

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	No. 112001
FRANK GIGLIO,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 29, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-665723-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Warren W. Griffin, Assistant Prosecuting Attorney, *for appellee*.

Jonathan N. Garver, *for appellant*.

SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Frank Giglio appeals his convictions in this case. Upon review, we affirm.

{¶ 2} On December 3, 2021, Giglio was charged in a ten-count indictment with offenses arising from a shooting incident that occurred on or about July 10,

2021. Giglio pled not guilty to the indictment, and the case proceeded to trial in July 2022.

{¶ 3} Surveillance video of the incident depicted two teenagers, identified as J.P. and D.I., who walked into a street from the sidewalk near an intersection while looking in the direction of a red minivan that was approaching. A black car is seen alongside the teenagers and turned left onto the cross street ahead of the approaching minivan. Litter in the minivan could be seen through the windshield of the vehicle. D.I., who was straddling a bicycle, approached the center line of the street. Neither teenager appeared to have a weapon. As the minivan approached, the teenagers quickly turned and ran in the other direction, and then a single shot was fired from the minivan. The teenagers were not struck by the bullet, which hit the passenger door of a nearby Chevy Tahoe truck, which was parked in the street and owned by another individual. The minivan then accelerated and drove away.

{¶ 4} Testimony at trial revealed that a few minutes before the incident occurred, J.P. was at home with his mom, dad, and brother, all of whom were about to leave their house, which was around the block from the intersection observed in the surveillance video. J.P. heard a man call his mom a “bitch” and looked and saw a dark red van with a “bunch of garbage” driving down the street. J.P. testified he had never seen the man before. J.P.’s mom testified that she stepped in the middle of the street and said “who are you talking to?” but then she shrugged it off and proceeded on with her daily routine.

{¶ 5} J.P. then went down the street with his friend D.I., with whom he had plans to play basketball that day. When they reached the intersection, J.P.'s mom, who was in a vehicle with her husband at the intersection, turned left onto the cross street, seconds ahead of Giglio. She testified that she was taking her husband to work.

{¶ 6} J.P. testified that he entered the roadway with the purpose of addressing the driver of the red minivan for having disrespected his mother. He conceded that he entered the roadway in a manner designed to get Giglio to pay attention to him. D.I. likewise testified that all he wished to do was to tell the person in the van to "watch his mouth" and "to be respectful." He indicated that as he approached the vehicle he said, "what's up?" D.I. did not expect the driver to shoot at him. He was not carrying any weapon.

{¶ 7} J.P. testified that he ran as soon as he saw Giglio holding a gun, which is consistent with the video. D.I. similarly turned and ran as soon as he saw the gun. He testified he heard the gunshot after he turned. J.P.'s mother, who testified she heard multiple shots, made a U-turn and went to her son, who stated "he shot at me, he shot at me."

{¶ 8} J.P.'s mom contacted the police. She then proceeded to take her husband to work. She spotted the red minivan on her way and informed law enforcement of the location. J.P. and D.I. proceeded to go play basketball.

{¶ 9} During an interview with a police detective, Giglio asked, "He's not dead, is he?" Giglio stated that he's "not a pansy" and "handles his own affairs." He

admitted that he did not observe the teenagers with a weapon. After viewing the surveillance video, Giglio confirmed he was the one driving the red minivan. He stated that he would pay for any damage to the Chevy Tahoe truck. The detective conceded that there was no evidence that more than one gunshot was fired.

{¶ 10} Other testimony and evidence were introduced, which we have also reviewed. Though the testimony had some inconsistencies, the description of what transpired at the intersection was largely consistent with the video surveillance. At trial, jury instructions on self-defense were provided.

{¶ 11} The state dismissed Counts 5 and 6 (felonious assault—motor vehicle) and deleted certain specifications from other counts. The trial court granted a Crim.R. 29 motion on Count 1 for attempted murder (J.P.). Giglio was found not guilty by the jury on Count 2 for attempted murder (D.I.) and not guilty by the court of Count 9 (having a weapon while under disability). The jury found Giglio guilty of felonious assault under Count 3 (J.P.) and Count 4 (D.I.), each with one- and three-year firearm specifications and a five-year drive-by shooting specification; Count 7 for discharge of a firearm on or near prohibited premises (a public road or highway) with one- and three-year firearm specifications; Count 8 for improper handling of a firearm in a motor vehicle with one- and three-year firearm specifications; and Count 10 for criminal damaging (2008 Chevy Tahoe truck). The trial court merged the felonious assault offense on Counts 3 and 4 for sentencing, with the state electing to proceed on Count 3. The trial court imposed a prison sentence of eight years for the firearm specifications in Count 3 and three years for the firearm specification in

Count 7, which were run consecutive for a total prison term of 11 years. Giglio was sentenced to five years of community control on each of the underlying charges in Counts 3, 4, 7, 8, and 10.

