

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| | : | |
| Plaintiff-Appellee, | : | No. 08AP-952 |
| | : | (C.P.C. No. 07CR06-4299) |
| v. | : | |
| | : | (REGULAR CALENDAR) |
| Kenneth Grisson, | : | |
| | : | |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on October 29, 2009

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Kenneth Grisson ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict convicting appellant of improperly discharging a firearm at or into a habitation, improper handling of a firearm in a motor vehicle, and several counts of felonious assault, along

with various firearm and drive-by shooting specifications. For the following reasons, we affirm that judgment.

{¶2} Appellant's convictions arise from an incident that occurred on March 20, 2007, at 1022 Wilson Avenue, in Franklin County, Ohio. As a result of a drive-by shooting at this address, Tameka Brightwell, who was hosting a cookout for family and friends, was struck in the face by a bullet. Although several shots were fired during this incident, no other individuals were injured.

{¶3} On June 18, 2007, appellant was indicted by the Franklin County Grand Jury on one count of improperly discharging a firearm at or into a habitation, one count of improper handling of a firearm in a motor vehicle, and four counts of felonious assault. The count for improperly discharging a firearm at or into a habitation and the four counts of felonious assault were all indicted with one- and three-year firearm specifications, as well as a five-year drive-by shooting specification. The count charging improper handling of a firearm in a motor vehicle was indicted with only one- and three-year firearm specifications. Appellant entered pleas of not guilty and the case proceeded to trial.

{¶4} On the morning of trial, appellant's trial counsel addressed the court with respect to two matters regarding his representation of appellant. First, counsel informed the court that appellant had asked him to interview a particular witness. Counsel had experienced difficulty in obtaining an address for that witness. Counsel informed the trial court that an investigator had recently been able to contact and interview that witness and a report regarding his findings had been provided to appellant that morning. Second, counsel informed the court that appellant's mother had previously filed a complaint against him with the local bar association. The complaint had been dismissed and was

no longer pending. Counsel indicated he was not asking to withdraw from the case, but did want to inform the court that appellant had been frustrated with the progress and development of the case, in the event that appellant wanted to comment further. No further comments were made on the subject and the case proceeded to trial.

{¶5} At trial, the state of Ohio called several witnesses to testify, including Tameka Brightwell, her daughter Antonette Brightwell, her friend Alfreda Hyppolite, and appellant's co-defendant Theresa Harper, as well as a paramedic and several witnesses employed by the Columbus Division of Police.

{¶6} Tameka Brightwell was on her front porch eating with family and friends at approximately 7:00 p.m. on the evening the drive-by shooting occurred. Tameka's daughter, Antonette, was present, along with Anonette's friend, Robert Taylor, who worked with Antonette. Alfreda Hyppolite and her three children were also there, along with several other friends and family members.

{¶7} Tameka testified that prior to the shooting, she heard her daughter, Antonette, shouting on the phone with another girl. Tameka was aware that Antonette had been having problems with a female she had met at work. Antonette testified that the girl she was arguing with over the phone was Theresa Harper, who had recently been fired. At least one of these arguments with Theresa occurred while Antonette was on her mother's front porch. After Theresa threatened Antonette, Antonette hung up on her. Theresa then called back and gave the phone to a man who identified himself as "Kenny." Kenny wanted Antonette and Theresa to engage in a boxing match against each other. Antonette testified that Kenny informed her that he and Theresa were coming over to Antonette's house.

{¶8} Approximately 10 to 15 minutes after this phone conversation ended, Antonette was talking to friends and family on the porch when she heard gunshots. Antonette testified she and her mother were on the porch and Robert was right next to the porch. Tameka testified she was on her porch standing by the steps and Antonette was on the sidewalk by the steps, while Robert was right next to Antonette. Both Antonette and Tameka testified that they observed a male firing shots at their house while driving by in a green, four-door vehicle. Antonette heard six or seven shots while Tameka testified to hearing five or six shots. Tameka testified that she was hit in the face by one of those shots when she was standing on her front porch. Antonette called 911. Police and emergency medical personnel responded and Tameka was transported to the hospital. Medical personnel treated her for injuries she received as a result of a single bullet entering and exiting the right side of her face. She was released later that night.

