

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 111986
 v. :
 :
 JOHNNY EVANS, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 6, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-659883-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Benjamin Fuchs, Assistant Prosecuting
Attorney, *for appellee*.

Russell S. Bensing, *for appellant*.

MARY EILEEN KILBANE, J.:

{¶ 1} Defendant-appellant Johnny Evans (“Evans”) appeals from his
convictions and sentence for improperly discharging a firearm into a habitation,

felonious assault, and having weapons while under a disability following a jury trial. For the reasons that follow, we affirm.

Factual History

{¶ 2} This matter stems from a shooting incident on May 13, 2021, when Evans allegedly fired gunshots into the home located at 3425 East 114th Street in Cleveland, Ohio where K.T. lived with his aunt and legal guardian, S.T., and K.T.’s younger sister. K.T. and his family lived two houses south of their neighbor, Jeneen Bennett (“Bennett”), who lived at 3417 East 114th Street. Janisha Whitaker (“Whitaker”) lived at 3415 East 114th Street, just north of the Bennett home. It is not clear from the record whether Evans lived with Whitaker, but it is evident that Evans regularly spent time at the house with Whitaker and her children.

{¶ 3} Around 7:00 p.m., K.T. was standing in his front yard and two of the Whitaker children were playing with a frisbee in their front yard. The children’s frisbee landed in K.T.’s yard; K.T. returned the frisbee to them.

{¶ 4} At the time K.T. returned the frisbee — at which point K.T. was standing in the Bennett’s front yard — a light-colored car, similar in appearance to a Tahoe, stopped on the street near the Whitaker home. K.T. was unfamiliar with the driver of the car but recognized the passenger as Evans. Evans exited the vehicle “and started screaming at the kids, started hitting the kids. Then he turned to [K.T.] and started talking crazy to [him].” Tr. 464. Evans yelled at K.T., telling him to go and get his father. K.T. responded “I don’t need my daddy, I got me.” Tr. 466.

{¶ 5} K.T. initially testified that following the verbal exchange with Evans, K.T. was called across the street by the mother of K.T.'s friend, Bobby, who lived at 3424 East 114th Street. Bobby's mother had heard the exchange between K.T. and Evans, and she attempted to calm K.T. down. After speaking with Bobby and Bobby's mom for three to four minutes, K.T. observed Evans leave the Whitaker home and cross the street to the red house situated at 3420 East 114th Street. As Evans walked up the driveway of the red house where the "guy with the dreadlocks" lived, K.T. saw Evans was carrying a black 9mm gun with a 50-round magazine. Tr. 522. K.T. also provided conflicting testimony that he saw Evans carrying a firearm when Evans exited the backyard of the Whitaker home and that Evans had a firearm in his possession when Evans and K.T. initially exchanged words. While these details were inconsistent, K.T. maintained that he observed Evans in possession of a firearm.

{¶ 6} At the suggestion of Bobby's mother, K.T. and Bobby returned to K.T.'s house to "calm down." Tr. 529. When K.T. and Bobby entered K.T.'s house, Evans was standing in the driveway of the red house talking to the man with dreadlocks.

{¶ 7} K.T. testified that upon returning to his home from across the street, K.T., Bobby, and K.T.'s little sister went upstairs to the room located in the back of the house where K.T. thought they would be the safest. While in the second story back room, K.T. heard gunshots. K.T. ran to look out the second floor window that looked out onto East 114th Street. K.T. saw Evans in the middle of the street,

running south towards K.T.'s home, and then he saw Evans point his gun at K.T.'s house. This was the last time K.T. saw Evans. After seeing Evans with his gun directed at K.T.'s house, K.T. ran to the back room. While running to the back room, K.T. heard gunshots and bullets entering his house. K.T. testified that he heard one to five gunshots and the bullets all entered the main floor of the house rather than the second floor.

{¶ 8} After the shooting, K.T. called his mom on his cell phone. There was conflicting testimony whether K.T. also called S.T. who was at work when the shooting occurred. K.T. did not call 911, but Bennett, K.T.'s neighbor, and S.T., K.T.'s aunt, placed 911 calls. Bennett made a 911 call at 7:12 p.m. to report approximately 40 shots were fired outside her house. Bennett further stated in the call that the gunshots were related to an incident between the neighbors on either side of her: "dude is shooting over to our next-door neighbor." State's ex. No. 124, 911 call of Bennett. At 7:14 p.m., S.T. called 911 to report that her nephew, K.T., and a neighbor "had words" and the neighbor subsequently pulled a gun and was shooting at her home with her niece and nephew inside the home. State's ex. No. 123, 911 call of S.T.

