

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 85
v.	:	T.C. NO. 08 CR 0166
JAMES HANDCOCK, JR.	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

**OPINION**

Rendered on the 21<sup>st</sup> day of August, 2009.

AMY M. SMITH, Atty. Reg. No. 0081712, Assistant Prosecuting Attorney, 50 E. Columbia Street, 4<sup>th</sup> Floor, P. O. Box 1608, Springfield, Ohio 45501  
Attorney for Plaintiff-Appellee

WILLIAM N. MERRELL, Atty. Reg. No. 0015957, P. O. Box 2901, Springfield, Ohio 45501  
Attorney for Defendant-Appellant

HARSHA, J. (by assignment)

{¶ 1} After being found guilty of felonious assault with a firearm specification, James Hancock, Jr. appeals, contending the verdict was contrary to law and against the manifest weight of the evidence. The State introduced evidence that Hancock shot a 9 millimeter pistol at a car occupied by three

individuals. Hancock testified that he had not taken his medication and during a “nervous breakdown”, only shot the gun in the air out of frustration, not in an attempt to hurt anyone. He also points out he was so close to the car that it was improbable that he would have missed it had he been trying to shoot any of the three occupants. However, the occupants testified Hancock pointed the gun at their car before firing it and a reasonable juror could infer Hancock was aiming at one of the occupants even though he did not hit the car. The jurors were also free to disbelieve Hancock's claim that he only shot in the air. Thus, the State's evidence passed the tests for both the sufficiency and the manifest weight of the evidence. Hancock's assignment of error is meritless.

#### I. Facts

{¶ 2} Thomas Benner, Robert Camp and Robert Dawes stopped at a Speedway gas station for gasoline and coffee while on the way to work. Benner went inside where he saw Hancock, who raised his shirt and showed Benner a handgun that was apparently in a holster. Benner left the store and returned to the car where he waited for the driver Robert Camp to pay for the gas.

{¶ 3} Hancock also left the store and sat down next to his car, which had broken down near the gas pumps. Just before Camp's car left the gas station, Benner and Hancock exchanged stares and perhaps some words. Then Hancock ran toward the car and started firing the gun.

{¶ 4} At trial, Thomas Benner testified the three men stopped at the gas station for coffee and gas. Benner went into the store, where he saw Hancock standing near the ATM. Benner stated Hancock lifted his shirt and showed

Benner a handgun. Benner then walked out of the store and went to Camp's car. After Camp paid for the gas, they started to leave and Benner stared at Hancock, who was sitting near his disabled vehicle. According to Benner, Hancock responded by yelling, "What, mother fucker!" and drawing the pistol. Benner testified, "He started coming at me with the gun, holding it sideways and shooting at me." In response to the question, "You are certain he was shooting at you?", Benner answered, "Yeah." When subsequently asked if he saw Hancock pointing the gun at him, Benner indicated, "Yes." He also testified, "and he wasn't shooting at no air either."

{¶ 5} Robert Camp, the driver of the car testified he saw Hancock in the rearview mirror as they were attempting to get away from him. In response to an inquiry about whether he saw Hancock point the gun at the car, Camp responded, "Yeah(.)".

{¶ 6} The third passenger, Robert Dawes, did not see any of the shooting because he was lying down in the front seat after the incident started.

{¶ 7} In the defense case, Hancock testified he had stopped at the gas station because his car's transmission broke down. He went into the store to use the ATM but could not get it to work properly. He admitted he had mental health problems and indicated he had not been taking his medication. Hancock denied taking the gun into the store, but admitted firing it. However, he indicated he was not trying to shoot anyone, but rather was firing in the air because of frustration over the car, his inability to get cash from the ATM and the resulting "nervous breakdown." He asserted that if he intended to shoot anyone, he could not have

missed because he was within fifteen feet of the car. He denied pointing the gun at anyone and said he shot “into the air.”

{¶ 8} The State offered the rebuttal testimony of a police weapons training expert who noted shooting a gun “sideways” was not an accurate technique. He also indicated that even trained police officers frequently missed human sized targets from twenty feet or less. In fact, he had observed officers under stress miss from less than five feet.

