

[Cite as *State v. Almashni*, 2010-Ohio-898.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. **92237**

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

YASIN ALMASHNI

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506300

BEFORE: Gallagher, A.J., Sweeney, J., and Jones, J.

RELEASED: March 11, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Paul Mancino, Jr.
75 Public Square
Suite 1016
Cleveland, Ohio 44113-2098

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Debra A. Obed
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Defendant-appellant, Yasin Almashni, appeals his conviction from the Cuyahoga County Court of Common Pleas. Finding no merit to the arguments set forth, we affirm.

{¶ 2} On January 26, 2008, the victim, Ahmad Abukhalil, went to the Shell gas station located at Lee Road and Harvard Avenue in Cleveland, Ohio.

The victim went inside to pay for his gasoline. Almashni, who is the cousin of the victim's wife, was behind the bulletproof glass with another employee. Almashni started an argument with the victim and then walked out from behind the counter.

{¶ 3} The victim testified that he tried to walk away from Almashni, but he blocked the way. Almashni became loud and aggressive. He went back behind the counter, grabbed a gun, and started threatening the victim with it.

The victim testified that the gun was pointed at his stomach. Almashni shot at the victim, missing him and hitting the glass door.

{¶ 4} Amjad Alsabbar ("A.J.") testified that he was working with Almashni on the night of the incident. He stated that the victim came into the store and Almashni started cussing at the victim. The two began to argue, and A.J. tried to calm them down. Almashni went back behind the bulletproof glass, grabbed the gun, and started threatening the victim with it.

A.J. tried to get Almashni to stop. A.J. heard the gunshot and the glass door shattering.

{¶ 5} Emad Tayeh testified that on the night of the incident, he was pumping gas at the Shell gas station when he heard a gunshot and saw that the glass door was shattered. He also heard Almashni threaten the victim while the police were taking him into custody. Almashni said, in Arabic, that he was getting locked up for 24 hours and that he would shoot the victim when he got out.

{¶ 6} Officers Kenneth Kirk and Shane Bauhof responded to the call for “shots fired.” Officer Bauhof spoke with Almashni, who showed him where the gun was hidden. Almashni was arrested.

{¶ 7} Officer Kirk testified that he inspected the glass door that had been shot and stated that the bullet entered approximately two and one-half to three feet from the ground. He also looked for bullet fragments, ricochets, and markings to indicate a ricochet and found no evidence that the bullet ricocheted off the ground.

{¶ 8} Almashni was charged with aggravated menacing and felonious assault with firearm specifications. He was found guilty as charged and sentenced to a total of 11 years in prison. Almashni appeals, advancing nine assignments of error for our review.

{¶ 9} “I. Defendant was denied due process of law when the court failed to conduct a competency hearing after referring defendant for an evaluation to determine competency to stand trial and sanity at the time of the offense.”

{¶ 10} A defendant who is legally incompetent may not stand trial. *Pate v. Robinson* (1966), 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815; *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, citing *State v. Berry*, 72 Ohio St.3d 354, 1995-Ohio-310, 650 N.E.2d 433. In Ohio, a defendant is presumed to be competent unless it is demonstrated by a preponderance of the evidence that he is incapable of understanding the nature and objective of the proceedings against him or of presently assisting in his defense. R.C. 2945.37(G).

{¶ 11} R.C. 2945.37(B) allows the trial court, prosecutor, or the defense to raise the issue of defendant’s competence to stand trial. If the request is made before trial, a competency hearing is required. *State v. Were*, 94 Ohio St.3d 173, 2002-Ohio-481, 761 N.E.2d 591.

{¶ 12} In this case, Almashni’s first attorney requested a psychiatric evaluation of the defendant. The court granted the request and referred Almashni to the court psychiatric clinic for an evaluation as to competence to stand trial and sanity at the time of the act. No hearing was held regarding the results of the evaluation.

{¶ 13} It is error for the trial court not to hold a hearing after a request has been made. Nevertheless, “failure to hold a mandatory competency hearing is harmless error where the record fails to reveal sufficient indicia of incompetency.” *State v. Bock* (1986), 28 Ohio St.3d 108, 110, 505 N.E.2d 965, citing *Drope v. Missouri* (1975), 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103. Accordingly, “[t]he right to a hearing ‘rises to the level of a constitutional guarantee where the record contains “sufficient indicia of incompetence,” such that an inquiry * * * is necessary to ensure the defendant’s right to a fair trial.’” *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 156, quoting *State v. Berry*, 72 Ohio St.3d at 359. “Incompetency must not be equated with mere mental or emotional instability or even with outright insanity. A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel.” *Bock*, supra, at 110.

