

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-20-1110

Appellee

Trial Court No. CR0201902687

v.

Carlson Edward Brown

DECISION AND JUDGMENT

Appellant

Decided: November 5, 2021

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Autumn D. Adams, for appellant.

* * * * *

ZMUDA, P.J.

I. Introduction

{¶ 1} Appellant, Carlson Brown, appeals the judgment of the Lucas County Court of Common Pleas, sentencing him to life in prison after it found him guilty of aggravated

murder, murder, felonious assault, improperly discharging a firearm at or into a habitation, participating in a criminal gang, and improperly handling firearms in a motor vehicle. Finding no error in the proceedings below, we affirm.

A. Facts and Procedural Background

{¶ 2} On September 26, 2019, appellant and two codefendants (Edward Reese and Kenneth Allison) were jointly indicted on one count of aggravated murder in violation of R.C. 2903.01(A) and (G), an unspecified felony, one count of murder in violation of R.C. 2903.02(B) and 2929.02, an unspecified felony, one count of felonious assault in violation of R.C. 2903.11(A)(1) and (D), a felony of the second degree, two counts of felonious assault in violation of R.C. 2903.11(A)(2) and (D), felonies of the second degree, one count of improperly discharging a firearm at or into a habitation in violation of R.C. 2923.161(A)(1) and (C), a felony of the second degree, one count of participating in a criminal gang in violation of R.C. 2923.42(A) and (B), a felony of the second degree, and one count of improperly handling firearms in a motor vehicle in violation of R.C. 2923.16(B) and (I), a felony of the fourth degree. These charges were related to a July 14, 2019 drive-by shooting that occurred at 3390 Woodrow Boulevard, Toledo, Ohio, resulting in the death of G.S. The charge of participating in a criminal gang was based upon conduct taking place over a five-year period commencing on September 26, 2014, and ending on the date the indictment was filed.

{¶ 3} After appellant entered a plea of not guilty, the matter proceeded through pretrial discovery and motion practice. Eventually, appellant and Reese waived their rights to a jury trial and the matter proceeded to a six-day bench trial in which appellant and Reese were tried together.¹

{¶ 4} During its case-in-chief, the state called 22 witnesses. Four of these witnesses were eyewitnesses to the shooting. The first eyewitness called by the state was Emilio Hernandez. Hernandez resides in a home that is located on Manhattan Boulevard near the scene of the shooting. On July 14, 2019, Hernandez decided to go to the store. Upon his return, Hernandez parked his vehicle in front of his house. While Hernandez was still in his vehicle, he noticed a white sedan approach from the west and stop in the road to his left.

{¶ 5} After the sedan stopped, Hernandez, a United States Army veteran, noticed “two arms come out of the car both with semi-automatic handguns and [start] opening [fire].” Hernandez indicated that he could not see the faces of the individuals who fired the weapons. However, Hernandez testified that he saw their arms, which were tattooed, and stated that the individuals were African American.

¹ Allison exercised his right to a trial by jury and was tried separately. Reese was acquitted of all charges except participating in a criminal gang. He separately appealed and, on September 30, 2021, we issued our decision affirming Reese’s conviction. *State v. Reese*, 6th Dist. Lucas No. L-20-1111, 2021-Ohio-3506.

{¶ 6} Approximately 25 seconds after the shooting stopped, Hernandez exited his vehicle and made his way to the porch on which G.S. was shot. After learning that G.S. was shot, Hernandez began to apply pressure to the gunshot wound and waited for paramedics to arrive.

{¶ 7} Next, the state called Randolph Canales. Like Hernandez, Canales lives in a home located on Manhattan Boulevard, near the scene of the shooting. According to Canales, he was doing concrete work in front of his home at the time of the shooting. Canales testified that he saw two vehicles approach the scene, which he identified as a blue or green van and a white sedan. The vehicles slowed down as they approached, and Canales witnessed a “volley” of shots fired toward the residence located at 3390 Woodrow Boulevard by occupants of the vehicles. Consistent with Hernandez’s testimony, Canales observed two shooters in the white sedan, one from the front passenger seat and one from the rear passenger seat. Canales also witnessed at least one shooter firing a weapon from the van. After the shooting stopped, the vehicles fled the scene heading eastbound on Manhattan Boulevard.