{¶9} The Columbus Division of Police collected evidence, including spent shell casings. Photographs were also taken of the scene, including the residence. Detective Jeffrey Collins testified the investigation and the photographs revealed what appeared to be a fresh bullet strike to Tameka's residence.

{¶10} The day after the shooting, Tameka was shown a photo array containing a suspect who was not the appellant. Tameka did not select anyone from that photo array. On May 18, 2007, after detectives had obtained additional information, Tameka was shown a new photo array containing a photo of the appellant. Using that photo array, Tameka identified appellant as the shooter.

{¶11} Tameka also made an in-court identification of appellant as the shooter. In addition, Alfreda Hyppolite made an in-court identification of appellant as the shooter.

She testified that she got a very good look at the shooter as she was running to the sidewalk to protect her children after a gunshot was fired. However, Alfreda had never been shown a photo array by detectives and never identified appellant prior to trial.

{¶12} Antonette was not able to identify appellant as the shooter, but she did identify Theresa Harper as the female passenger in the shooter's vehicle, via a photo array shown to her on March 21, 2007.

{¶13} Theresa testified against appellant pursuant to a proffer and plea bargain her attorney negotiated with the state of Ohio in exchange for a reduced sentence. Theresa testified that she and appellant had been friends since 2004 and were both from the Hilltop area. On the date of the incident, she and appellant and a man named "HB" were driving to the home of Robert Taylor. She was the front seat passenger in a green vehicle being driven by appellant.

{¶14} While appellant was driving, Theresa informed him that Antonette had called her several times that day. Appellant answered Theresa's phone the next time Antonette called. Following an unfriendly conversation, appellant advised Antonette that he and Theresa would be coming to her house and that he wanted the two of them to fight. Theresa provided appellant with directions to Antonette's house and pointed out the house and Antonette to appellant. She observed Antonette on the porch and Robert on the sidewalk in front of the house. As the car was slowing down near Antonette's house, Theresa prepared to exit the vehicle. However, the car did not stop and appellant began firing shots at the house. After the car sped off, Theresa asked appellant why he did it and he explained that he wasn't going to let anyone "send" or "play" her. (Tr. 292.)

{¶15} Theresa was arrested for the shooting several hours later and was taken to jail. She testified that she spent approximately 98 days in jail. During her time in jail, Theresa testified that she did communicate with appellant using a phone at the jail and that her calls were recorded. The state of Ohio introduced portions of some of those phone calls in its case-in-chief. During some of those calls appellant and Theresa had veiled discussions regarding the incident. At least one of those calls involved a discussion of whether or not Theresa was supposed to "take the rap" for appellant. (Tr. 326.)

{¶16} On August 26, 2008, the jury returned verdicts convicting appellant of all counts and all specifications. Because appellant had two additional cases involving separate crimes for which he had not yet been tried, a new trial date was selected for those cases and for sentencing on the instant case. On September 29, 2008, appellant entered guilty pleas pursuant to a plea bargain regarding the two cases on which he was not tried. The trial court then proceeded to sentencing on all three cases. At that time, appellant advised the trial court he had several complaints about the way his counsel had conducted the trial. After providing appellant an opportunity to voice his complaints, the trial court imposed a total aggregate sentence of 19 years of incarceration.

{¶17} Following his conviction and sentencing, appellant filed a timely notice of appeal and raises the following assignments of error for our review:

First Assignment of Error

The trial court erroneously failed to conduct a full inquiry to determine the nature and extent of any breakdown in the attorney-client relationship between Appellant and trial counsel.

