

[Cite as *State v. Potts*, 2017-Ohio-4435.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104482

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTIAN A. POTTS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-601384-A

BEFORE: E.T. Gallagher, J., Kilbane, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: June 15, 2017

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Christian Potts (“Potts”), appeals from his convictions and sentence following a jury trial. He raises the following assignments of error for review:

1. Appellant’s convictions were not supported by sufficient evidence, and the trial court erred by denying his motion for acquittal.
2. The convictions were against the manifest weight of the evidence.
3. The trial court erred by admitting pretrial identifications that were tainted and where the jury was not instructed on the failure to comply with photo lineup procedures in accordance with R.C. 2933.83.
4. The trial court erred by giving the flight instructions over appellant’s objection.
5. Appellant’s sentence is contrary to law and consecutive sentences were not properly imposed.
6. The trial court erred by imposing costs where it found appellant indigent, did not impose costs in open court, and failed to consider his ability to pay.

{¶2} After careful review of the record and relevant case law, we affirm Potts’s convictions and sentence, but reverse and remand for the limited purpose of allowing Potts to move the trial court for a waiver of payment of court costs.

I. Procedural and Factual History

{¶3} In December 2015, Potts and his stepbrother, codefendant, Quentin Elder (“Elder”), were indicted for attempted murder in violation of R.C. 2903.02(A) and 2923.02, with firearm specifications; two counts of felonious assault in violation of R.C. 2903.11(A)(1) and 2903.11(A)(2), with firearm specifications; and discharge of a firearm

on or near prohibited premises in violation of R.C. 2923.162(A)(3), with firearm specifications. Potts was also indicted for illegal conveyance of a deadly weapon into a detention facility in violation of R.C. 2921.36(A)(1). Both defendants pleaded not guilty and the case proceeded to a jury trial, where the following facts were adduced.

Potts's indictment arose out of an incident that occurred on November 20, 2015. A few months prior to the incident, Potts's and Elder's friend Terrell Sherron was shot and killed; rumors were that he was killed by an individual named Saquon.

S.S., who was 14 years old at the time of the incident, testified that he was at his girlfriend's house, in her bedroom, at approximately 7 p.m. on November 20, 2015. S.S. testified that when his girlfriend's mother came home unexpectedly, he climbed out the window and down the fire escape. His girlfriend's mother came outside and chased him down the street, loudly calling his name, which sounds very similar to "Saquon."

S.S. testified that he ran away, but then, as he was walking down East 71st Street, a gray Chevy Impala screeched to a stop by him, and someone holding a gun got out of the backseat of the car. S.S. ran into a nearby field and hid among some trees. S.S. testified that the individual with the gun chased him into the field looking for him, but never found him.

When he thought the coast was clear, S.S. came out of the field and began walking down Melrose Avenue. As he approached East 71st Street, S.S. saw three males turn the corner from 71st Street and begin walking toward him. S.S. recognized one of the males as his friend C.S. S.S. had seen the other two males, "Slingshot" and "Dolo" (later identified by S.S. in court as Potts), around the neighborhood. Potts asked S.S. what neighborhood he was from, and Slingshot asked him if his name was Saquon. S.S. told them he was not Saquon and that he was not from the area. C.S. told the two men that S.S. was "cool" and not the man they were looking for.

S.S. testified that Potts then shot him in his eye. The three males ran away as S.S. fell to the ground. S.S. said that a woman got out of her car to help him but then got back in her car and drove away after shots were fired into the air. Potts and C.S. then came back, and Potts shot S.S. again, this time in his jaw.

The police immediately received multiple 911 calls about the shooting, and they responded to the scene. S.S. was rushed to the hospital, where doctors performed emergency life-saving surgery. Dr. Anne Kim testified at trial that S.S. lost an eye as a result of the shooting, and that a bullet is still lodged at the top of his spine.