{¶ 12} Giglio timely filed this appeal.

{¶ 13} Under his first assignment of error, Giglio claims the evidence is insufficient to support his convictions. “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.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), 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.* “If the state fails to present sufficient evidence on every element of an offense, then convicting a defendant for that offense violates the defendant’s right to due process of law.” *State v. Messenger*, Slip Opinion No. 2022-Ohio-4562, ¶ 13, citing *State v. Thompson*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997).

{¶ 14} Among other arguments, Giglio argues that the state failed to show that he acted knowingly or attempted to cause harm to the alleged victims. Giglio asserts that the evidence shows the teenagers escalated the conflict by aggressively charging his minivan, that he fired a single warning shot to scare off his pursuers and terminate the threat, and that the shot was not intended to harm anyone. He

further maintains that because only one shot was fired, the evidence is insufficient as a matter of law to support two counts of felonious assault. He also asserts that there was no evidence of any contemporaneous statements suggesting he wanted to harm the victims and that there was no forensic analysis of the trajectory of the bullet. Additionally, Giglio claims that there was insufficient evidence to sustain all his convictions because he was acting in self-defense. He maintains that the case involves two teenagers and two parents who aggressively chased after him to try and stop his vehicle, causing him to believe that they presented a threat of imminent, serious physical harm.

{¶ 15} Our review of the testimony and evidence in this case reflects that there was sufficient evidence to conclude that Giglio knowingly attempted to cause serious physical harm to the two victims and that he had not merely fired a warning shot. Although Giglio argues only a single shot was fired, other cases have recognized that even if only one shot has been fired, multiple felonious assault convictions may be supported by evidence showing that the shot was fired by a defendant toward multiple victims in the line of fire. *See, e.g., State v. A.W.M.*, 10th Dist. Franklin No. 18AP-523, 2020-Ohio-4707, ¶ 143; *State v. Prater*, 2018-Ohio-932, 108 N.E.3d 665, ¶ 26 (10th Dist.); *State v. Massalay*, 10th Dist. Franklin No. 15AP-544, 2016-Ohio-779, ¶ 38. Here, the record reflects that the two teenage victims were standing “very” close together and that they turned to run away as soon as Giglio brandished a firearm. The surveillance video shows Giglio fired his gun in the direction of the teenagers after they turned away and while they were posing no

immediate threat to Giglio. D.I. testified that he turned to run because he “[did not] want to get shot” and saw “a gun pointed towards my direction.” The bullet struck a nearby truck that was parked in the street. A diagram shown by defense counsel also demonstrates the line of fire, and Giglio’s own statement to the detective was “he’s not dead, is he?” Viewing this and other evidence that was presented in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of each of the offenses for which Giglio was convicted were proven beyond a reasonable doubt. There was sufficient evidence to support the criminal convictions.

{¶ 16} Insofar as Giglio argues that there was insufficient evidence to sustain all his convictions because he was acting in self-defense, “the defendant has the burden of producing legally sufficient evidence of self-defense to trigger the state’s [burden of persuasion] to overcome that evidence.” *Messenger*, Slip Opinion No. 2022-Ohio-4562, at ¶ 19; *see also State v. Barker*, 8th Dist. Cuyahoga No. 111597, 2023-Ohio-453, ¶ 47 (“[The defendant] has the burden of producing sufficient evidence he acted in self-defense.”). The state’s “burden of disproving the defendant’s self-defense claim beyond a reasonable doubt is subject to a manifest-weight review on appeal,” not a sufficiency review. *See Messenger* at ¶ 27.¹ The first assignment of error is overruled.

¹ That the trial court provided the jury with an instruction regarding self-defense means the trial court concluded the defendant put forward sufficient evidence that he was acting in self-defense. *See Messenger* at ¶ 26.

