

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-199
v.	:	(C.P.C. No. 10CR-05-3130)
	:	
Kinneth T. Rice, Jr.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 20, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Darryl O. Parker, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

PER CURIAM.

{¶1} Defendant-appellant, Kinneth T. Rice, Jr., appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of felonious assault with a specification under R.C. 2941.145 relating to defendant's firearm and a specification under R.C. 2941.146 concerning defendant's discharging the firearm from a motor vehicle. Because the state presented sufficient evidence supporting

the conviction, and the trial court properly sentenced defendant consecutively on the specifications, we affirm.

I. Facts and Procedural History

{¶2} By indictment filed May 25, 2010, defendant was charged with five counts arising out of a drive-by shooting. Regarding the first victim Shawn Moorer, Count 1 charged defendant with felonious assault in violation of R.C. 2903.11, while Count 3 alleged attempted murder in violation of R.C. 2923.02 as it relates to R.C. 2903.02. Both included specifications under R.C. 2941.145 and 2941.146. Counts 2 and 4 charged defendant with the same offenses and specifications regarding victim Michael Robinson. Count 5 of the indictment alleged defendant had a weapon while under disability in violation of R.C. 2923.15.

{¶3} During the course of the trial that commenced on February 1, 2011, the trial court granted defendant's Crim.R. 29 motion on Counts 2 and 4 of the indictment. On February 3, 2011, the jury returned a guilty verdict on the remaining felonious assault count, including both specifications, but could not reach a verdict on the remaining attempted murder charge. The state requested a nolle prosequi of that count, and the trial court found defendant not guilty on the weapon under disability charge.

{¶4} By judgment entry filed February 4, 2011, the trial court sentenced defendant to six years for the felonious assault charge, plus three consecutive years of actual incarceration for the firearm specification and an additional five consecutive years of actual incarceration for the specification relating to discharging a firearm from a motor vehicle. Defendant appeals.

II. Assignments of Error

{¶5} On appeal, defendant assigns three errors:

1. The evidence against the Appellant did not support the Jury's verdicts finding the Appellant Guilty of Felonious Assault with Specification.
2. The Trial Court erred in overruling Appellant's Motion for Judgment of Acquittal pursuant to Ohio Criminal Rule 29.
3. The Trial court erred in running the gun specifications consecutively.

III. First and Second Assignments of Error—Crim.R. 29, Sufficiency and Manifest Weight of Evidence

{¶6} Defendant's first assignment of error challenges the sufficiency and manifest weight of the evidence; his second assignment of error asserts the trial court erred in failing to grant his Crim.R. 29 motion for acquittal. Because the assignments of error are interrelated, we address them jointly.

A. *Crim.R. 29 and Sufficiency of the Evidence*

{¶7} Pursuant to Crim.R. 29(A), a court "shall order the entry of the judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Because a Crim.R. 29 motion questions the sufficiency of the evidence, "[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence." *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶6; *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37.

{¶8} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. Sufficiency is a test of adequacy. *Id.* We construe the evidence in a light most favorable to the prosecution and

determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

{¶9} To prove defendant committed felonious assault, the state was required to demonstrate that defendant knowingly either (1) caused serious physical harm to another or (2) caused or attempted to cause physical harm to another by means of a deadly weapon or dangerous ordnance. R.C. 2903.11(A). Here, no one disputes that Moorer suffered physical harm as a result of being shot. Instead, the issue is identification of the shooter. The state acknowledges it could present no witness to identify defendant as the perpetrator of the shooting. Accordingly, the state relied on circumstantial evidence to prove identification.

{¶10} According to the state's evidence, Mary Givens-Hayes and her daughter Al-Nisha, were in the living room of her home at 679 Stanley Avenue on April 23, 2010 when she "heard two types of shots. One was a small sounding shot, like maybe a small gun. The other was a heavier shot, but it was two sounds." (Tr. 125.) Because someone previously had shot out a window of her home with a shotgun, she and her daughter were a bit nervous about the gunshots that evening. Al-Nisha took her son and the other small children to a back room while Givens-Hayes opened the front door. Givens-Hayes saw a parked black car across the street and "burgundy-ish looking car" trying to get away, but "it was hung up" on the driver's side "against a car that was there. And once it got away, it was going really fast. And it sped up and made a left turn on 18th Street." (Tr. 122.)

{¶11} Givens-Hayes also saw Moorer lying on the ground near the street directly in front of her, "hollering out that he had been hit." (Tr. 123.) Michael Robinson, the fiancée of one of Givens-Hayes' daughters, picked Moorer up from the ground and brought him into Givens-Hayes' house. Although someone already had called 911, a call again was placed. Police officers arrived, had Moorer taken to the hospital, and at 10:17 p.m. radioed a shooting at 679 Stanley Avenue. In examining the surroundings, police found damage to a vehicle parked on the street, pieces of a different car on the street surface, and two .22 shell casings; one of the shell casings was crushed, consistent with a car running over it.