The 911 calls were played for the jury. In one call, an anonymous caller reported seeing a male firing a gun into the air. The caller described the male as wearing a white-striped shirt and a black jacket with a white stripe on it. The caller reported that the male was getting into a gray Impala that was parked around the corner from where the shooting occurred. The caller said the Impala had a spoiler on the back and only one headlight. The caller stated that he was following the Impala and it was turning onto a one-way street behind a school.

Cleveland police officer Fridrich Kaufmann testified that he and his partner responded to the scene of the shooting, where they found a shell casing and a bullet. They also spoke with S.S. In light of what S.S. told them, Kaufmann and his partner began looking for the gray Impala. After being advised of the 911 call about where the Impala had gone, they found the Impala parked in a driveway on Everett Court, a one-way street behind Wade Park Elementary School and only a mile and a-half from where the shooting occurred. [Potts and Elder each resided in the home where the Impala was discovered.] Kaufmann testified that the night was cold but the hood of the Impala was warm, indicating that it had recently been driven. The police found Potts's identification and an obituary for Terrell Sherron in the car.

Officer Kaufmann testified that he observed four men sitting on or standing around the porch of the house where the Impala was found. One man was Potts; another was Elder, who was wearing the clothes described by the anonymous 911 caller. Potts denied having any weapons, but the police found three guns on or near Elder. The four men were arrested and tested at the jail for gunshot residue. Elder tested positive; no gun residue was found on Potts's hands.

When Potts was patted down after being processed and booked into jail, a corrections officer found a .25 caliber Raven Arms semi-automatic pistol in Potts's underwear. [The magazine retrieved from the pistol was empty.] Ballistic expert, Detective James Kooser, testified that the casing

found at the scene where S.S. was shot matched the .25 caliber pistol found on Potts.

State v. Elder, 8th Dist. Cuyahoga No. 104392, 2017-Ohio-292, ¶ 3-12.

{¶4} Detective Ronald James (“Det. James”), of the Cleveland Police Department, testified that on November 21, 2015, he was assigned to this case. Det. James stated that in the midst of his investigation he was contacted by Detective Saunders (“Det. Saunders”) of the Cleveland Metropolitan Housing Authority (“CMHA”). According to Det. James, Det. Saunders had indicated that she was familiar with S.S.’s family. On November 24, 2015, Det. James met with Det. Saunders at the hospital where S.S. was being treated. Prior to the hospital visit, Det. James created a photo array containing a photo of Potts and five other males. He also created a separate photo array containing a photo of Elder and five other males.

{¶5} Det. James testified that during the hospital interview, S.S. was conscious and coherent, but had difficulty communicating because he was on a ventilator and his mouth was wired shut. Nevertheless, Det. James stated that he was able to complete an interview and obtained a full statement from S.S. concerning his version of the events.

{¶6} With respect to the administration of the photo array, Det. James stated that he read the photo lineup instructions to S.S. in the presence of S.S.’s mother and that S.S. confirmed that he understood the instructions. Det. Saunders served as a blind administrator and presented S.S. with the photo arrays while Det. James waited in the hospital hallway. After Det. Saunders administered the photo arrays, she called Det.

James back into S.S.'s hospital room and indicated that he had picked suspect number 2, which was a photo of Potts.

{¶7} Det. James testified that

Due to [S.S.'s] limited mobility, he was unable to directly point, or circle at that point in time. So once he confirmed that he had made a selection, his mom circled it and she initialed it for him.

{¶8} During his cross-examination, Det. James explained that Det. Saunders knew S.S.'s family because they lived on CMHA property. Regarding her role as the blind administrator, Det. James testified that he did not believe Det. Saunders was biased. He testified that Det. Saunders did not know the identity of the suspects and was not provided with any information regarding his investigation into the shooting.

{¶9} C.S. testified on behalf of the state. He stated that he knew Potts as "Dello" and knew him from the neighborhood. C.S. identified Potts in court as the person he referred to as "Dello" throughout his testimony. C.S. testified that on the night of the shooting, he was walking down the street with his friend "Slingshot" in the immediate proximity of S.S. and Potts. C.S. stated that he heard Potts ask S.S. where he was from and subsequently heard a gun shot. According to C.S., he immediately ran and did not look back. He heard approximately two more gun shots as he was running. C.S. testified that he did not see who fired the shots.