{¶ 17} Under his second assignment of error, Giglio claims his convictions are against the manifest weight of the evidence. When evaluating a claim that a jury verdict is against the manifest weight of the evidence, “we 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 we must reverse the conviction and order a new trial.” *State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.3d 1092, ¶ 168, citing *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. Reversing a conviction based upon the weight of the evidence should occur “only in the exceptional case in which the evidence weighs heavily against the conviction.” *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 18} Giglio incorporates the arguments made under his first assignment of error and maintains that the story told by the state’s three witnesses was incredible. In this case, the testimony was largely consistent with the shooting that was captured on video. Credible testimony and evidence were presented showing that Giglio pointed a gun in the direction of the teenage victims and discharged his firearm after they had turned and had begun to run away. Neither of the teenagers were carrying a weapon. The bullet hit a nearby vehicle that appeared to be in line with the teenagers. The state met its burden of persuading the jury beyond a reasonable doubt that Giglio was not acting in self-defense. Upon our review of the entire record, we find this is not an exceptional case in which the evidence weighs

heavily against the challenged convictions. The second assignment of error is overruled.

{¶ 19} Under his third, fourth, and fifth assignments of error, Giglio claims that the trial court committed prejudicial error in instructing the jury on self-defense.

{¶ 20} In this matter, the jury instructions that were provided were correct statements of the law and were consistent with the Ohio Jury Instructions section on self-defense. *See* 2 Ohio Jury Instructions, CR Section 421.21 (2021). However, the Supreme Court of Ohio has stated that “a court’s instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings.” *State v. Jackson*, 22 Ohio St.3d 281, 284, 490 N.E.2d 893 (1986), quoting *State v. Guster*, 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981).

{¶ 21} Giglio raises three challenges to the jury instructions that were provided in this case. First, he claims the trial court erred by instructing the jury that self-defense does not apply if the defendant violated a duty to retreat. Giglio claims that because there was no evidence tending to show that the defendant was not in a place in which he lawfully had a right to be, there was no basis for the jury to consider the possibility of retreat as a factor in determining whether appellant acted in self-defense. However, even if we were to accept that the jury should not have been instructed on the duty to retreat, Giglio has failed to demonstrate that he was prejudiced.

{¶ 22} A claim of self-defense includes the following elements:

“(1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he [or she] was in imminent danger of death or great bodily harm and that his [or her] only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger.”

Messenger, Slip Opinion No. 2022-Ohio-4562, at ¶ 14, quoting *State v. Barnes*, 94 Ohio St.3d 21, 24, 2002-Ohio-68, 759 N.E.2d 1240. As recognized in *Jackson*, “the elements of self-defense are cumulative” and “[i]f the defendant fails to prove *any one* of [the] elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense.” (Emphasis sic.) *Id.* at 284.

{¶ 23} It is apparent from the verdict herein that the jury believed the testimony of the state’s witnesses and did not believe Giglio had a bona fide belief that he was in imminent danger of death or great bodily harm from the victims and that his only means of escape from such danger was in the use of such force. The testimony of the witnesses, as corroborated by the video, demonstrates that Giglio shot his firearm in the direction of the two unarmed victims after they turned to run away. Reviewing all the evidence presented, no reasonable jury could have believed that Giglio acted in self-defense. Therefore, the third assignment of error is overruled. *See State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 77.

{¶ 24} Second, Giglio claims the trial court erred by instructing the jury that self-defense does not apply if the defendant used “unreasonable force.” Giglio offers no legal basis to support this argument. In the context of self-defense, “[i]t is well-

established that the defendant may only use ‘that force which is reasonably necessary to repel the attack.’” *State v. Rhymer*, 1st Dist. Hamilton No. C-200164, 2021-Ohio-2908, ¶ 19, quoting *State v. Williford*, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990). In this matter, the trial court’s instruction complied with Ohio law regarding the defendant’s use of deadly force in self-defense and the requirement that the force used cannot be unreasonable. *See Rhymer* at ¶ 21. The fourth assignment of error is overruled.