{¶ 9} After the jury acquitted Hancock of two counts of felonious assault on Camp and Dawes, respectively, but found him guilty of the crime involving Benner, Hancock filed this appeal.

## II. Assignment of Error

{¶ 10} Hancock presents one assignment of error for our review:

{¶ 11} “THAT THE VERDICT OF GUILTY IN COUNT II (FELONIOUS ASSAULT) IS CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

## III. Standard of Review

{¶ 12} 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. See, e.g., *State v. Jenks* (1991), 61 Ohio St.3d 259, 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.*, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 13} A sufficiency of the evidence challenge tests whether the state's case is legally adequate to satisfy the requirement that it contain prima facie evidence of all the elements of the charged offense. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, and *Carter v. Estell* (CA 5, 1982), 691 F.2d 777, 778. It is a test of legal adequacy, rather than a test of rational persuasiveness.

{¶ 14} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. A reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Johnson* (1991), 58 Ohio St.3d 40, 41; *State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph two of the syllabus.

#### IV. Felonious Assault

{¶ 15} R.C. 2903.11 defines the crime of felonious assault and provides:

{¶ 16} "(A) No person shall knowingly do either of the following:

{¶ 17} \* \*

{¶ 18} "(2) Cause or attempt to cause physical harm to another \* \* \* by

means of a deadly weapon \* \* \* (.)"

{¶ 19} Hancock asserts that the State failed to prove he knowingly attempted to cause physical harm to Benner by firing the gun. He submits he had no intention to harm anyone because he fired the gun "into the air, not in the direction of the three men." As proof of that assertion he points to several pieces of evidence.

{¶ 20} First, he relies on his own testimony that he fired into the air rather than at the car. He notes no bullets struck the car even though he fired at a short distance from the car. He also emphasizes that all the occupants either ducked down behind their seats and could not see him fire, or in the case of the driver, he was hastily driving the car out of the gas station and couldn't see what was happening behind him.

{¶ 21} Although there is a limited amount of logic behind these arguments, they overlook several very important legal rules and the State's competing evidence. First, because the State successfully presented a prima facie case, the court properly allowed the jury to decide Hancock's case. Both Benner and Camp testified Hancock pointed the gun at them and/or the car. Thus, a reasonable juror could infer that Hancock intended to cause physical harm to Benner. And, the jury was free to believe all, part or none of Hancock's testimony. As long as the State presented substantial competing evidence, it was the jury's role to choose which version of the events to believe. So, in spite of some of the inconsistencies and weaknesses in the State's case, we conclude there is no manifest miscarriage of justice here.

{¶ 22} Hancock also seems to rely upon an apparent inconsistency among the verdicts in this case. Hancock was charged with one count of felonious assault on each of the individuals in the car: Thomas Benner, Robert Camp, and Robert Dawes. Although the jury found him guilty on the charge involving Benner, it acquitted him on the counts involving Camp and Dawes. To the extent that he relies on this inconsistency to support his argument that the verdict in Count II involving Benner is contrary to law, he is mistaken. Initially, we fail to see the inconsistency that Hancock suggests. Rather, we conclude the jury had a rational basis for their decision to acquit on the charges involving the occupants other than Benner. The evidence indicates Benner and Hancock had two direct contacts that created friction between them: 1) the incident in the store where Hancock exposed his pistol to Benner and 2) the exchange of stares and/or words in the parking lot, which ultimately led to the shooting spree. Neither of the other two “victims” had any direct contact with Hancock. And, Benner testified “he” (Hancock) was “shooting at me.” Camp merely indicated Hancock was shooting at the vehicle. Thus, there was a factual and logical basis for the jury to conclude Hancock intended to harm Benner, but not the other two occupants of the car.

{¶ 23} Moreover, to the extent an inconsistency may exist, a reviewing court will not overturn a verdict that convicts a defendant of one crime and acquits him of another merely because the two findings are irreconcilable. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, at ¶81; see, also, *State v. Gopen*, 104 Ohio St.3d 358, 2004-Ohio-6548; *State v. Adams* (1978), 53 Ohio St.2d 223, 7 O.O.3d 393. Consistency in the verdict is not necessary. Each count in an

indictment is regarded as if it was a separate indictment. *Id.*, quoting *United States v. Powell* (1984), 469 U.S. 57, 62, 105 S.Ct. 471, 83 L.Ed.2d 461. Inconsistent verdicts should not be interpreted as a windfall for the State at an accused's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on one offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on other offenses. Thus, we are duty bound to preserve the sanctity of the jury's verdict and to refrain from speculation or inquiry into such matters to resolve the inconsistency. See *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 444, citing *Powell*, *supra*, and *Dunn v. United States* (1932), 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed.2d 356.