{¶10} At the close of the state's case, the trial court denied Potts's and Elder's Crim.R. 29 motions for acquittal. At the conclusion of trial, the jury found Potts guilty as indicted. It found Elder not guilty of attempted murder and felonious assault, but

guilty of firing a firearm on or near prohibited premises, in violation of R.C. 2923.162(A)(3).

{¶11} At Potts’s sentencing hearing, the trial court merged Counts 1, 2, 3, and 4 as allied offenses of similar import. The state elected to pursue sentencing on Count 1, attempted murder, and the court imposed an eleven-year sentence to run consecutive to the attached three-year firearm specification. In addition, the trial court sentenced Potts to a three-year prison term on Count 5, illegal conveyance of a deadly weapon into a detention facility, to run consecutive to the prison term imposed on Count 1, for a total prison sentence of 17 years.

{¶12} Potts now appeals from his convictions and sentence.

II. Law and Analysis

{¶13} For the purposes of judicial clarity, we review Potts’s assignments of error out of order.

A. Administration of Photo Array

{¶14} In his third assignment of error, Potts argues “the trial court erred by admitting pretrial identifications that were tainted and where the jury was not instructed on the failure to comply with photo lineup procedures in accordance with R.C. 2933.83.”

{¶15} “An identification derived from unnecessarily suggestive procedures, which have a likelihood of leading to a misidentification, violates a defendant’s right to due process.” *State v. Fields*, 8th Dist. Cuyahoga No. 99750, 2014-Ohio-301, ¶ 10, citing *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

{¶16} Courts apply a two-step test in determining the admissibility of challenged identification testimony (1) the defendant must demonstrate that the identification procedure was unnecessarily suggestive; and (2) if the defendant meets this burden, the court must consider whether the procedure, under the totality of the circumstances, was so unduly suggestive as to give rise to irreparable mistaken identification. *State v. Wills*, 120 Ohio App.3d 320, 324, 697 N.E.2d 1072 (8th Dist.1997), citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), and *State v. Garner*, 74 Ohio St.3d 49, 61, 656 N.E.2d 623 (1995). If the defendant fails to meet the first part of his burden, the court need not consider the totality of the circumstances test under the second prong. *State v. Green*, 117 Ohio App.3d 644, 653, 691 N.E.2d 316 (1st Dist.1996). However, if the pretrial procedures were not suggestive, any remaining questions as to reliability go to the weight of the identification, not its admissibility. *Wills* at 324.

{¶17} R.C. 2933.83 governs the administration of photo lineups and is aimed at preventing the use of unnecessarily suggestive procedures. *State v. Fields*, 8th Dist. Cuyahoga No. 99750, 2014-Ohio-301, ¶ 11; *State v. Howard*, 8th Dist. Cuyahoga No. 100094, 2014-Ohio-2176, ¶ 18. R.C. 2933.83 requires any law enforcement agency that conducts photo lineups to adopt specific procedures for conducting the lineups. Such procedures must provide, at minimum, the use of a “blind administrator” for the photo array, who does not know the identity of the suspect. The administration involves the use of a folder system or a substantially similar system. R.C. 2933.83(A)(2). The

administrator conducting the lineup must make a written record of the lineup that includes all results obtained during the lineup, the names of all persons at the lineup, the date and time of the lineup, and the sources of the photographs used in the lineup. R.C. 2933.83(B)(4). The administrator is also required to inform the eyewitness that the suspect may or may not be in the lineup and that the administrator does not know the identity of the suspect. R.C. 2933.83(B)(5).

{¶18} When evidence of failure to comply with R.C. 2933.83 is presented at trial, the jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of any eyewitness identification resulting from or related to the lineup.