{¶ 8} Canales’ live-in girlfriend, Judith Daudritch, was called by the state following Canales’ testimony. Daudritch testified that she was at her Manhattan Boulevard home all day on July 14, 2019. Just prior to the shooting, Canales asked Daudritch to come outside to see the concrete work he had just completed. Daudritch witnessed the shooting, and recounted seeing one handgun hanging out of the front

passenger window of the sedan, one handgun hanging out of the rear passenger window of the sedan, and two handguns hanging out of the front passenger window of the van.

{¶ 9} As its fourth eyewitness, the state called Marlon Powell. In 2019, Powell was charged with having a weapon while under disability, possession of drugs, and failure to appear. In exchange for his agreement to testify in this case, the state reduced the charges to carrying a concealed weapon and failure to appear, and recommended a community control sentence in lieu of prison. At the time of his guilty plea, Powell was on parole relating to a prior conviction for participating in a criminal gang.

{¶ 10} At the outset of his testimony, Powell explained that the Cherrywood Crips and the Geer Gang Crips are rival gangs in Toledo. Powell stated that these gangs “beef,” meaning they fight with (and sometimes shoot) one another. According to Powell, this rivalry began in 2013 with the death of a gang member named Shamar. As of the time of trial, the rivalry between the two gangs remained active.

{¶ 11} Powell testified that he was at the residence located at 3390 Woodrow Boulevard on July 14, 2019. He indicated that the residence was his mother’s home. Four other individuals were also present at the residence, including Powell’s mother, Powell’s younger sister, G.S., and Robert Sherman. At the time of the shooting, Powell, G.S., and Sherman were seated on the front porch of the residence having a conversation.

{¶ 12} While on the porch, Powell received a phone call from his cousin and G.S.’s brother, Javon Parcher, who told Powell that Cherrywood Crips gang members

were on their way to his location and advised Powell to leave the area. Powell informed G.S. and Sherman of the phone call, and then entered the residence to check on his mother. Shortly thereafter, Powell returned to the porch and resumed the conversation with G.S. and Sherman.

{¶ 13} Five minutes later, Powell saw a white sedan approaching, followed by a van. Powell recognized appellant (whom he called “Keno”) as one of the two individuals in the white sedan. Additionally, Powell also recognized that Allison (whom he called “Fredo”) was in the passenger front seat of the van and Reese (whom he called “DooDoo”) was in the passenger rear seat of the van. Subsequent to the shooting, Powell identified each of these three men in three separate photo arrays shown to him by law enforcement. He testified that he selected their photographs immediately upon seeing them and indicated that he was “a hundred percent sure” of his selection.

{¶ 14} According to Powell, the white sedan stopped on Manhattan Boulevard. At this point, appellant attempted to fire his handgun, but it did not initially fire. Powell testified that no shots were fired out of the back passenger seat of the white sedan. Meanwhile, several shots were fired from the van by Allison and Reese. When the shooting stopped, Powell found G.S. lying on the floor of the porch. Thereafter, he called 911 to seek medical attention.

{¶ 15} Following Powell’s testimony, the state called Javon Parcher to testify about his observation of events that transpired just prior to the shooting. Parcher, who

was serving a prison sentence for burglary after violating the terms of his parole, testified that he had been in prison for ten years. While incarcerated, Parcher learned of a “Cherrywood and Geer beef.”

{¶ 16} On the day of the shooting, Parcher was standing near the Greenbelt Place Apartments when a white Chevrolet sedan approached and appellant exited from the front passenger seat. Meanwhile, a green van also pulled up. According to Parcher, Allison was driving the van at the time. A conversation ensued, and Parcher testified that he overheard someone state, “we just caught Little Rob and Moota slippin’.” This statement caught Parcher’s attention because “Moota” was Powell’s street name. Further, Parcher overheard someone state, “we just caught him slippin’ out of the blue house on Manhattan,” which Parcher recognized as his aunt’s home.

{¶ 17} After the conversation concluded, a group of three individuals (including Allison) entered the green van, and the vehicles departed. After the white sedan and green van left the area, Parcher called Powell to warn him that he was in danger.

{¶ 18} In addition to the foregoing eyewitnesses, the state called several law enforcement officers during its case-in-chief. The state’s first such witness was detective William Noon. Noon works in the Toledo Police Department’s Gang Task Force, where he conducts surveillance and investigates gang-related criminal activity in the city of Toledo. After Noon explained his training and expertise, the state asked the trial court to

certify him as an expert in the field of gang investigation. Without objection, Noon was so certified.