Second Assignment of Error

Appellant's convictions were not supported by sufficient credible evidence.

{¶18} In his first assignment of error, appellant argues the trial court abused its discretion by failing to make a full inquiry into the "ongoing tension" between appellant and his counsel in order to determine whether there was a breakdown in the attorney-client relationship. We find this argument to be without merit.

{¶19} "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, quoting *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶20} "The right to have counsel assigned by the court does not impose a duty on the court to allow the accused to choose his own counsel[.]" *Thurston v. Maxwell* (1965), 3 Ohio St.2d 92, 93. In order to discharge a court-appointed attorney, the accused must show a breakdown in the attorney-client relationship which jeopardizes his right to effective assistance of counsel. *State v. Coleman* (1988), 37 Ohio St.3d 286, 292. The accused is not guaranteed a "meaningful relationship" with his counsel. *Morris v. Slappy* (1983), 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617. Mere personality conflicts or disputes as to trial strategy are insufficient to require appointment of new counsel. *State v. Davis* (May 19, 1998), 10th Dist. No. 97AP-1020, citing *Morris*. The fact that an accused disagrees with his attorney regarding trial tactics and strategy is insufficient to warrant the substitution of counsel. *State v. Alexander*, 10th Dist. No. 05AP-192, 2006-Ohio-1298. Yet, the accused is entitled to competent assistance from counsel and when he expresses a specific complaint during the course of the trial regarding counsel's

effectiveness, the trial court must inquire into the nature of the complaint. *State v. Deal* (1969), 17 Ohio St.2d 17.

{¶21} In *Deal*, the Supreme Court of Ohio held that, when an accused raises a specific complaint regarding his dissatisfaction with counsel during the course of the trial, the trial court has an obligation to ensure that the record contains an adequate investigation of the complaint before continuing with the trial. *Id.* at 19-20.

{¶22} Here, appellant did not advise the court of any dissatisfaction with his counsel until approximately 30 days after the trial had concluded and after he had been convicted by the jury and was about to be sentenced. In *State v. Frazier*, 10th Dist. No. 05AP-425, 2006-Ohio-1475, we held that where the appellant did not raise a claim of dissatisfaction with his appointed counsel until the time of his sentencing hearing, *Deal* was not applicable. In *State v. Morrison*, 10th Dist. No. 02AP-651, 2003-Ohio-1517, we determined that a *Deal* inquiry was not required where a defendant's complaint was brought to the attention of the court by defense counsel during a resentencing hearing. See also *Davis* ("[w]hen * * * a defendant fails to raise specific concerns about his appointed counsel with the court during trial, we have held that the requirements of *Deal* are not implicated"). Therefore, we find that a *Deal* inquiry was unnecessary here.

{¶23} To the extent that appellant argues counsel's comments to the trial court made prior to the start of the trial regarding appellant's "frustrations" with the progress of the case are enough to trigger a *Deal* inquiry, we reject that claim as well.

{¶24} Immediately prior to trial, appellant did not make any complaints regarding his representation. While appellant's trial counsel advised the court that appellant may have been frustrated with the progress of the case, counsel also advised the court that he

had recently located and interviewed a witness whom appellant had requested that he contact. Appellant did not offer any comments on the record with respect to this.

{¶25} Additionally, regarding the issue of the bar complaint, it is significant to note that it was filed by appellant's mother, rather than by appellant, and appellant did not offer any information regarding the complaint, as the issue was raised solely by counsel. We also note that the substance of the complaint is not in the record, and appellant's counsel informed the trial court that the matter had been dismissed and therefore, it was no longer at issue. Furthermore, the mere fact that a complaint has been filed with the bar association does not in itself warrant an inquiry by the trial court. See *Alexander*, supra, at ¶22.