{¶ 25} Third, Giglio claims the trial court erred by failing to instruct the jury that a person is presumed to have acted in self-defense if the person against whom defensive force is used is in the process of entering a vehicle occupied by the person using the defensive force. In this matter there was absolutely no evidence to suggest that either D.I. or J.P. was attempting to enter Giglio’s vehicle or to suggest that Giglio had good reason to believe they were in the process of attempting to enter his vehicle. The record shows that Giglio revved the engine and accelerated as he drove past the victims, who had turned to run away from the minivan. We find nothing in the record to support Giglio’s contention that he was entitled to the instruction under the circumstances presented. The fifth assignment of error is overruled.

{¶ 26} Under his sixth assignment of error, Giglio claims he was denied a fair trial and due process because of prosecutorial misconduct during closing arguments. The Supreme Court of Ohio has stated that “[t]he test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused’s substantial rights.” *State v. Garrett*, Slip

Opinion No. 2022-Ohio-4218, ¶ 144, citing *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). It is well settled that considerable latitude is afforded in closing arguments. *State v. Maurer*, 15 Ohio St.3d 239, 269, 473 N.E.2d 768 (1984), citing *State v. Pustare*, 33 Ohio App.2d 305, 312, 295 N.E.2d 210 (8th Dist.1973). The conduct of a prosecuting attorney during trial is not a ground for error unless that conduct deprives the defendant of a fair trial. *Id.* at 266, citing *State v. Papp*, 64 Ohio App.2d 203, 211, 412 N.E.2d 401 (9th Dist.1978). Accordingly, “[t]he touchstone of the analysis ‘is the fairness of the trial, not the culpability of the prosecutor.’” *Garrett* at ¶ 144, citing *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

{¶ 27} In this matter, Giglio claims that the assistant prosecutor falsely represented that Giglio had “aimed a gun at [the victims,]” that he “pointed it directly at D.I.,” and that if he was successful, “[D.I.] would have been shot in the head.” However, D.I. testified that he saw “a gun pointed towards my direction” as the minivan was approaching and there was evidence indicating that the bullet struck a nearby truck in line with the teenage victims. Additionally, the prosecutor was free to express an opinion on what the state believed the evidence showed; and in the end, the jury found Giglio not guilty of attempted murder. Giglio further argues that the prosecutor improperly appealed to the passions of the jury in commenting upon “a gun’s ability to destroy life” and this being “something as a society we see all the time.” These remarks were within the “degree of latitude” parties are given in their concluding remarks. *See State v. Powell*, 8th Dist.

Cuyahoga No. 99386, 2014-Ohio-2048, ¶ 64. The statements herein were not so inflammatory as to render the jury's decision a product solely of passion and prejudice against the defendant. *See State v. Williams*, 23 Ohio St.3d 16, 20, 490 N.E.2d 906 (1986). Giglio also argues that the prosecutor misrepresented the facts by suggesting Giglio came back to the scene and was seeking a confrontation at the intersection. Even if these or any of the other challenged remarks were improper, the remarks were not so prejudicial as to affect Giglio's substantial rights. The sixth assignment of error is overruled.

{¶ 28} Under his seventh assignment of error, Giglio claims that the trial court committed plain error by failing to merge the convictions for felonious assault, improper handling of a firearm in a motor vehicle, and discharge of a firearm on or near a prohibited premises. He maintains that the three offenses arose from the same conduct, involving what he claims was a single warning shot and the same animus.

{¶ 29} To demonstrate plain error regarding the failure to merge allied offenses, “an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus * * *.” *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. Plain error should be noticed “only in ‘exceptional circumstances and only to prevent a manifest miscarriage of justice.’” *State v. Bond*, Slip Opinion No. 2022-Ohio-4150, ¶ 18, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶ 30} Here, Giglio fails to demonstrate that plain error occurred. Felonious assault involves harm to a particular victim, whereas the victim of discharging a firearm upon or over a public road or highway is the public at large. *See State v. Williams*, 2019-Ohio-794, 132 N.E.3d 1233, ¶ 49 (8th Dist.); *State v. Carzelle*, 8th Dist. Cuyahoga No. 105425, 2018-Ohio-92, ¶ 9-10. Additionally, the improper handling of a firearm in a motor vehicle caused separate and identifiable harm. In this case, not only were the two teenage victims in the street, but the bullet struck a parked Chevy truck that belonged to another individual. The Supreme Court of Ohio has recognized offenses are of dissimilar import “when the defendant’s conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.” *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 23. Because no manifest miscarriage of justice would occur if these counts were not merged, we are not obligated to reverse the sentence. The seventh assignment of error is overruled.