{¶ 14} After reviewing the record, we find that the record fails to contain sufficient indicia of incompetence. There is no motion in the file describing the original defense attorney’s reasons for requesting the evaluation, nor does the court’s journal entry indicate why the evaluation was ordered. Further, neither the second nor the third defense attorney requested an evaluation or brought to the court’s attention that Almashni was incompetent. We find that there is nothing in the record to indicate Almashni was incapable of

understanding the nature and objective of the proceedings against him or of presently assisting in his defense. Therefore, the error was harmless, and Almashni's first assignment of error is overruled.

{¶ 15} "II. Defendant was denied due process of law when the court allowed hearsay testimony and also improper expert testimony."

{¶ 16} Under this assignment of error, Almashni argues that Officer Kirk was improperly allowed to testify to what other officers told him regarding the store's video surveillance. Officer Kirk testified that he was told the video did not show the area where the shooting occurred. Also, Almashni complains that Officer Kirk gave expert testimony regarding the lack of ricochet marks from the bullet.

{¶ 17} The trial court has broad discretion in the admission or exclusion of evidence. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of syllabus. Absent an abuse of discretion and a showing of material prejudice, a trial court's ruling on the admissibility of evidence will be upheld. *State v. Martin* (1985), 19 Ohio St.3d 122, 129, 483 N.E.2d 1157.

{¶ 18} Evid.R. 602 requires that the witness have personal knowledge of the matter about which he is testifying.

{¶ 19} Although Officer Kirk did not have personal knowledge about the video surveillance, we find that his testimony was not materially prejudicial.

The testimony about the video surveillance was so innocuous it did not help the state or prejudice the defendant.

{¶ 20} Regarding Officer Kirk's testimony that he did not find any evidence that the bullet ricocheted off the tile floor and into the glass door, Evid.R. 701 provides: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue." We find that the officer was testifying as a lay witness and that his testimony was not based on some specialized knowledge. Officer Kirk's opinion was based on his training and experience as a police officer, and his testimony was helpful to determine a fact in issue. Therefore, his testimony was properly admitted under Evid.R. 701.

{¶ 21} Almashni's second assignment of error is overruled.

{¶ 22} "III. Defendant was denied due process of law when the court refused to grant a continuance when it was determined that there was a video showing the entire transaction."

{¶ 23} Almashni contends that the trial court erred by denying his request for a continuance of his sentencing hearing. He insists that he "learned from someone who knew the owner" that a video of what happened existed.

{¶ 24} A trial court has broad discretion when ruling on a motion for continuance. *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078. Thus, a trial court's denial of a motion for a continuance will only be reversed on appeal if the trial court abused its discretion. *Id.* An abuse of discretion connotes more than an error of law or judgment, and implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 25} In *Unger*, the court identified certain factors that should be considered in determining whether a continuance is appropriate. These factors include the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel, and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance that gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case. *Id.* at 67-68.

{¶ 26} We find that the trial court did not abuse its discretion when it denied Almashni's request for continuance. Almashni's claim that the videotape was "newly discovered evidence" that may be exculpatory was disingenuous. The record reflects that he was well aware that the tape existed prior to trial. Accordingly, his third assignment of error is overruled.

{¶ 27} “IV. Defendant was denied due process of law by reason of improper prosecutorial argument.”

{¶ 28} Almashni complains that the prosecutor improperly argued that Almashni did not shoot at the ground because there were no ricochet marks. In addition, he complains that the prosecutor stated that “the elements of felonious [assault] had been proven.”

{¶ 29} Parties are granted wide latitude in closing arguments. *State v. Smith*, 97 Ohio St.3d 367, 377, 2002-Ohio-6659, 780 N.E.2d 221. Parties may comment on the evidence presented, as well as the inferences that can be drawn from the evidence. *State v. Martin*, Cuyahoga App. No. 91276, 2009-Ohio-3282, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

The test for prosecutorial misconduct during closing argument is whether the remarks were improper and, if so, whether they prejudicially affected the accused’s substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. To determine prejudice, the record must be reviewed in its entirety. *State v. Lott* (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293.