{¶ 19} According to Noon, at least 18 street gangs have been identified in Toledo. Admission to these gangs is obtained in several ways. Noon stated that people join gangs through their family, by fighting their way in, or through friendship with other gang members.

{¶ 20} Asked how he determined whether a particular individual is involved in a gang, Noon indicated that the Toledo Police Department developed certain criteria, which he explained as follows: “Our criteria’s either self-admission, crimes that are being committed, who they’re being committed with. Social media as in Facebook, Instagram or Snapchat or whatever it is. We also have confidential informants collecting different things that we put together.” Noon went on to describe that a person’s clothing and tattoos may be used to determine gang affiliation. He also indicated that gang members sometimes acquire and use “street names” when they enter a gang.

{¶ 21} Later in his testimony, Noon described the prevalence of rivalries among the criminal gangs in Toledo. Noon cited several examples of gang rivalries and characterized these rivalries as “fluid,” meaning they were subject to change on a regular basis depending upon who is “beefing,” or fighting. The extent to which the rivalry is active depends upon the level of violence taking place among the rivaling gangs. Noon

stated that fighting usually begins when one gang member is shot by a member of a rivaling gang, and intensifies from that point.

{¶ 22} According to Noon, one of the gangs located in Toledo is known as the Cherrywood Crips. The Cherrywood Crips are named after the Greenbelt Place Apartments, formerly known as the Cherrywood Apartments, which are located in the area occupied by the gang. Noon testified that the Cherrywood Crips can be identified by their blue clothing and their use of C-formation hand signs. Further, Noon has observed identifying tattoos on Cherrywood Crips with inscriptions such as “O’Blocc, One Ontario, 800 Woodz, Straight Eight, [and] Woodz Boyz.”

{¶ 23} Throughout the course of his employment as a detective with the Toledo Police Department, Noon has observed several prosecutions of Cherrywood Crip members. At trial, he testified that these prosecutions were based upon various criminal charges including drug possession, drug trafficking, and firearm-related offenses.

{¶ 24} During his testimony, Noon revealed that the Cherrywood Crips have had several rivalries with other gangs over the years. In the summer of 2019, the Geer Gang Crips was one such rival gang. Noon was familiar with the rivalry, which began after the death of a Cherrywood Crip sometime prior to 2019. Following the death, another incident took place at appellant’s home, in which a Geer Gang Crip fired shots at the residence. Noon testified that the rivalry between the Cherrywood Crips and the Geer Gang Crips was ongoing, as indicated by the occurrence of “multiple shootings.”

{¶ 25} Noon testified that he is familiar with both Reese and appellant. According to Noon, Reese and appellant are associated with one another, and both men are members of the Cherrywood Crips gang. Noon provided extensive testimony concerning his prior interactions with, and surveillance of, appellant, who is also known by the street names of “TAG Keno” and “Keno Dash.” Noon indicated that he has seen appellant on “several occasions.”

{¶ 26} Several years prior to trial in this case, Noon attended a Cherrywood Crips gang member’s funeral. Appellant was also in attendance. At the funeral, Noon approached appellant and appellant fled. Noon apprehended appellant and determined that the vehicle appellant was driving was stolen. At this point, appellant acknowledged his membership in the Cherrywood Crips gang to law enforcement officers.

{¶ 27} According to Noon, appellant has many tattoos revealing his affiliation with the Cherrywood Crips, including a tattoo of the phrase “800 Wood” on his stomach and another tattoo of a street sign that says walnut and Ontario on his chest. Noon explained that these tattoos are references to the 800 block of Ontario and Walnut streets, the location of the Greenbelt Place Apartments and the territory occupied by the Cherrywood Crips.

{¶ 28} Noon also investigated appellant’s Facebook profiles, which were listed under the names “Keno Dash” and “TAG Keno.” Screenshots from the profiles containing gang-related text and images of appellant were admitted into evidence at trial

without objection. According to the dates listed on the screenshots, several of the photographs showing appellant flashing gang hand signs were posted on Facebook by appellant and others between 2017 and 2019.