{¶12} Amberly Smith, defendant's girlfriend at the time, owned a burgundy Honda. Testifying for the prosecution, she stated that earlier in the evening of April 23, she and her children had dinner with defendant. They parted ways with defendant after dinner to pursue different agendas, but later in the evening defendant came to her house, his left hand bleeding, and stated he had been shot. She testified that they ran to her Honda, a car she inherited from her mother, and drove to Children's Hospital, which was close to her home. She parked the car outside the emergency room.

{¶13} Kyle Cull, a patrol officer with the Columbus Division of Police, was on his way to the scene when he instead responded to Children's Hospital, where someone had walked into the emergency room suffering from a gunshot wound. Arriving about 10:25 p.m., he found a burgundy Honda parked outside the emergency room doors; it had blood on the passenger seat and door, as well as on the inside of the driver's door. The side

reflector on the front driver's side appeared to have been struck, and the damage appeared to be new.

{¶14} Ronda Siniff, an assault squad detective with the Columbus Division of Police, went to Children's Hospital to examine the vehicle. The driver's side appeared to have fresh damage, although some damage to the rear of the car did not look as new. While she was at the hospital, Siniff interviewed Smith, who saw the damage to the front of the driver's side and told Siniff it was new but testified to the contrary at trial; Smith confirmed the damage to the rear of the vehicle was old.

{¶15} Daniel Douglas of the Crime Scene Search Unit with the Columbus Division of Police assisted in examining the Honda. In it were found a spent shell casing in the center console cup holder, a spent shell casing in the center console under the ashtray, and a spent shell casing on the floor, a live shell casing, and suspected gunshot pellets on the driver's seat. An x-ray of defendant's hand conducted at Children's Hospital revealed the pellet-like objects imbedded in it were consistent with a shotgun blast and with the spent shotgun pellets recovered from the front driver's seat of the Honda.

{¶16} With the recovered items, Amy Myers of the Columbus Police Crime Laboratory conducted a ballistics examination of the cartridges and casings collected from Stanley Avenue and compared them to the spent .22 caliber cartridge cases from the Honda. She could not say they were fired from the same weapon, as the weapon never was found. She, however, testified the items found at Stanley Avenue and those recovered from the Honda were once chambered in the same firearm.

{¶17} Heather Collins, an assault squad detective with the Columbus Division of Police, teamed with other detectives in examining the site of the shooting. The parked black car on which the burgundy car was hung up evidenced some red paint transfer and paint chips from the other car. Collins was able to recover some debris from the headlight and from the side view mirror of the parked car, including what appeared to be part of the front headlight, along with paint chips from the left front fender. She took the car debris to the burgundy Honda parked at Children's Hospital, where the parts perfectly matched the damage to the Honda. Tim Welsh, also an assault squad detective with the Columbus Division of Police, picked up the broken car pieces on Stanley Avenue and testified the burgundy Honda at Children's Hospital had damage consistent with the broken parts.

{¶18} Donna Rose of the Bureau of Criminal Identification and Investigation analyzed the paint chips from the car on Stanley Avenue and compared it to the paint on the Honda parked at Children's Hospital. She testified "they were similar in color, texture, layer structure and chemical composition. And based on all of those findings, they may have originated from the same source." (Tr. 418-19.) Rose could not testify to a 100 percent certainty about the match because various things could have affected the paint. She nonetheless stated the two paints had the same chemical signature to a 98 percent degree of certainty. As she explained, "[t]he more things that you have that are consistent, the more valuable that it is, without us actually saying that it originated from that source." To illustrate the point, she stated that "if they didn't have the same colors, we wouldn't go any further. If we had the same color and layer structure and the chemical properties were different, then we would say that they did not originate from that source

because the chemical properties were different." (Tr. 427.) Here, although all of the samples matched, the nature of the analysis precluded a 100 percent assurance that they came from the same vehicle.

{¶19} With the noted evidence, the state presented sufficient evidence that defendant committed felonious assault with respect to Shawn Moorer, either as a principal offender or as a complicitor. Initially, the state presented evidence that witnesses heard two different types of gunfire, one a smaller sound and the other heavier. Mary Givens-Hayes testified to seeing the front driver's side of a burgundy car hung up on a black car parked on Stanley Avenue. After freeing itself, it turned left onto 18th Avenue and sped away.