{¶ 30} After a review of the record, we find that the prosecutor’s statements were a fair comment on the evidence presented and were not improper. Accordingly, we overrule Almashni’s fourth assignment of error.

{¶ 31} “V. Defendant was denied due process of law when the court refused to give an instruction on the act of pointing the weapon.”

{¶ 32} Almashni contends that the trial court should have instructed the jury in accordance with *State v. Brooks* (1989), 44 Ohio St.3d 185, 542 N.E.2d 636, syllabus, wherein the Ohio Supreme Court held that “[t]he act of pointing a deadly weapon at another, without additional evidence regarding the actor’s intention, is insufficient evidence to convict a defendant of the offense of ‘felonious assault’ as defined by R.C. 2903.11(A)(2).”

{¶ 33} We find no merit to Almashni’s assertion. This is not a case where the defendant only pointed the gun at the victim. Almashni pointed the gun at the victim, threatened to shoot him, and then shot at him. He was not entitled to the *Brooks* instruction.

{¶ 34} Almashni’s fifth assignment of error is overruled.

{¶ 35} “VI. Defendant was denied his right to present a defense when the court would not instruct upon the lesser offense of aggravated assault.”

{¶ 36} When reviewing a trial court’s jury instructions, the proper standard of review for an appellate court is whether the trial court’s refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. When a defendant requests an instruction on an inferior offense, the burden is on the defendant to persuade the fact-finder of the mitigating elements of the offense. See *State v. Livingston*, Cuyahoga App. No. 88714, 2007-Ohio-3664; *State v. Hill* (1996), 108 Ohio App.3d 279, 284, 670

N.E.2d 555; *State v. Rhodes* (1992), 63 Ohio St.3d 613, 590 N.E.2d 261, syllabus.

{¶ 37} Aggravated assault is an inferior offense to felonious assault, meaning that “its elements are identical to those of felonious assault, except for the additional mitigating element of serious provocation.” *State v. Deem* (1988), 40 Ohio St.3d 205, 210-211, 533 N.E.2d 294; see, also, R.C. 2903.12(A).

A jury instruction should be given for an inferior offense, if under any reasonable view of the evidence, and when all of the evidence is construed in a light most favorable to the defendant, a reasonable jury could find that the defendant had established by a preponderance of the evidence the mitigating circumstance of serious provocation. *Rhodes*, 63 Ohio St.3d at 617-618.

{¶ 38} In *State v. Mack*, 82 Ohio St.3d 198, 1998-Ohio-375, 694 N.E.2d 1328, the Ohio Supreme Court explained that in order to instruct on the inferior offense of aggravated assault, an objective standard must be applied to determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage. That is, the provocation must be “sufficient to arouse the passions of an ordinary person beyond the power of his or her control.” If this objective standard is met, the inquiry shifts to a subjective standard to determine whether the defendant in the particular case “actually was under the influence of sudden passion or in a sudden fit of rage.” *Id.*, citing *State v. Shane* (1992), 63 Ohio St.3d 630, 634-635, 590 N.E.2d 272, 276.

{¶ 39} Words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations. *Shane*, 63 Ohio St.3d at paragraph two of the syllabus. Also, past incidents or verbal threats do not satisfy the test for reasonably sufficient provocation when there is sufficient time for cooling off. *State v. Huertas* (1990), 51 Ohio St.3d 22, 31-32, 553 N.E.2d 1058, 1068-1069. Finally, fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage. See *State v. Collins* (1994), 97 Ohio App.3d 438, 445-446, 646 N.E.2d 1142, 1146-1148; *State v. Williams* (Aug. 13, 1992), Cuyahoga App. No. 60819.

{¶ 40} We find that the trial court did not abuse its discretion when it refused to give an instruction on aggravated assault. There is no evidence in the record that there was provocation by the victim sufficient to arouse the passions of an ordinary person beyond his power or control. The evidence established that Almashni started the argument, went back behind the bulletproof glass and retrieved the gun, threatened and then shot at the victim. There is no evidence that the victim did anything except try to leave.

{¶ 41} Almashni's sixth assignment of error is overruled.

{¶ 42} "VII. Defendant was denied due process of law when the court overruled defendant's motion for judgment of acquittal."