{¶ 29} In addition to the foregoing testimony, the state introduced certified copies of three judgment entries relating to appellant's prior felony convictions for burglary in 2013, attempt to commit carrying a concealed weapon in 2016, and possession of cocaine in 2018.² Noon testified that these convictions are indicative of prior gang participation, because criminal gangs sell narcotics to fund operations and commit acts of violence in order to establish their authority. Further, Noon stated that "[i]t is very common to find that gang members are found guilty of weapons offenses." Noon explained that firearms are used by gangs, including the Cherrywood Crips, for retaliation, protection, and influence.

{¶ 30} Later in the trial, the state called Megan Webb as its twentieth witness. As the unit manager for Lucas County Electronic Monitoring, Webb works with electronic monitoring equipment used for defendants who are on parole, and oversees parole officers as they monitor such defendants. At trial, Webb testified that appellant was

² The state also introduced judgment entries for Allison and two other known members of the Cherrywood Crips gang. The offenses for which these individuals were convicted included aggravated trafficking in drugs, having weapons while under disability, attempted felonious assault, attempt to commit burglary, attempted possession of heroin, and escape.

being electronically monitored via GPS ankle monitor on the day of the shooting. Upon request from the state, Webb retrieved the electronic records associated with appellant for July 14, 2019, between the hours of 4:30 and 5:30 p.m. During that time period, appellant traveled to the scene of the shooting and then drove to the Greenbelt Place Apartments. Thereafter, appellant traveled back to the scene of the shooting, and his ankle monitor recorded his position at the scene at the time of the shooting. After the shooting, appellant returned to the Greenbelt Place Apartments.

{¶ 31} Next, the state called Terry Cousino, a part-time investigator at the Lucas County Prosecutor's Office. Cousino testified that he analyzed the data from appellant's ankle monitor and determined that appellant was near the location at which spent shell casings were discovered at the time of the shooting.

{¶ 32} As its final witness, the state called detective Paul Marchyok of the Toledo Police Department. Marchyok was the lead homicide detective assigned to this case. During his investigation, Marchyok obtained a surveillance video from a residence located near the scene of the shooting. The video depicted two vehicles, a "white sedan and a dark colored minivan," that matched the eyewitness descriptions of the vehicles used in the shooting. According to Marchyok, the van was damaged and appeared to be "very distinctive." Photographs of the minivan reveal body damage to the passenger side of the van, as well as a missing hubcap on the front passenger wheel.

{¶ 33} Marchyok proceeded to disseminate still images of the vehicles from the video to other law enforcement agencies for assistance in locating and identifying the vehicles. He testified that he had received information that Powell and Sherman were members of the Geer Gang Crips street gang, which he knew to be involved in a violent gang feud with the Cherrywood Crips.

{¶ 34} After disseminating the still images, Marchyok was contacted by law enforcement officers who informed him that the van “belonged to somebody in * * * the Greenbelt Place Apartments.” Moreover, officers from the gun crimes unit of the Toledo Police Department located a white Chevrolet Sonic that matched the image. Subsequently, Marchyok dispatched a surveillance unit to observe the white Sonic and the minivan. During the ensuing surveillance, officers took “several photographs of known Cherrywood gang members * * * going in and out of [the van] and driving that vehicle.”

{¶ 35} At the conclusion of Marchyok’s testimony, the state rested. Appellant and Reese each moved the trial court for acquittals under Crim.R. 29, and the trial court denied the motions. The court then inquired as to whether appellant or Reese intended to present any evidence. Defense counsel for appellant informed the court that appellant was not calling any witnesses. After the trial court ensured that appellant did not wish to take the stand, each party rested. Thereafter, the matter proceeded to closing arguments.

{¶ 36} Upon consideration of the evidence introduced at trial and the arguments of the parties, the trial court found appellant guilty of all charges contained in the indictment. On June 11, 2020, and January 28, 2021, appellant appeared before the trial court for sentencing and resentencing, respectively.³ At both hearings, the trial court addressed the issue of merger, ultimately concluding that counts one (aggravated murder), two (murder), and three (felonious assault) were allied offenses of similar import subject to merger. The state elected to proceed upon the charge of aggravated murder. Likewise, the trial court found that counts six (improperly discharging a firearm at or into a habitation) and eight (improperly handling firearms in a motor vehicle) were subject to merger, and the state elected to proceed to sentencing on count six.