{¶26} An accused bears the burden of presenting evidence that demonstrates grounds for the appointment of new counsel. If the accused alleges facts that, if true, would require relief, then the trial court must inquire into the complaint and make that inquiry a part of the record. *Alexander* at ¶16, citing *State v. Smith* (Dec. 29, 1998), 4th Dist. No. 98CA12.

{¶27} In the instant case, the record does not contain specific facts or evidence that warrant a further inquiry, as appellant did not make a specific complaint regarding his counsel until the time of the sentencing hearing. Therefore, based upon the reasons set forth above, we find the trial court did not abuse its discretion in failing to conduct a full inquiry. Accordingly, we overrule appellant's first assignment of error.

{¶28} In his second assignment of error, appellant argues his convictions are not supported by sufficient evidence. Although not specifically stated in his one-sentence assignment of error, a review of appellant's argument reveals that, throughout his brief,

he asserts the convictions are also against the manifest weight of the evidence. Therefore, we shall consider his convictions under both standards of review.¹

{¶29} Appellant asserts several deficiencies with the evidence. First, appellant contends the evidence identifying him as the shooter is subject to challenge based upon alleged deficiencies with the photo arrays and the in-court identification. Second, appellant submits that the testimony of the co-defendant, Theresa Harper, should be carefully examined as a result of the substantial break she received in exchange for her testimony and cooperation. Third, appellant asserts the record contains minimal evidence to support a conviction for the felonious assault count involving victim Robert Taylor. Appellant alleges that a conviction on that count is not supported by the evidence, arguing Mr. Taylor was not in close proximity to the shots being fired, which, in actuality, only struck one individual, Tameka Brightwell.

{¶30} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

¹ Although appellant failed to specifically include this asserted error in his stated assignment of error, due to the overlap between these two standards of review, we shall consider his convictions under both a sufficiency of the evidence review, as well as a manifest weight review. We note that appellee did address both the sufficiency and weight of the evidence arguments made by appellant.

{¶31} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶32} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? *Id.* at ¶25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; See also *State v. Robinson* (1955), 162 Ohio St. 486 (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276.

{¶33} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a

'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Wilson* at ¶25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶34} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶35} Appellant argues the evidence identifying him as the shooter is subject to challenge under a sufficiency and manifest weight review. We disagree.

{¶36} Although the events of the drive-by shooting may have happened very quickly, leaving little time for witnesses to observe the events, several witnesses were able to identify appellant as the shooter. Tameka positively identified appellant from a photo array and also made an in-court identification. Appellant has failed to raise a legitimate challenge to the photo array presented to Tameka. In addition, Antonette testified that she had been on the phone with a man identified as "Kenny" just minutes

before the shooting who stated he was on his way over to her house with Theresa. Antonette identified Theresa as the passenger in the vehicle from which the shots were fired. Theresa, who has known appellant for several years, testified that he was the shooter.

{¶37} The recorded jail calls between appellant and Theresa also corroborate the identification of appellant as the shooter, as it can be inferred from the conversations that appellant was involved and wants Theresa to take the fall because he does not want to go to jail. Finally, although the identification by Alfreda could have possibly been stronger if she had been shown a photo array and selected appellant as the shooter prior to making an in-court identification, the jury was free to consider the credibility of the witnesses. We cannot say, based upon all of the identification testimony, that reasonable minds could not have arrived at the conclusion that appellant was the shooter, nor can we say that the jury clearly lost its way in reaching that determination.

{¶38} Next, appellant challenges the testimony of his co-defendant on the grounds that her testimony should be carefully examined because she received a substantial benefit as a result of her cooperation, which resulted in a sentence of community control, rather than prison. However, the jury was aware early on of the "sweetheart deal" that Theresa received in exchange for her truthful testimony. (Tr. 46.) Furthermore, the jury instructions provided by the court contained language advising the jurors that the testimony of a co-defendant or accomplice was "subject to grave suspicion" and should be "weighed with great caution." (Jury Instructions, R. 185 at 5.) Based upon this, we cannot say that a reasonable jury would not carefully examine Theresa's

testimony and, considering the corroborating testimony of the other witnesses, conclude that appellant was the shooter.