{¶ 9} Following the shooting, K.T.'s mother, S.T., and the police arrived at K.T.'s residence. The police investigated the alleged shooting by Evans. The police observed bullet holes at K.T.'s home, the Bennett home, and the house situated at 3403 East 114th Street. The police testified that 9mm shell casings were recovered in front of K.T.'s and the Bennett's homes. K.T. testified that he observed shell

casings in the same area in the street where he saw Evans running with his gun aimed at K.T.'s house. The bullet holes at K.T.'s house were situated in the exterior of the house, the front door, the front room of the house, and the kitchen. K.T. and S.T. testified that the bullet holes were not present prior to May 13, 2021.

{¶ 10} K.T. testified that Evans never pointed the gun directly at him nor did K.T. see Evans shoot at K.T.'s house. Yet, K.T. testified that “[Evans] pointed [the gun] to my house. I [was] in my house.” Tr. 524. K.T. testified that following the shooting with Evans, he also heard gunshots from the Buckeye Road area. K.T. testified that the gunshots in the Buckeye area were unrelated to the incident with Evans.

{¶ 11} The trial testimony included the audio recordings of the 911 calls from Bennett and S.T. as well as six additional emergency calls placed between 7:12 p.m. and 7:18 p.m. relaying concerns about gunshots. The 7:13 p.m. caller reported that she was seated on her porch at East 115th Street and Union Avenue and heard over 10 gunshots that may have occurred in the Kinsman Road area. During the call, the individual reported hearing eight additional gunshots. Another 911 call at 7:13 p.m. reported that a white Chrysler had driven up and down East 114th Street, near Union Avenue, for the past 10 minutes, shooting into houses. Gunshots could be heard in the background. At 7:14 p.m., a 911 call from a driver stated he had heard repetitive shooting — approximately 20 gunshots — around East 116th Street or East 112th Street, between Union Avenue and Kinsman Road. The caller also stated a white Chrysler in the area was driving recklessly, and it may be the source of the gunshots.

At the same time, another 911 call came from an individual at East 114th Street and Kinsman Road who stated someone was “shooting the street up” and she had heard 15 gunshots. The caller was concerned about her boyfriend who resided on East 114th Street between Union Avenue and Regalia Avenue. At 7:15 p.m., a 911 caller reported hearing approximately 20 gunshots on East 114th Street, and the shooting had not stopped. At 7:18 p.m., a 911 caller stated that for 20 minutes a white Chrysler had been randomly shooting throughout the neighborhood of East 114th Street and Union Avenue. The caller reported two people in the car and that the car had driven up and down East 114th Street at least three times in the past five minutes.

{¶ 12} Upon completion of the police investigation at K.T.’s home, the police officers were dispatched to the north end of East 114th due to a shooting where East 114th Street dead ends into Regalia Avenue. As part of their investigation, the police obtained a neighbor’s surveillance camera that shows at 7:17 p.m., a man was walking northbound on the sidewalk of East 114th Street, a few houses before the intersection with Regalia Avenue. At the same time, a light-colored Lincoln SUV was driving in the same direction. After the car passed the pedestrian, the pedestrian ran into the street, pulled out a firearm, and shot at the rear of the Lincoln SUV. The Lincoln SUV proceeded down East 114th Street and turned left onto Regalia Avenue. While not captured by the camera, the trial testimony established that the Lincoln SUV came to a stop just after turning onto Regalia Avenue. The

police later determined the Lincoln SUV was driven by Royale Respress (“Respress”).

{¶ 13} Almost immediately after the Lincoln SUV turned onto Regalia Avenue, the camera depicts a white Chrysler driving west on Regalia Avenue and turning left (south) onto East 114th Street. The Chrysler stopped for the pedestrian/shooter to enter the front passenger door of the car. The Chrysler then reversed down East 114th Street; stopped in the intersection of East 114th Street and Regalia Avenue so that at least one occupant of the car could shoot at the Lincoln SUV; and sped away down East 114th Street.

{¶ 14} The police speculated that a connection existed between the alleged East 114th Street shooting by Evans and the shooting of Respress in his Lincoln SUV at the intersection of East 114th Street and Regalia Avenue, but the police were unable to confirm the two shootings were related. K.T. testified that he did not see a white Chrysler on East 114th at the time of his interactions with Evans and the alleged shooting by Evans.

{¶ 15} On May 16, 2021, as part of the police investigation of the shooting at K.T.’s home, a photo array of six men was shown to K.T. K.T. identified Evans, with 100 percent certainty, as the individual who shot at K.T.’s house on May 13, 2021. Approximately ten months later, on March 22, 2022, a second photo array was presented to K.T. in an effort to identify the individual driving the car that dropped Evans off at the Whitaker home. K.T. was 50 percent certain the person he identified

in the photo array, Respress, was the driver of the car in which Evans was a front seat passenger.