{¶19} On appeal, Potts argues that the identification procedure employed by Det. James was unnecessarily suggestive because Det. Saunders was friends with S.S.'s family and, therefore, "was not a blind administrator."

{¶20} On this record, we find Potts has failed to satisfy the first prong for challenging identification testimony. As stated, R.C. 2933.83 provides in part that "[u]nless impracticable, a blind or blinded administrator shall conduct the live lineup or photo lineup." A blind administrator "means the administrator does not know the identity of the suspect." R.C. 2933.83(A)(2). Here, Det. James testified that Det. Saunders did not know the identity of the suspects present in the photo arrays and that he did not provide her with any information regarding his investigation into the shooting.

Under these circumstances, there is nothing to suggest Det. Saunders's participation in the administration of the photo array rendered the identification procedure unduly suggestive.

{¶21} Accordingly, Potts's third assignment of error is overruled.

B. Sufficiency of the Evidence

{¶22} In his first assignment of error, Potts argues his convictions were not supported by sufficient evidence and the trial court erred by denying his motion for acquittal.

{¶23} A Crim.R. 29 motion challenges the sufficiency of the evidence. When considering a challenge of the sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines 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.* A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶24} In this case, Potts was convicted of attempted murder in violation of R.C. 2923.02 and 2903.02(A). R.C. 2903.02(A) provides: "No person shall purposely cause the death of another * * *" and R.C. 2923.02(A), the "attempt" statute, provides that "no

person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.”

{¶25} Potts was also convicted of felonious assault in violation of R.C. 2903.11(A)(1) and (2), which provides:

(A) No person shall knowingly do either of the following:

- (1) Cause serious physical harm to another or to another’s unborn;
- (2) Cause or attempt to cause physical harm to another or to another’s unborn by means of a deadly weapon or dangerous ordnance.

{¶26} Potts was further convicted of discharging a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3), which provides that “[no] person shall * * * discharge a firearm upon or over a public road or highway.”

{¶27} Finally, Potts was convicted of illegal conveyance in violation of R.C. 2921.36(A), which states:

(A) No person shall knowingly convey, or attempt to convey, onto the grounds of a detention facility or of an institution, office building, or other place that is under the control of the department of mental health and addiction services, the department of developmental disabilities, the department of youth services, or the department of rehabilitation and correction any of the following items:

- (1) Any deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, or any part of or ammunition for use in such a deadly weapon or dangerous ordnance[.]

{¶28} In challenging the sufficiency of the evidence supporting his attempted murder, felonious assault, and discharge of a firearm on or near a prohibited premises convictions, Potts argues that S.S.'s identification testimony was not credible given the deficiencies in Det. James's administration of the photo array. Potts further contends that the evidence produced at trial, including his negative gun residue test result, establishes that he did not fire a gun on the night of the incident.

{¶29} After careful review, we find no merit to Potts's position and conclude that Potts's attempted murder, felonious assault, and discharge of a firearm on or near a prohibited premises convictions were supported by sufficient evidence.

{¶30} As discussed, there is nothing in this record to suggest the administration of the photo array was unduly suggestive. Thus, Potts's challenge to S.S.'s pretrial identification go to its weight and not the sufficiency of the evidence. Furthermore, while Potts did not test positive for gun residue, Curtis Jones of the Trace Evidence Department for the Cuyahoga County Medical Examiner's Office testified that it is possible to test negative for gun residue even if a person has fired a gun. He explained that gun residue can be removed by washing your hands and would not be found on someone who was wearing gloves.

{¶31} Despite Potts's reliance on the gun residue test, there was ample evidence presented at trial establishing that Potts was the shooter. In addition to his pretrial identification of Potts as the shooter during Det. Sauders's blind administration of the photo array, S.S. testified in detail regarding the events of November 20, 2015, and

unambiguously identified Potts in court as the person that shot him in the face and neck. C.S. corroborated S.S.'s testimony that Potts was present at the time of the shooting. Moreover, Det. Kooser testified that he examined the cartridge case discovered at the crime scene and compared it to the test-fired cartridge case from the .25 caliber pistol discovered in Potts's underwear. He concluded that the cartridge cases were a match beyond a reasonable degree of scientific certainty.