#### V. Mental Health Issues

{¶ 24} Hancock originally entered a plea of not guilty by reason of insanity under Crim.R. 11(H) and raised the issue of his competency to stand trial under R.C. 2945.37. The trial court ordered Hancock evaluated under R.C. 2945.371 on each issue but never conducted a hearing after the mental health expert issued his evaluations. We inquired about the status of these issues and ordered the parties to file supplemental briefs addressing our concern. The parties responded and stipulated that the mental health evaluations be certified and transmitted as a supplemental record. We still have some concern about the failure of the record to affirmatively establish either that counsel for the appellant withdrew the NGRI plea and the request for a competency evaluation, or alternatively, that the trial court conducted a hearing and expressly ruled on those issues. However, our review of the two evaluations filed by the Forensic Psychiatry Center for Western Ohio and

prepared by Dr. DeMarchis leads us to conclude any potential error in that regard can only be harmless error in this context.

{¶ 25} Despite Handcock's history of mental illness, Dr. DeMarchis expressly concluded in his competency evaluation that Handcock was competent to stand trial. While acknowledging that Handcock could become destabilized upon “medical noncompliance”, i.e., his voluntary failure to take his medications, Dr. DeMarchis also noted Handcock “rapidly stabilized” once he resumed those medications. By his observations and testing, Dr. DeMarchis concluded Handcock was able to understand the nature of the court process, the role of its various participants, the nature of the charges he faced and thus, was able to assist in his defense.

{¶ 26} On the issue of lack of criminal responsibility under R.C. 2945.371 and Crim.R. 11(H), Dr. DeMarchis concluded Handcock's conduct was not the result of an active mental disease or defect of the mind at the time of the incident. Handcock's voluntary “medical noncompliance” was probably occasioned by substance abuse. And although he may have been experiencing mental disease as a result, his actions were motivated by frustration and poor impulse control “rather than the result of \* \* \* an active mental disorder.” Moreover, Handcock “knew the wrongfulness of his actions”, as evidenced by his flight after firing the gun in an apparent effort to escape apprehension.

{¶ 27} Just as in *State v. Bock* (1986), 28 Ohio St.3d 108, we conclude the court's failure to hold the mandatory competency hearing after the issue was raised prior to trial is harmless error. It is possible that defense counsel orally withdrew

the motion after receiving Dr. DeMarchis's reports, but we are unwilling to assume that to be the case in the absence of anything establishing that fact. Nonetheless, because of the absence of sufficient indicia of incompetency, we find no prejudicial error here. *Bock*, supra, at 110.

{¶ 28} Like the situation in *Bock*, trial counsel never mentioned the issue of competency again on the record. And Hancock's appellate counsel has not raised any factual concern with Hancock's competency to stand trial or his sanity. Although Hancock's conduct during the incident was unquestionably strange, his behavior during the trial did not present the indicia of incompetency. Just like the defendant in *Bock*, Hancock testified and was subject to cross-examination "with no apparent behavior which would lead this court to believe he was not competent to stand trial." *Bock*, supra, at 111. "Nor is there any expert or lay opinion in the record that the defendant was actually incompetent." *Id.*

{¶ 29} Therefore, we conclude Hancock suffered no prejudice as the result of the failure of the record to reflect either a written withdrawal of the plea and motion, or in the alternative, the absence of a hearing. See *State v. Bock* (1986), 28 Ohio St.3d 108, at syllabus one. See, also, *State v. Furlow* (1998), Montgomery App. No. 16403, 1998 WL 257877.

## VI. Conclusion

{¶ 30} Accordingly, we reject Hancock's assignment of error and affirm his conviction.

JUDGMENT AFFIRMED.

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FAIN, J. and FROELICH, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Amy M. Smith  
William N. Merrell  
Hon. Douglas M. Rastatter