Procedural History

{¶ 16} On July 1, 2021, in Cuyahoga C.P. No. CR-21-659883, a Cuyahoga County Grand Jury indicted Evans on four counts: Count 1, improperly discharging a firearm into a habitation (K.T.'s home) in violation of R.C. 2923.161(A)(1); Count 2, felonious assault in violation of R.C. 2903.11(A)(2); Count 3, improperly discharging into a habitation (Bennett's home) in violation of R.C. 2923.161(A)(1); and Count 4, having weapons while under disability in violation of R.C. 2923.13(A)(3). Counts 1, 2, and 3 also carried one- and three-year firearm specifications. On July 8, 2021, Evans pleaded not guilty to the indictment.

{¶ 17} On August 1, 2022, trial commenced. K.T. and S.T. testified at trial on behalf of the state as well as officers Bolivar Villafuente and Demetrius Madison and detectives Darryl Johnson, Eric Strick, and Zara Hudson. Lisa Carbone, a 911 dispatcher, and Marvin Cross, a private investigator hired by the defense, testified for Evans. Neither Bennett nor any other neighbors testified at trial. The trial court granted Evans's Crim.R. 29 motion for acquittal on Count 3, improperly discharging a firearm into the Bennett's home. On August 9, 2022, the jury returned a verdict finding Evans guilty of Count 1, improperly discharging a firearm into K.T.'s home, with one- and three-year firearm specifications; Count 2, felonious assault, with one- and three-year firearm specifications, and Count 4, having weapons while

under disability. The trial court referred Evans for a presentence investigation and report.

{¶ 18} On August 30, 2022, the trial court held a sentencing hearing. The trial court found Counts 1 and 2 were not allied offenses of similar import and the one-year and three-year firearm specifications merged. The trial court sentenced Evans to six years on Count 1; seven to ten and one-half years on Count 2, pursuant to the Reagan Tokes Law; and three years on Count 4. The court sentenced Evans to three years on the firearms specifications under Counts 1 and 2; the firearm specifications were ordered to be served consecutively to each other and to the underlying sentence in Count 2. The trial court imposed a total stated prison term of 13 to 16.5 years.

{¶ 19} On September 27, 2022, Evans filed a timely notice of appeal, presenting verbatim these assignments of error:

Assignment of Error No. 1: Defendant's conviction of felonious assault was based on insufficient evidence, in derogation of his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

Assignment of Error No. 2: The modifications to sentencing for first and second degree felonies made by the Reagan-Tokes Act violate the Defendant's right to jury trial, as protected by the Fifth and Fourteenth Amendment to the United States Constitution, and the separation of powers doctrine embedded in the Ohio Constitution.

Legal Analysis

{¶ 20} In his first assignment of error, Evans argues there was insufficient evidence to find him guilty of felonious assault where there was no evidence that

Evans pointed his gun directly at K.T.; all the bullets entered the first floor of K.T.'s house while the occupants of the house were on the second floor at the time of the shooting; and no one was harmed during the shooting.

{¶ 21} Where a party challenges the sufficiency of the evidence supporting a conviction, a determination of whether the state has met its burden of production at trial is conducted. *State v. Hunter*, 8th Dist. Cuyahoga No. 86048, 2006-Ohio-20, ¶ 41, citing *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997). An appellate court reviewing sufficiency of the evidence must determine “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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. With a sufficiency inquiry, an appellate court does not review whether the state’s evidence is to be believed but whether, if believed, the evidence admitted at trial supported the conviction. *State v. Starks*, 8th Dist. Cuyahoga No. 91682, 2009-Ohio-3375, ¶ 25, citing *Thompkins* at 387. A sufficiency of the evidence argument is not a factual determination, but a question of law. *Id.*

{¶ 22} To prove felonious assault, the state must prove beyond a reasonable doubt that

- (A) No person shall knowingly do either of the following:
 - (1) Cause serious physical harm to another * * *;
 - (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance.

R.C. 2903.11. To establish Evans’s state of mind, the state had to prove that Evans acted knowingly, regardless of his purpose, when he was aware that his conduct would probably cause a certain result. R.C. 2901.22(B). “When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.” R.C. 2901.22(B). “A defendant’s knowledge may be inferred from the totality of the surrounding circumstances.” *State v. Nicholson*, 8th Dist. Cuyahoga No. 110595, 2022-Ohio-2037, ¶ 184. Additionally, the attempt statute, R.C. 2923.02(A), states that “[n]o person, purposely or knowingly * * * shall engage in conduct that, if successful, would constitute or result in the offense.”