{¶ 31} Under his eighth assignment of error, Giglio claims that the trial court abused its discretion and denied him his constitutional right to counsel by denying his request for a continuance to obtain counsel of his choice, which was made on the morning of trial.

{¶ 32} An appellate court will not reverse the denial of a continuance absent an abuse of discretion. *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, 804 N.E.2d 1, ¶ 45, citing *State v. Jones*, 91 Ohio St.3d 335, 342, 744 N.E.2d 1163 (2001). “In evaluating a motion for a continuance, ‘several factors can be considered: the

length of the delay requested, prior continuances, inconvenience, the reasons for the delay, whether the defendant contributed to the delay, and other relevant factors.” *Id.*, quoting *State v. Landrum*, 53 Ohio St.3d 107, 115, 559 N.E.2d 710 (1990).

{¶ 33} The record in this case reflects that the case initially was set for trial in May 2022, and Giglio failed to appear. The case was reset for trial in July 2022. On the date of trial, defense counsel revealed that he was informed that morning by Giglio that he was retaining new counsel. Giglio stated to the court that he was requesting a continuance. Although Giglio had reached out to another attorney, no notice of appearance had been filed. Also, the trial court indicated that it had not heard anything from Giglio prior to the date of trial regarding dissatisfaction with defense counsel’s representation and that the case had been going on for a very long time. Defense counsel stated that he was not asking to withdraw, would provide a competent defense, and was ready to try the case. It also is apparent that any continuance would have inconvenienced the state, the jury, the witnesses who were scheduled to appear for trial, and the trial court. As this court has previously recognized, “[a] defendant’s request to substitute retained counsel of his choice must be timely and not disrupt the trial proceedings.” *State v. Nicholson*, 8th Dist. Cuyahoga No. 89245, 2007-Ohio-6653, ¶ 14, citing *State v. Cox*, 4th Dist. Lawrence No. 94CA01, 1994 Ohio App. LEXIS 5686 (Dec. 12, 1994).

{¶ 34} Our review reflects that the trial court acted within its sound discretion in denying Giglio’s request for a continuance and that no abuse of discretion occurred. The eighth assignment of error is overruled.

{¶ 35} Under his ninth assignment of error, Giglio claims that the trial court committed prejudicial error by imposing consecutive sentences on Counts 3 and 7 without making the findings necessary to support the imposition of consecutive sentences. The state argues that the trial court was mandated to impose an 11-year prison term for the firearm specifications and was not required to make any consecutive sentence findings. As this court has previously held, “R.C. 2929.14(C)(4) consecutive sentence findings do not apply to specifications[,]” which are sentencing enhancements. *State v. Goins*, 8th Dist. Cuyahoga No. 103874, 2016-Ohio-5930, ¶ 11-12. Furthermore, it has also been recognized that “because the imposition of consecutive sentences for firearm specifications is mandatory under R.C. 2929.14(B)(1)(g), [a] trial court [is] not required to make R.C. 2929.14(C)(4) findings before imposing multiple and consecutive firearm specifications.” *State v. Nelson*, 8th Dist. Cuyahoga No. 110593, 2022-Ohio-1665, ¶ 42, citing *State v. Brown*, 8th Dist. Cuyahoga No. 102549, 2015-Ohio-4764, ¶ 19; *see also State v. Beatty*, 12th Dist. Clermont No. CA2021-10-057, 2022-Ohio-3099, ¶ 5; *State v. Freeman*, 7th Dist. Mahoning No. 14 MA 25, 2014-Ohio-5725, ¶ 31. The ninth assignment of error is overruled.²

{¶ 36} We are not persuaded by any other argument not specifically addressed.

² We note that in *State v. Bollar*, Slip Opinion No. 2022-Ohio-4370, the Supreme Court of Ohio recognized that “R.C. 2941.25’s merger provision does not override R.C. 2929.14(B)(1)(g)” and that “R.C. 2929.14(B)(1)(g) requires that courts impose prison terms for the two most serious firearm specifications ‘of which the offender is convicted or to which the offender pleads guilty.’” *Bollar* at ¶ 21, 23, quoting R.C. 2929.14(B)(1)(g).

{¶ 37} Judgment affirmed.

It is ordered that appellee recover from 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. 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.

SEAN C. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
EMANUELLA D. GROVES, J., CONCUR