{¶32} Viewing this evidence in a light most favorable to the prosecution, we find a rational trier of fact could have found the essential elements of the attempted murder, felonious assault, and discharge of a firearm on or near a prohibited premises offenses were proven beyond a reasonable doubt.

{¶33} In challenging the evidence supporting his illegal conveyance into a detention facility conviction, Potts argues that because the firearm found in Potts's possession was not loaded, it was not capable of being used as a "deadly weapon" or "dangerous ordinance" as required by R.C. 2921.36(A). In contrast, the state contends that, although the firearm was unloaded, it was capable of being used as a bludgeon and, therefore, was a deadly weapon.

{¶34} R.C. 2921.11(A) defines "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."

{¶35} The Ohio Supreme Court has addressed the meaning of "deadly weapon." *In re J.T.*, 143 Ohio St.3d 516, 2015-Ohio-3654, 39 N.E.3d 1240.

{¶36} In *In re J.T.*, a juvenile was carrying a broken pistol in his waistband that was no longer capable of firing a round. He was convicted of carrying a concealed weapon in violation of R.C. 2923.12(A), which states:

(A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:

- (1) A deadly weapon other than a handgun;
- (2) A handgun other than dangerous ordnance;
- (3) A dangerous ordnance.

{¶37} In reversing the juvenile's conviction, the Supreme Court observed:

Today, we apply a common-sense reality check to that fact pattern. When a person has an inoperable handgun tucked into his or her waistband and does not use it as a bludgeoning implement, it is not a deadly weapon. While it had been designed as a deadly weapon in that it was meant to fire a potentially lethal projectile, its essence as a deadly weapon ended when it became inoperable. In effect, since it was inoperable, it was no different from a stone or a brick. If it had been used as a bludgeon or otherwise used, possessed, or carried as a weapon, it could be considered a deadly weapon. As nothing more than a heavy object tucked into a waistband or a pocket, however, it was not. Just as it would be improper to convict someone of carrying a concealed weapon simply because he had a stone in his pocket, it is also improper to convict someone of that crime simply for having an inoperable pistol tucked into his waistband.

J.T. at ¶ 1. The Supreme Court further noted:

This court has previously held that a pistol must be operable or readily rendered operable at the time of the offense in order to be a "firearm" that would support a firearm specification under former R.C. 2929.71, Am.Sub.H.B. No. 261, 142 Ohio Laws, Part II, 3109. *State v. Murphy*, 49 Ohio St.3d 206, 208, 551 N.E.2d 932 (1990), citing *State v. Gaines*, 46 Ohio St.3d 65, 545 N.E.2d 68 (1989), syllabus. While the present case does not involve a firearm specification, there is no valid basis to distinguish between guns for purposes of a firearm specification and for the statute prohibiting carrying a concealed weapon. To allow an

inoperable handgun to be considered a per se deadly weapon would be an unintended expansion of the statute. The General Assembly has shown that it is capable of crafting a statute that penalizes someone for carrying a gun whether it is operable or inoperable. R.C. 2923.122(C), the statute prohibiting weapons within a school zone, states, “No person shall knowingly possess an object in a school safety zone if * * * [t]he object is indistinguishable from a firearm, whether or not the object is capable of being fired.”

J.T. at ¶ 7.

{¶38} In this case, the term “deadly weapon” is the same as the term analyzed by the Supreme Court in *In re J.T.* However, we find the circumstances presented in this case to be distinguishable from those presented in *In re J.T.* It is undisputed that the .25 caliber pistol found in Potts’s possession contained an empty magazine. However, unlike the handgun in *In re J.T.*, Potts’s firearm was capable of readily being rendered operable and, therefore, qualified as a deadly weapon under R.C. 2921.11(A). See *State v. Jackson*, 8th Dist. Cuyahoga No. 103590, 2016-Ohio-4567, ¶ 15. Accordingly, the evidence was sufficient to convict him of illegal conveyance into a detention facility.