{¶ 37} The trial court then determined that the remaining charges in counts four (felonious assault), five (felonious assault), and seven (participating in a criminal gang) were not subject to merger. The trial court proceeded to sentence appellant to prison terms of 30 years to life for count one, 8 to 12 years for count four, 8 years for count five, and 8 years for count seven. The court ordered all of these sentences served concurrently.

³ This court remanded the matter for resentencing after appellant filed his initial notice of appeal, because we found that the trial court's handling of merger at the June 11, 2020 sentencing hearing was incomplete.

{¶ 38} Additionally, counts one, four, five, and six included three specifications as to each offense: (1) a firearm specification under R.C. 2941.145; (2) a specification that appellant discharged a firearm from a motor vehicle under 2941.146; and (3) a specification that appellant participated in a criminal gang under 2941.142.⁴ In connection with count one, the trial court imposed a three-year prison term for the firearm specification, five-year prison term for the specification for discharging a firearm from a motor vehicle, and one-year prison term as to the gang specification. The court also imposed three-year sentences for the firearms specifications attached to counts four, five, and six. The court indicated that the sentences for the firearms specifications in counts four and five are to be served consecutive to one another and consecutive to the underlying sentence imposed for aggravated murder. The three-year firearm specification sentence in count six was imposed concurrent to the sentence imposed in count one, for a total prison sentence of 45 years to life.

B. Assignments of Error

{¶ 39} Appellant filed a timely notice of appeal from the trial court's judgment, and now assigns the following errors for our review:

⁴ Counts two and three also included these three specifications as to each offense. The court found that the specifications attached to counts two and three merged with those attached to count one and sentenced appellant accordingly.

I. The evidence presented at trial was insufficient to support a conviction for Participating in a Criminal Gang.

II. The sentencing provisions of Senate Bill 201, otherwise known as the Reagan Tokes Act, are unconstitutional.

II. Analysis

A. The state’s evidence was sufficient to prove the elements of participating in a criminal gang.

{¶ 40} In appellant’s first assignment of error, he argues that the evidence presented by the state at trial was insufficient to support his conviction for participating in a criminal gang.

{¶ 41} In reviewing a record for sufficiency, “[t]he 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.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 42} Appellant was convicted of participating in a criminal gang during the five-year period from September 26, 2014 through September 26, 2019, in violation of R.C. 2923.42(A), which provides:

No person who actively participates in a criminal gang, with knowledge that the criminal gang engages in or has engaged in a pattern of criminal gang activity, shall purposely promote, further, or assist any criminal

conduct, as defined in division (C) of section 2923.41 of the Revised Code, or shall purposely commit or engage in any act that constitutes criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code.

{¶ 43} Under this statutory section, the state is required to prove four elements, which we have identified as

(1) the existence of a criminal gang, (2) appellant's active participation in the gang, (3) appellant's knowledge that the gang engages in or has engaged in a pattern of criminal gang activity, and (4) appellant's purposeful promotion, furtherance, or assistance of, or commission of or engagement in, any criminal conduct.

State v. Roberson, 6th Dist. Lucas No. L-16-1131, 2017-Ohio-4339, ¶ 72. We will address each of these elements in turn.

i. Existence of a Criminal Gang

{¶ 44} At trial in this case, the state established that the Cherrywood Crips gang is a "criminal gang." Under R.C. 2923.41(A), a criminal gang is defined as an ongoing organization, consisting of three or more persons who engage in or have engaged in a pattern of criminal gang activity, which has as one of its primary activities the commission of one or more felonies and has a common name or common identifying signs, symbols, or colors.

{¶ 45} In our resolution of Reese’s direct appeal, we found that “[t]he state introduced testimony at trial to establish that the Cherrywood Crips gang is a criminal gang in the city of Toledo that consists of more than three individuals.” *State v. Reese*, 6th Dist. Lucas No. L-20-1111, 2021-Ohio-3506, ¶ 46. Since Reese and appellant were tried together, the same evidence that we relied upon to reach our conclusion regarding the existence of a criminal gang in *Reese* exists in the record in this case. Consequently we find, as we did in *Reese*, that “the state introduced sufficient evidence to prove that the Cherrywoods Crips gang is a ‘criminal gang’ under R.C. 2923.41(A).” *Id.* at ¶ 47.

ii. Active Participation

{¶ 46} Next, we turn to appellant’s contention that the state failed to introduce evidence to prove that he is an active participant in the Cherrywood Crips gang.