{¶ 43} A motion for acquittal under Crim.R. 29(A) is governed by the same standard used for determining whether a verdict is supported by

sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 260, 2006-Ohio-2417, 847 N.E.2d 386. “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. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” (Citations and quotations omitted.) *Id.*

{¶ 44} Almashni claims that the elements of aggravated menacing and felonious assault were not met. He argues that there was no evidence that the victim believed the defendant would cause him serious physical harm, and that there was no attempt to cause physical harm because he pointed the gun at the ground and not at the victim.

{¶ 45} R.C. 2903.21 defines aggravated menacing as knowingly causing another to believe that the offender will cause serious physical harm. R.C. 2903.11 defines felonious assault as knowingly causing or attempting to cause physical harm to another.

{¶ 46} The testimony at trial was that Almashni repeatedly threatened to shoot the victim and then shot at him. In addition, after Almashni was arrested, he threatened the victim that he would be out in 24 hours. The victim testified that he believed that Almashni would shoot him when he got out of jail. We find that the evidence was sufficient to establish the essential

elements of both crimes. Accordingly, we overrule Almashni's seventh assignment of error.

{¶ 47} "VIII. Defendant was denied due process of law when the court vindictively sentenced defendant after allocution."

{¶ 48} Almashni complains that the trial court vindictively sentenced him after he exercised his right to speak at sentencing. The trial court stated: "Well, congratulations, Mr. Almashni. You talked your way into more prison than I intended to give you upon coming out on the bench with that lovely tale of horse hockey." Almashni was sentenced to the maximum eight years on the felonious assault conviction and three years on the firearm specification. In addition, he was sentenced to six months on the menacing by stalking, which was to run concurrent to the felonious assault charge.

{¶ 49} The United States Supreme Court has held that a trial court violates the Due Process Clause of the Fourteenth Amendment when it imposes a harsher sentence motivated by vindictive retaliation. *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656. Vindictive sentencing cases often discuss instances when a defendant is resentenced to a greater sentence than his or her original sentence after an appeal or withdrawal of a guilty plea, or when a defendant claims the trial court punished him or her for going to trial.

{¶ 50} This case does not involve a resentencing, and Almashni does not claim that he was punished for going to trial; instead, Almashni claims that he was punished for exercising his right to allocution.

{¶ 51} The Ohio Supreme Court has determined that Crim.R. 32(A)(1) confers an absolute right of allocution. *State v. Green*, 90 Ohio St.3d 352, 358, 2000-Ohio-182, 738 N.E.2d 1208; *State v. Campbell*, 90 Ohio St.3d 320, 324-325, 2000-Ohio-183, 738 N.E.2d 1178. “The purpose of allocution is to allow the defendant an additional opportunity to state any further information which the judge may take into consideration when determining the sentence to be imposed.” *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 828, 592 N.E.2d 884. See, also, *State v. Muntaser*, Cuyahoga App. No. 81915, 2003-Ohio-5809. It is the defendant’s last opportunity to plead his case or express remorse. *State v. Green*, supra.

{¶ 52} Although trial courts have full discretion to impose a prison sentence within the statutory range and are not required to make findings or give reasons for imposing the maximum, or consecutive sentences, the trial court must still consider the purposes of the felony sentencing statute as set forth in R.C. 2929.11 and in R.C. 2929.12, which provides factors to consider relating to the seriousness of the offense and recidivism of the offender. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470; *State v. Mathis*, 109 Ohio St.3d 54, 62, 2006-Ohio-855, 846 N.E.2d 1. One of the

factors the trial court is to consider is the defendant's remorse or lack thereof. A review of the record demonstrates that Almashni expressed no remorse and continued to blame the victim. We find that Almashni's sentence was well within the trial court's discretion, and Almashni's due process rights were not violated. His eighth assignment of error is overruled.

{¶ 53} "IX. Defendant was denied due process of law and equal protection of the law when he was sentenced for a second degree felony when the defendant was only convicted of attempted felonious assault."

{¶ 54} Almashni claims he was convicted of attempted felonious assault, a felony of the third degree. We find no merit to his claim.

{¶ 55} Almashni was charged with and convicted of felonious assault in violation of R.C. 2903.11(A)(2), which states that no person shall knowingly cause or *attempt* to cause physical harm to another by means of a deadly weapon. It is a felony of the second degree. The transcript clearly reflects that Almashni attempted to cause physical harm by means of a deadly weapon. Accordingly, his ninth assignment of error is overruled.

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, ADMINISTRATIVE JUDGE

JAMES J. SWEENEY, J., and
LARRY A. JONES, J., CONCUR