{¶39} Potts’s first assignment of error is overruled.

C. Manifest Weight of the Evidence

{¶40} In his second assignment of error, Potts argues his convictions were against the manifest weight of the evidence.

{¶41} While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest-weight challenge questions whether the state has met its burden of persuasion. *Thompkins*, 78 Ohio St.3d at 390, 678 N.E.2d 541. Unlike challenges to the sufficiency of the evidence, which raise a question of law,

manifest weight challenges raise factual issues. When a defendant asserts that his conviction is against the manifest weight of the evidence, the court,

“reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.”

Id. at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶42} On appeal, Potts contends that Det. Koosler’s expert ballistics testimony was unreliable because he did not produce the electronic images he relied on in formulating his opinion for the jury to review. We find no merit to Potts’s argument and find nothing in this record to conclude Det. Koosler’s summary of his findings or the forensic procedures he used in comparing the relevant shell casings were unreliable.

{¶43} In addition, Potts reiterates his position that S.S.’s pretrial identification testimony was not credible given Det. Saunders’s involvement in the administration of the photo array. However, as discussed, there was no evidence presented in this case to suggest the identification procedure was unduly suggestive or that Det. Saunders influenced S.S.’s identification of Potts.

{¶44} Potts further argues that S.S.’s testimony was inconsistent and, therefore, was not credible. Potts contends that at one point S.S. testified that “he couldn’t see anything,” despite his subsequent testimony that his vision was clear and only became

blurry once he stood up. After careful review of the portions of S.S.'s testimony cited by Potts, we are unable to conclude that this is the exceptional case where the evidence weighs heavily against Potts's convictions. Significantly, the testimony relied on by Potts relates to S.S.'s physical condition after he was shot and does nothing to discredit S.S.'s testimony identifying Potts as the shooter. Throughout the police investigation and trial proceedings, S.S. consistently and repeatedly identified Potts as the shooter. Mindful that the weight to be given the evidence presented by the state and the credibility of the witnesses are primarily for the trier of the facts, we cannot conclude the jury in this case lost its way and created such a manifest miscarriage of justice that Potts's convictions must be reversed and a new trial ordered. Accordingly, Potts's convictions were not against the weight of the evidence.

{¶45} Potts's second assignment of error is overruled.

D. Flight Instruction

{¶46} In his fourth assignment of error, Potts argues the trial court erred by giving the flight instruction over his objection. He contends there was insufficient factual basis to support such an instruction.

{¶47} The decision whether or not to give a flight instruction is a matter within the trial court's discretion. *State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578, ¶ 48-49. We therefore will not reverse the trial court's judgment to give a particular jury instruction absent an abuse of discretion.

{¶48} In this case, the trial court gave the following instruction to the jury on flight:

Before I get to that, testimony has been admitted indicating that the defendants fled the scene. You are instructed that the defendants flight alone does not raise a presumption of guilt, but it may tend to indicate the defendants consciousness or awareness of guilt. If you find that the facts do not support that the defendants' flight, or if you find that some other motive prompted the defendants conduct, or if you are unable to decide what the defendants' motivation was, then you should not consider this evidence for any purpose.

However, if you find that the facts support that the defendants engaged in such conduct and if you decide that the defendants were motivated by a consciousness or an awareness of guilt, you may but are not required to consider that evidence in deciding whether the defendant or either of them is guilty or not guilty of the crime charged. You alone will determine what weight, if any, to give to this evidence.