{¶ 47} Notably, R.C. 2923.42 contains the phrase “actively participates,” but does not define active participation. *Roberson* at ¶ 76. Nonetheless, we have explained that “the active participation element of the criminal gang statute requires the state [to] demonstrate that appellant actually – not just nominally – took part in the criminal gang.” *State v. Smith*, 6th Dist. Lucas No. L-15-1027, 2017-Ohio-776, ¶ 38. “Actual participation requires that the appellant perform ‘some role to benefit the gang.’” *Roberson* at ¶ 76, quoting *Smith* at ¶ 39.

{¶ 48} Appellant argues that the state failed to introduce evidence to prove that he was an *active* participant in the Cherrywood Crips. Appellant acknowledges that the state

introduced evidence of his gang-related tattoos, music videos, and criminal convictions. Nonetheless, he asserts that such evidence was insufficient because it failed to “show how on July 14, 2019 those tattoos showed active participation.”

{¶ 49} At the outset, we note that the state was not required to establish that appellant was an active participant on July 14, 2019, in order to obtain a conviction for participating in a criminal gang in this case. Indeed, the relevant time period for this offense was set forth in the indictment and encompasses a five-year period commencing on September 26, 2014, and ending on September 26, 2019. Thus, the state was required to introduce evidence to prove appellant’s active participation in the Cherrywood Crips gang at some point during this five-year period, not necessarily on the day of the drive-by shooting.

{¶ 50} At trial in this case, the state introduced several pieces of evidence to establish appellant’s active participation in the Cherrywood Crips gang. In particular, Noon testified that an ongoing rivalry existed between the Geer Gang Crips and the Cherrywood Crips at the time of the drive-by shooting. This rivalry intensified when the Geer Gang Crips fired shots into appellant’s residence and remained ongoing based upon what Noon described as the occurrence of “multiple shootings.” Noon testified that he is familiar with appellant, whom he knew to be a member of the Cherrywood Crips gang based upon his observation and appellant’s acknowledgement.

{¶ 51} Noon’s observation regarding appellant’s active participation in the Cherrywood Crips gang was supported by evidence of appellant’s tattoos on his stomach and chest, which indicated his affiliation with the Cherrywood Crips. While there was no evidence as to when appellant received these tattoos, the state introduced further evidence establishing appellant’s ongoing participation in the Cherrywood Crips gang, namely certified copies of two judgment entries relating to appellant’s prior felony convictions for attempt to commit carrying a concealed weapon in 2016 and possession of cocaine in 2018. Noon testified that these convictions are indicative of gang participation.

{¶ 52} In *Reese*, we found that the state introduced sufficient evidence to prove that Reese was an active participant in the Cherrywood Crips Gang. *Reese, supra*, 6th Dist. Lucas L-20-1111, 2021-Ohio-3506, at ¶ 56-62. There, we relied upon evidence of Reese’s “gang-related encounters with law enforcement officers, acknowledgement of gang membership, and incriminating social media posts” to reach our conclusion. *Id.* at ¶ 58.

{¶ 53} As in *Reese*, the state introduced evidence here to establish that appellant acknowledged his gang affiliation to officers, demonstrated such gang affiliation in social media posts placed on Facebook as recently as 2019, and participated in gang-related criminal activity during the time period set forth in the indictment. Moreover, the state introduced extensive evidence of appellant’s participation in the drive-by shooting on July 14, 2019. Indeed, appellant’s unchallenged convictions for aggravated murder,

murder, felonious assault, improper discharge of a firearm into a habitation, and improperly handling firearms in a motor vehicle all stem from the drive-by shooting that was fueled by the ongoing gang rivalry between the Geer Gang Crips and the Cherrywood Crips.

{¶ 54} In light of the foregoing, we find that the state’s evidence was sufficient to prove that appellant was an active participant in the Cherrywood Crips criminal gang during the five-year period contained in the indictment. As in *Reese*, the state offered evidence to establish appellant’s historical gang involvement and also provided evidence to prove that appellant participated in the drive-by shooting as one of the shooters.

iii. Knowledge of the gang’s pattern of criminal gang activity

{¶ 55} Having found that the state’s evidence was sufficient to prove the first two elements of R.C. 2923.42(A), we turn now to the third element involving appellant’s knowledge that the Cherrywood Crips gang engages in or has engaged in a pattern of criminal gang activity.