{¶39} Finally, we find appellant's assertion that only minimal evidence existed to convict him of felonious assault on the count involving Robert Taylor is without merit.

{¶40} The applicable provision of the felonious assault statute found in R.C. 2903.11(A)(2) provides in relevant part: "[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon * * * ." "Attempt" is further defined as purposely or knowingly engaging in conduct that, if successful, would constitute or result in the offense. R.C. 2923.02(A). "Deadly weapon" is defined 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." R.C. 2923.11(A). This includes a firearm or handgun such as the one used in this incident. See generally R.C. 2923.11.

{¶41} In *State v. Phillips* (1991), 75 Ohio App.3d 785, 792, a case similar to the instant case, the defendant randomly fired at least five shots in the direction of the victims during a drive-by shooting. As a result, several individuals were injured. Phillips was convicted of five counts of felonious assault. On appeal, Phillips argued the evidence did not support his convictions because there was no testimony that he had aimed the weapon at a particular individual. However, the court of appeals found that his "intent to cause physical harm to the five individuals could be inferred from his having shot a gun randomly in the direction of each individual." *Id.*

{¶42} In *State v. Thompson* (Nov. 10, 1997), 10th Dist. No. 97APA04-489, we also held that an attempt to cause physical harm may be inferred from the act of firing a

gun in the direction of an individual. ("When appellant fired the gun in the direction of [the victim], he committed an overt act sufficient to support the finding that he knowingly attempted to cause physical harm.")

{¶43} Firing a weapon randomly in the direction of individuals who are arguably within range of the shooter is sufficient to demonstrate an attempt to cause physical harm. *Phillips* at 792. The firing of the gun alone is sufficient evidence of intent to cause physical harm. *Id.* See *Thompson and State v. Gray*, 10th Dist. No. 04AP-938, 2005-Ohio-4563 (intent to cause or attempt to cause physical harm is inferred by shooting the gun in the direction of the victim). See also *State v. Windom* (Dec. 30, 1997), 10th Dist. No. 97APA03-370 (given the proximity of the victims to one another, who were standing in a group, it was reasonable to infer that the defendant's conduct created a substantial risk of serious physical harm to all of the persons in the group).

{¶44} Here, the testimony supports the conclusion that Robert was standing in the very area where the shots were fired. Antonette and Tameka testified to hearing anywhere from five to seven shots. The state of Ohio introduced photographic evidence and testimony demonstrating that it was likely at least one of the bullets fired during the shooting struck Tameka's house. Tameka, who was on the porch, was also struck by one of those shots. Tameka testified that Robert was standing next to Antonette who was next to the steps leading to the porch in front of the house when the shooting occurred. Antonette testified that Robert was standing next to the porch when shots were fired, and Theresa testified that Robert was standing in front of the house on the sidewalk as the car approached the residence. A review of the photographs submitted into evidence reveals that the porch, steps, sidewalk, and front yard at 1022 Wilson Avenue encompass a very

small area. Thus, the evidence supports the conclusion that Robert was in very close proximity to both Antonette and Tameka. Therefore, appellant's intent to cause physical harm to Robert is inferred by the fact that he shot the gun several times in the direction of Robert Taylor and others who were gathered on or around the porch of Tameka's residence, even though the bullets only struck Tameka.

{¶45} Therefore, viewing the evidence in a light most favorable to the state, we find that a rationale trier of fact could have concluded that appellant knowingly attempted to cause physical harm to Robert Taylor. Furthermore, there is nothing to indicate that the jury clearly lost its way or created a manifest miscarriage of justice with respect to its verdict on this count.

{¶46} For all of these reasons, we reject appellant's challenges and find his conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. Therefore, we overrule appellant's second assignment of error.

{¶47} Accordingly, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.