{¶49} Flight from justice means escape or affirmative attempt to avoid apprehension. *State v. Wesley*, 8th Dist. Cuyahoga No. 80684, 2002-Ohio-4429, ¶ 19, citing *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1207 (9th Cir.1991). “[A] mere departure from the scene of the crime is not to be confused with deliberate flight from the area in which the suspect is normally to be found.” *State v. Santiago*, 8th Dist. Cuyahoga No. 95516, 2011-Ohio-3058, ¶ 30, quoting *State v. Norwood*, 11th Dist. Lake Nos. 96-L-089 and 96-L-090, 1997 Ohio App. LEXIS 4420 (Sept. 30, 1997). A flight instruction based on the flight of the accused is appropriate when supported by sufficient evidence in the record. *Hill* at ¶ 49.

{¶50} After careful review, we find the evidence in this case did not support the flight instruction provided to the jury. The testimony provided at trial merely

demonstrated that Potts departed from the scene after the shooting was completed. There was no evidence that Potts “fled to a situs where he could not have been easily located.” *See State v. Johnson*, 8th Dist. Cuyahoga No. 99715, 2014-Ohio-2638, ¶ 109, citing *Norwood* at * 15-16. Rather, he was discovered sitting on the front porch of his home, located just blocks from where the shooting occurred. In our view, such evidence does not lead to a reasonable inference that Potts was actively fleeing to avoid apprehension. Therefore, we find the trial court abused its discretion by giving a flight instruction.

{¶51} The error in giving the flight instruction, however, was harmless beyond a reasonable doubt. *See* Crim.R. 52(A) (“Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.”). As discussed, the state presented overwhelming evidence of Potts’s guilt, including S.S.’s pretrial and in-court identification of Potts as his shooter. Under the totality of the circumstances, we cannot say that the trial court’s instruction on flight was prejudicial, such that a manifest miscarriage of justice occurred.

{¶52} Accordingly, Potts’s fourth assignment of error is overruled.

E. Consecutive Sentence

{¶53} In his fifth assignment of error, Potts argues the sentence is contrary to law and consecutive sentences were not properly imposed.

{¶54} Appellate sentencing review is guided by R.C. 2953.08. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231. R.C. 2953.08(A)(4) allows a

criminal defendant to appeal a sentence that includes consecutive service. In order to impose consecutive sentences, the trial court, where required, must make findings set forth in R.C. 2929.14(C)(4) and incorporate those findings into the journal entry of sentence. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. R.C. 2929.14(C)(4) requires the court to find that consecutive sentences are (1) necessary to protect the public from future crime or to punish the offender, (2) are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public, and one of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under postrelease control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender’s conduct.

(c) The offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

Id.

{¶55} This court will affirm the sentence imposed unless the record clearly and convincingly demonstrates that the trial court’s sentence is contrary to law. *Marcum* at paragraph two of the syllabus. A sentence is not clearly and convincingly contrary to law “where the trial court considers the purposes and principles of sentencing under R.C. 2929.11 as well as the seriousness and recidivism factors listed in R.C. 2929.12, properly

applies postrelease control, and sentences a defendant within the permissible statutory range.” *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 10, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18, *overruled on other grounds*, in *Marcum*.

{¶56} In support of its decision to impose consecutive sentences in this matter, the trial court stated:

I am running those consecutive because under 2929.14(C)(4) this Court finds consecutive sentences are necessary to protect the public from future crime, and also to punish the offender. And 17 years is not disproportionate to the seriousness of your conduct and to the danger that you impose to the public and our communities.

Also, you committed this offense while you were on probation to this Court. In fact, I believe you were capiased at the time for failing to report to probation at the time that you committed this offense.

And your history of criminal conduct, carrying guns and all, demonstrate consecutive sentences are necessary to protect the public from future crime by the offender. And 17 years adequately reflects the seriousness of your conduct. No one other sentence would do so.

* * *

And it is just lucky for this community this was not just another homicide. At least we have [the victim] with us today. But as you heard from his mother, certainly not in the same shape that he was in.

{¶57} On appeal, Potts does not dispute that the trial court made the required findings for imposing consecutive sentences. Rather, he contends that the record clearly and convincingly does not support the trial court’s findings. Without providing a basis for his position, Potts argues that the harm in this case “was not so great that concurrent terms would not adequately reflect the seriousness of the conduct involved.”