{¶ 56} Under R.C. 2923.41(B)(1), a “pattern of criminal gang activity” means that “persons in the criminal gang have committed, attempted to commit, conspired to commit, been complicitors in the commission of, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of two or more” specified offenses. These specified offenses include, *inter alia*, felonies or acts committed by a juvenile that would be felonies if committed by an

adult. R.C. 2923.41(B)(1)(a). The “pattern of criminal gang activity” is established when at least one of the two or more specified offenses is a felony, at least one of the two or more specified offenses occurs on or after January 1, 1999, the most recent of the specified offenses occurs within five years of another of the specified offenses, and the specified offenses are committed on separate occasions by two or more persons. R.C. 2923.41(B)(2).

{¶ 57} Relevant to this element, the state’s evidence consisted of several certified judgment entries involving appellant, Reese, Allison, and two other individuals, Jajuan Lawrence and Antwione Goetz, all of whom were known members of the Cherrywood Crips gang. These judgment entries reveal convictions for specified felony offenses that occurred after January 1, 1999, and were committed by separate individuals on separate occasions.

{¶ 58} Reese committed the most recent of the specified felony offenses, having weapons while under disability, on August 13, 2019. Two months prior to that offense, on June 14, 2019, Allison also committed, and was subsequently convicted for, the specified felony offense of having weapons while under disability. Additional judgment entries evidencing the commission of specified felony offenses within the five-year period preceding the most recent specified felony offense were admitted into the record. These entries reveal that Allison committed four additional specified felony offenses,

appellant committed two additional specified felony offenses, and Lawrence and Goetz each committed one additional specified felony offense.

{¶ 59} The above-referenced judgment entries clearly establish a “pattern of criminal gang activity” under R.C. 2923.41(B). Further, the offenses reflected in the judgment entries were committed during the time period in which appellant was an active participant in the Cherrywood Crips gang, and thus it is reasonable to infer that he knew of the gang’s criminal activity and the felony convictions that flowed therefrom (including his own). *Reese, supra*, 6th Dist. Lucas L-20-1111, 2021-Ohio-3506, at ¶ 62. Therefore, we find that the state introduced sufficient evidence to establish appellant’s knowledge that the Cherrywood Crips gang engages in or has engaged in a pattern of criminal gang activity.

iv. Purposeful promotion, furtherance, or assistance of, or commission of or engagement in, any criminal conduct

{¶ 60} Finally, we turn to the issue of whether the state introduced sufficient evidence to prove the fourth element of R.C. 2923.42(A) involving appellant’s purposeful promotion, furtherance, or assistance of, or commission of or engagement in, any criminal conduct. Under R.C. 2923.41(C), “criminal conduct” includes those offenses that are specified felony offenses under R.C. 2923.41(B)(1).

{¶ 61} In examining the sufficiency of the state’s evidence as to the active participation element of R.C. 2923.42(A), we noted that appellant’s unchallenged convictions in this case stem from his proven involvement as a shooter in the drive-by

shooting that took place on July 14, 2019. The same evidence that led the trier-of-fact to conclude that appellant was one of the shooters involved in the gang-related drive-by shooting establishes that appellant purposefully promoted, furthered, assisted, or committed criminal conduct. Therefore, we find that the state introduced sufficient evidence to prove the fourth and final element of R.C. 2923.42(A). Having already found the state's evidence sufficient as to the other three elements of participating in a criminal gang under R.C. 2923.42(A), we find no merit to appellant's sufficiency argument on appeal. Accordingly, appellant's first assignment of error is not well-taken.

B. Constitutionality of R.C. 2967.271

{¶ 62} In his second assignment of error, appellant argues that the indefinite sentencing scheme set forth in R.C. 2967.271 (the “Reagan Tokes Law”) is facially unconstitutional because it vests power in the executive branch to determine whether he has violated the law, thereby infringing upon the exclusive power of the judicial branch and violating the separation of powers doctrine. Further, appellant argues that the Reagan Tokes Law violates his procedural due process rights by denying him access to counsel at every disciplinary hearing.

