 93 Ohio St.3d 253, 265, 2001-Ohio-1340, 754 N.E.2d 1129; *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332, syllabus.
[6] (Oct. 22, 1998), 10th Dist. No. 98AP-55.
[7] (Oct. 8, 1987), 8th Dist. No. 52836.

Thomas presented an alibi defense, so the question of whether the shooter had attempted to cause harm was not put in issue at trial. In finding Thomas guilty of felonious assault against the three uninjured victims, the jury necessarily rejected his alibi defense and believed that he had tried to harm them with a deadly weapon.

{¶14} Where nothing presented by the defense disputed that there had been an attempt to harm the uninjured victims, and where the defense failed to object or to request a more specific instruction, we hold that the trial court's failure to define the term "attempt" in its felonious-assault instruction did not result in a manifest miscarriage of justice. Consequently, we cannot say that, but for the court's failure to define "attempt," Thomas would have been acquitted of the felonious-assault counts. We overrule the first assignment of error.

III. Allied Offenses

{¶15} In his second assignment of error, Thomas argues that the trial court erred by entering convictions for two counts of having a weapon while under a disability. He had one gun, but had two different statutory disabilities. One disability was a prior conviction for an offense of violence;[8] the other was a prior drug-abuse conviction.[9]

{¶16} Thomas argues that the two offenses were allied offenses of similar import. We rejected this argument in *State v. Render*.[10] Accordingly, we overrule the assignment of error.

[8] R.C. 2923.13(A)(2).
[9] R.C. 2923.13(A)(3).
[10] 1st Dist. No. C-060382, 2007-Ohio-1606, jurisdictional motion overruled, 115 Ohio St.3d 1411, 2007-Ohio-4884, 873 N.E.2d 1316.

IV. Weight of the Evidence

{¶17} In his third assignment of error, Thomas argues that his convictions were against the manifest weight of the evidence because the state's case was "replete with the self-serving testimony of criminal defendants and biased individuals."

{¶18} As is often necessary in criminal prosecutions, the state in this case presented the testimony of a co-defendant and of two other inmates charged with serious crimes. The weight to be given the evidence and the credibility of the witnesses were primarily for the jury to determine.[11] Moreover, our review of the record does not persuade us that the jury clearly lost its way and created a manifest miscarriage of justice in finding Thomas guilty of the offenses.[12] We overrule the third assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

HILDEBRANDT, P.J., and **SUNDERMANN, J.,** concur.

Please Note:

The court has recorded its own entry this date.

[11] See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.
[12] See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.