{¶58} We disagree with Potts’s interpretation of the facts presented in this case. Potts attempted to summarily execute an unarmed 14 year old. As noted by the trial court, the damage caused to S.S. is irreversible. He lost his eye as a result of this senseless shooting and at the time of sentencing was required to wear a “halo” to stabilize his spine because a bullet remains lodged in his neck. Under these circumstances, we cannot clearly and convincingly find that the record does not support the trial court’s R.C. 2929.14(C)(4) findings.

{¶59} Potts’s fifth assignment of error is overruled.

F. Court Costs

{¶60} In his sixth assignment of error, Potts argues the trial court erred by imposing costs where it found Potts indigent, did not impose costs in open court, and failed to consider his ability to pay.

{¶61} R.C. 2947.23(A)(1) governs the imposition of court costs and provides, in relevant part, that “[i]n all criminal cases * * * the judge * * * shall include in the sentence the costs of prosecution * * * and render a judgment against the defendant for such costs.” Thus, a sentencing court must include in the sentence the costs of prosecution and render a judgment against the defendant for costs, even if the defendant is indigent. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8.

{¶62} However, in its discretion, a trial court may waive court costs if the defendant is indigent. *State v. Walker*, 8th Dist. Cuyahoga No. 101213,

2014-Ohio-4841, ¶ 9. The discretion to waive court costs includes the discretion not to waive them. *Id.*

{¶63} In *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, the Ohio Supreme Court considered whether a trial court may impose court costs under R.C. 2947.23 in its sentencing entry when the trial court did not impose those costs during the sentencing hearing. *Id.* at ¶ 1. The court held that it is reversible error under Crim.R. 43(A) for the trial court to impose court costs in its sentencing entry when it did not impose those costs in open court at the sentencing hearing. *Id.* at ¶ 22. The court found that a defendant is harmed by the trial court's error in such cases because he is "denied the opportunity to claim indigency and to seek a waiver of the payment of court costs before the trial court." *Id.* The court determined that the remedy in such a situation is a limited remand to the trial court to allow the defendant to seek a waiver of court costs. *Id.* at ¶ 23.

{¶64} In this case, the record reflects that the trial court did not mention costs at sentencing, but then imposed court costs in its journal entry of sentencing. Accordingly, we reverse the portion of the trial court's judgment that imposed court costs and remand the matter for the limited purpose of allowing Potts to move the trial court for a waiver of payment of court costs. *See Elder*, 8th Dist. Cuyahoga No. 104392, 2017-Ohio-292, at ¶ 34.

{¶65} Potts's sixth assignment of error is sustained.

{¶66} Judgment affirmed in part, reversed in part, and remanded.

It is ordered that the parties share equally in the 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.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
MELODY J. STEWART, J., CONCURS IN PART AND DISSENTS IN PART WITH
SEPARATE ATTACHED OPINION

MELODY J. STEWART, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶67} I concur with the disposition of all but the sixth assignment of error relating to court costs. I agree that the court should have advised Potts that he had to pay court costs as required by R.C. 2947.23(A)(1)(a), but the error was harmless.

{¶68} Potts can petition the court to waive court costs because “[t]he court retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution, including any costs under section 2947.231 of the Revised Code, at the time of sentencing or at any time thereafter.” R.C. 2947.23(C) (emphasis added). This statute makes reliance on *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, improper — *Joseph* was decided before the legislature amended R.C. 2947.23(C). R.C.

2947.23(C) now gives Potts the opportunity to argue that the court imposed court costs without first engaging in an adequate assessment of his ability to pay in a postsentence petition to waive court costs. The record shows that Potts not only failed to file a motion to waive costs, he filed a postsentence motion to have the court establish a payment schedule of \$10 per month. The court granted the motion and the record shows that Potts has made several payments. So the court's error in failing to assess costs at the sentencing hearing was harmless. I would, therefore, overrule this assigned error.