{¶ 23} A plain reading of the applicable statute indicates that the state was not required to prove actual harm; an attempt to cause physical harm can satisfy the statutory requirements. R.C. 2903.11(A)(2). *See State v. Scott*, 8th Dist. Cuyahoga Nos. 106451 and 106474, 2018-Ohio-3791, ¶ 24 (“the state was only required to demonstrate that Scott knowingly attempted to cause [the victim] physical harm by means of a deadly weapon”). Thus, Evans’s argument that no one was harmed during the shooting does not support a claim that there was insufficient evidence at trial.

{¶ 24} Further, the felonious assault conviction was supported by the trial evidence that showed Evans knowingly attempted to cause physical harm to K.T. with a firearm. The evidence demonstrated that K.T. and Evans exchanged harsh

words while standing in their front yards. Evans either had a gun at that time or retrieved a gun shortly thereafter. K.T. further testified that he crossed the street to speak with Bobby's mother and Evans crossed the street to talk with the man with dreadlocks. While Evans was outside with the man with dreadlocks, K.T. and Bobby returned to K.T.'s house and entered through the front door. Within a few minutes, K.T. observed Evans running towards K.T.'s home with a gun in hand; Evans pointed the gun at K.T.'s home; and K.T. heard gunshots and bullets entering his house: "I didn't see him shoot, but I [saw] him point the gun at the house, and after — right after he pointed the gun, shots started to enter my house." Tr. 545.

{¶ 25} After the shooting subsided, K.T. observed bullet holes in the interior and exterior of the first floor of his house. K.T. and S.T. testified that the bullet holes did not exist prior to May 13, 2021. Bennett's 911 call on May 13, 2021, reported a shooting at her home due to a situation between the neighbors on either side of her house; the Bennetts lived in between K.T.'s home and the Whitaker home where Evans stayed. The police officers testified that they observed shell casings in front of the K.T.'s and the Bennett homes. The police administered a photo array to K.T. within days of the shooting and, with 100 percent certainty, K.T. identified Evans as the May 13, 2021 shooter.

{¶ 26} The evidence was sufficient to establish Evans knowingly attempted to cause K.T. physical harm by means of a deadly weapon when Evans shot a firearm at K.T.'s home where K.T. was present. Evans's intent to cause serious physical harm to K.T. was inferred from his shooting a gun in the direction of K.T.'s home

where K.T. and Bobby had just recently entered the front door. *Scott* at ¶ 25, citing *State v. Phillips*, 75 Ohio App.3d 785, 792, 600 N.E.2d 825 (2d Dist.1991); *see also State v. Grant*, 8th Dist. Cuyahoga No. 90465, 2008-Ohio-3970, ¶ 18, quoting *State v. Gregory*, 90 Ohio App.3d 124, 131, 628 N.E.2d 86 (12th Dist.1993) (“The shooting of a gun in a place where there is a risk of injury to one or more person supports the inference that appellant acted knowingly.”).

{¶ 27} Evans could not have known if K.T. and the other occupants of the house were located on the first or second floor of K.T.’s home when Evans shot his firearm. Thus, we find Evans’s argument that he did not knowingly attempt to harm K.T. because all the gunshots were limited to the first floor of the house lacks merit.

{¶ 28} While the record contains testimony about a second shooting that occurred at the intersection of East 114th Street and Regalia Avenue within a few minutes of the shooting at K.T.’s house, the second shooting neither relates to nor negates Evans’s sufficiency of the evidence argument.

{¶ 29} Evans’s first assignment of error is overruled.

Reagan Tokes Law

{¶ 30} In his second assignment of error, Evans argues that the Reagan Tokes Law is unconstitutional and, therefore, his sentence imposed under that law is invalid. Specifically, Evans argues that his indefinite sentence under the Reagan Tokes Law, enacted under S.B. 201 and R.C. 2901.011, is unconstitutional because it violates his constitutional right to a jury trial and the separation-of-powers doctrine.

The state argues that this court found the Reagan Tokes Law constitutional in *State v. Delvallie*, 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.).

{¶ 31} This court's en banc decision in *Delvallie* overruled Evans's challenges to S.B. 201 that are presented in this appeal. We are constrained to follow *Delvallie* and, therefore, find that the Reagan Tokes Law is not unconstitutional. We must find that Evans's sentence, pursuant to the Reagan Tokes Law, was not a violation of his constitutional rights and, thus, his second assignment of error is overruled.

{¶ 32} 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.

MARY EILEEN KILBANE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN A. GALLAGHER, J., CONCUR

N.B. Judge Mary Eileen Kilbane joined the dissenting opinion by Judge Lisa B. Forbes and the concurring in part and dissenting in part opinion by Administrative Judge Anita Laster Mays in *Delvallie* and would have found the Reagan Tokes Law unconstitutional.