{¶ 63} Constitutional challenges to the Reagan Tokes Law have been raised in this court several times. We first addressed this argument in *State v. Maddox*, 6th Dist. Lucas No. L-19-1253, 2020-Ohio-4702, where we determined that a constitutional challenge to the Reagan Tokes Law becomes ripe only after a defendant has completed the minimum

term of the indefinite sentence and has been denied release. *Id.* at ¶ 7-14. In *Maddox*, and in subsequent decisions from this court in which we followed *Maddox*, we have dismissed assignments of error raising constitutional challenges to the Reagan Tokes Law as not ripe for review. See *State v. Leak*, 2021-Ohio-3139, --- N.E.3d ---- (6th Dist.); *State v. Wheeler*, 6th Dist. Wood No. WD-21-019, 2021-Ohio-3062; *State v. Cook*, 6th Dist. Lucas No. L-20-1205, 2021-Ohio-2619; *State v. Figley*, 6th Dist. Lucas No. L-20-1167, 2021-Ohio-2622; *State v. Stenson*, 6th Dist. Lucas No. L-20-1074, 2021-Ohio-2256; *State v. Zambrano*, 6th Dist. Lucas No. L-19-1224, 2021-Ohio-1906; *State v. Shepard*, 6th Dist. Lucas No. L-20-1070, 2021-Ohio-1844; *State v. Perry*, 6th Dist. Wood No. WD-20-025, 2021-Ohio-1748; *State v. Savage*, 6th Dist. Lucas No. L-20-1073, 2021-Ohio-1549; *State v. Bothuel*, 6th Dist. Lucas No. L-20-1053, 2021-Ohio-875; *State v. Acosta*, 6th Dist. Lucas Nos. L-20-1068, L-20-1069, 2021-Ohio-757; *State v. Sawyer*, 2020-Ohio-6980, 165 N.E.3d 844 (6th Dist.); *State v. Montgomery*, 6th Dist. Lucas No. L-19-1202, 2020-Ohio-5552; *State v. Velliquette*, 2020-Ohio-4855, 160 N.E.3d 414 (6th Dist.).

{¶ 64} Consistent with the foregoing decisions, we find that appellant’s second assignment of error is not ripe for review and is hereby dismissed. In his brief to this court, appellant states: “If this Court is not willing to re-examine its past holdings that Reagan Tokes is not ripe for review, then Brown respectfully requests that this Court certify the issue of whether it is ripe for review as a conflict to the Ohio Supreme Court.”

{¶ 65} On December 28, 2020, the Ohio Supreme Court determined that a conflict exists between *Maddox* and *State v. Leet*, 2d Dist. Montgomery No. 28670, 2020-Ohio-4592, 2020 WL 5743293; *State v. Ferguson*, 2d Dist. Montgomery No. 28644, 2020-Ohio-4153, 2020 WL 4919694; *State v. Barnes*, 2d Dist. Montgomery No. 28613, 2020-Ohio-4150, 2020 WL 4919780; and *State v. Guyton*, 12th Dist. Butler No. CA2019-12-203, 2020-Ohio-3837, 2020 WL 4279793. Based on this conflict, the Ohio Supreme Court accepted review of the following certified question:

Is the constitutionality of the provisions of the Reagan Tokes Act, which allow the Department of Rehabilitation and Correctio[n] to administratively extend a criminal defendant's prison term beyond the presumptive minimum term, ripe for review on direct appeal from sentencing, or only after the defendant has served the minimum term and been subject to extension by application of the Act?

State v. Maddox, 160 Ohio St.3d 1505, 2020-Ohio-6913, 159 N.E.3d 1150.

{¶ 66} Section 3(B)(4), Article IV of the Ohio Constitution provides that “[w]henever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.” The Ohio Supreme Court set forth the following three requirements which must be met in order to certify a case:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be “upon the same question.” Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Whitelock v. Gilbane Bldg. Co., 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

{¶ 67} Upon review, we find that our judgment in this appeal is in conflict with decisions of the Second and Twelfth District Courts of Appeals. Thus, we hereby certify a conflict to the Supreme Court of Ohio, pursuant to Article IV, Section 3(B)(4), of the Ohio Constitution, on the same issue certified in *Maddox* and set forth above.

III. Conclusion

{¶ 68} In light of the foregoing, the judgment of the Lucas County Court of Common Pleas is affirmed. The costs of this appeal are assessed to appellant under App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J.

JUDGE

Christine E. Mayle, J.

JUDGE

Gene A. Zmuda, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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