{¶20} With that basis, the state presented evidence tying the burgundy car hung up on Stanley Avenue with the burgundy Honda in which defendant arrived at Children's Hospital. According to the state's evidence, the paint from the burgundy car transferred to the parked black automobile was consistent with the paint taken off the burgundy Honda in which defendant arrived at Children's Hospital. The state further strengthened the tie with testimony that the broken car parts found on Stanley Avenue matched the damage to the Honda, consistent with the officer's testimony the damage to the Honda appeared to be fresh.

{¶21} Confirming eyewitnesses' testimony that two different types of firearm appeared to be involved, police found both shotgun shell casings and .22 caliber casings in the Honda that was parked at Children's Hospital. X-rays of defendant's hand again connected defendant with the Honda, revealing what appeared to be gunshot pellets

consistent with those found in the Honda. Moreover, the shell casings found in the Honda were at one time chambered in the same gun with those found on Stanley Avenue.

{¶22} Although none of the evidence directly identified defendant in the crime committed against Moorer, the evidence circumstantially points to him. Because circumstantial evidence and direct evidence "inherently possess the same probative value," the state's evidence was sufficient to identify defendant as the perpetrator of the felonious assault against Moorer. *Jenks* at 272. Accordingly, the trial court properly denied defendant's Crim.R. 29 motion for acquittal.

B. Manifest Weight of the Evidence

{¶23} When presented with a manifest weight argument, we weigh the evidence in a manner to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley; Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, at ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶24} In contesting the manifest weight of the evidence, defendant notes a number of factors. Initially, he points out that no one identified him as the shooter and he had no gunshot residue on his hands. The state's witness, however, explained the absence of gun residue may be the result of the medical treatment defendant received at Children's Hospital for his injured left hand. Moreover, defendant need not be the actual shooter to be liable for felonious assault as a complicitor.

{¶25} Defendant also points to Smith, who stated her burgundy Honda was not moved after her return from dinner until defendant appeared, and she then drove him to Children's Hospital to attend to his injured left hand. The jury was not required to believe Smith, and her testimony presented grounds to find her testimony less than credible. Indeed, the state aptly summarized why a jury might choose not to believe her when, in a single question to her, it presented the evidence tying her car and defendant to the shooting on Stanley Avenue. See Tr. 198-99.

{¶26} Defendant also points to the inability of the ballistics analyst to state the ammunition evidence recovered from Stanley Avenue and the ammunition recovered from the Honda were fired from the same gun. Myers, however, explained that, in the absence of the firearm, such a conclusion could not be reached. She nonetheless testified she was able to determine both sets of ammunition at one time were chambered in the same gun. Similarly, although the paint analyst could not determine with 100 percent certainty that the paint chip removed from the black car on Stanley Avenue matched the paint on the Honda Accord, she explained her inability to do so with complete certainty, as well as the reliability of the analysis she was able to provide.

{¶27} In the final analysis, defendant challenges the jury's resolution of credibility issues. The jury, however, is charged with that responsibility, and defendant points to nothing suggesting the jury lost its way in resolving any inconsistencies in the state's evidence. Accordingly, defendant's conviction for felonious assault is not against the manifest weight of the evidence.

{¶28} Defendant's first and second assignments of error are overruled.

IV. Third Assignment of Error—Consecutive Sentences of Firearm Specifications

{¶29} Defendant's third assignment of error contends the trial court erred in not merging the two firearm specifications because they arose out of the same incident. Defendant was convicted of a firearm specification under R.C. 2941.145, which provides for a mandatory three-year prison term if the offender displayed, brandished, indicated possession of or used the firearm while committing the offense. He was also convicted of a specification under R.C. 2941.146, and it requires a mandatory five-year prison term where the offender discharged a firearm from a motor vehicle.

{¶30} As this court noted in *State v. Coffman*, 10th Dist. No. 09AP-727, 2010-Ohio-1995, former R.C. 2929.14(D)(1)(c), effective at the time of defendant's sentencing, governed defendant's R.C. 2941.146 specification for discharging a firearm from a motor vehicle, while R.C. 2929.14(D)(1)(a) governed sentencing on the firearm specification under R.C. 2941.145. See 2011 H.B. 86. In resolving the same argument in *Coffman*, this court concluded that "if an offense is properly accompanied with a specification under R.C. 2941.146 and another under 2941.145, there is no merger of the specifications, and the court must impose a sentence for each." *Id.* at ¶11, citing *State v. Bates*, 10th Dist.

No. 03AP-893, 2004-Ohio-4224, ¶8, 10. Moreover, the court noted, R.C. 2929.14(E)(1)(a) requires that the terms be served consecutively. *Id.*, citing *Bates* at ¶9-10. As in *Coffman*, the trial court did not err in not merging the sentences on the specifications and in requiring defendant to serve them consecutively. Defendant's third assignment of error is overruled.

V. Disposition

{¶31} Having overruled defendant's three assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

BRYANT, P.J., KLATT and SADLER, JJ., concur.
