

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : CASE NO. CA2011-03-043  
 :  
 - vs - : OPINION  
 : 12/12/2011  
 :  
 CHARLES DILLINGHAM, :  
 :  
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CR2010-10-1742

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Scott N. Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

**RINGLAND, J.**

{¶1} Defendant-appellant, Charles Scott Dillingham, appeals from his conviction in the Butler County Court of Common Pleas for felonious assault and having weapons while under a disability. For the reasons outlined below, we affirm the trial court's judgment.

{¶2} On November 17, 2010, the Butler County Grand Jury returned an indictment against appellant charging him with four counts of felonious assault and one count of having weapons while under a disability. A three-year firearm specification was attached to each of the four counts of felonious assault charges. The indictment was based on appellant's

alleged role in a shooting that occurred at the Grub Pub, a Hamilton bar, on October 15, 2010. On that night, appellant briefly visited the Grub Pub and then walked outside and shot two victims as they were walking into the bar. The Grub Pub's video surveillance system captured appellant entering the bar and the shooting.

{¶3} A bench trial was held on January 10 and 11, 2011 in which appellant argued that he was not the individual that committed the shooting at the Grub Pub. The trial court found appellant guilty on all counts and all specifications. The court merged two of the felonious assault charges and firearm specifications and appellant was sentenced to serve a total of 14 years in prison.

{¶4} Appellant now appeals his conviction, raising three assignments of error for review:

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING HIS MOTIONS FOR ACQUITTAL AND IN ENTERING GUILTY VERDICTS CONTRARY TO APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION."

{¶7} Assignment of Error No. 2:

{¶8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN ENTERING GUILTY VERDICTS WHERE SAID VERDICTS WERE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶9} In his first assignment of error, appellant argues that the trial court erred by denying his Crim.R. 29(C) motion for acquittal because the state provided insufficient evidence to support his convictions. Appellant also argues in his second assignment of error that his convictions were against the manifest weight of the evidence. Specifically, appellant

claims that the state did not prove beyond a reasonable doubt that he was the shooter because video surveillance tapes showing the shooting were unclear and none of the state's witnesses were able to provide an adequate identification of appellant.

{¶10} As this court has previously stated, "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35; *State v. Urbin*, 148 Ohio App.3d 293, 2002-Ohio-3410, ¶31. In turn, while a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, this court's determination that appellant's conviction was supported by the manifest weight of the evidence will be dispositive of the issue of sufficiency. *State v. Rigdon*, Warren App. No. CA2006-05-064, 2007-Ohio-2843, ¶30, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52; see, e.g., *State v. Rodriguez*, Butler App. No. CA2008-07-162, 2009-Ohio-4460, ¶62.

{¶11} A manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Clements*, Butler App. No. CA2009-11-277, 2010-Ohio-4801, ¶19. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State v. Lester*, Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James*, Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide since it is in the best position to judge the credibility of the witnesses and the weight to be given to the evidence. *State v. Gesell*, Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10

Ohio St.2d 230, paragraph one of the syllabus. Therefore, the question upon review is whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶12} To find appellant guilty of felonious assault in violation of R.C. 2903.11(A)(1) and (2), the state was required to prove appellant, "knowingly" "cause[d]" "serious physical harm to another" and "cause[d] or attempt[ed] to cause physical harm to another" "by means of a deadly weapon or dangerous ordinance." To prove appellant had a weapon while under a disability in violation of R.C. 2923.13(A)(3), the state was required to prove appellant, "knowingly acquire[d], ha[d], carr[ied], or use[d] any firearm" and he had been convicted of "any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse." "Firearm," as defined by R.C. 2923.11(B)(1) "means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant."

{¶13} At trial, the prosecution introduced video surveillance tapes from the Grub Pub that captured the shooting. The tapes were a compilation of the recordings made by the Pub's many cameras situated throughout the property. Several of the prosecution witnesses used these videos to help explain their testimony. One of these witnesses was Shawn Fryman, a police officer for the city of Hamilton who was the responding officer to the October 15 shooting. Fryman testified that earlier in the night he had been dispatched to appellant's house and he had spent four hours with the appellant. After arriving at the Grub Pub following the shooting, Fryman reviewed the videos and initially identified appellant as the shooter based on the similar stature and gait. Fryman further identified appellant as the shooter based on his knowledge of appellant for four and one-half years, the shooter's facial

features, the similar type, color, and condition of the vehicle, and the proximity of the shooter's escape route to appellant's home.

{¶14} Also at trial, Khaleim Waver and Danyell Stiehl testified to the injuries they sustained from the Grub Pub shooting. Waver stated that he was shot multiple times and was not able to see who shot him because his back was turned to the shooter. Stiehl also spoke about the gunshot wound she endured and her inability to make an identification because she was also not facing the shooter.

{¶15} Further Natasha Ness, the Grub Pub bartender and nighttime manager, testified that she observed appellant in the bar shortly before the shots were fired. Ness used the video to identify appellant as the shooter. Ness testified that she recognized appellant in the video while he was in the Grub Pub. She then stated that she could see where appellant left the Pub, went outside, and performed the shooting. Ness identified appellant as the shooter based on the similarities between the facial features, shape of head, stature, and body movement. She admitted that she would not be able to identify appellant in the video if she had not seen him in person that night. Ness is familiar with appellant because she has been acquainted with him through her employment at the Grub Pub for four years. Ness also recognized the shooter's white vehicle shown in the video as appellant's car because both automobiles are the same color and style.

{¶16} Additionally, Detective Patrick Erb of the Hamilton City Police Department testified he recognized appellant and his car on the video. Erb began focusing on appellant when he learned from Fryman that the police were dispatched to appellant's house earlier in the night and it was suspected he was at the Grub Pub. While investigating the shooting, Erb spoke with appellant who, although denying he was the shooter, admitted that he was at the bar during the time of the shooting and left shortly after he heard gunshots. While appellant was a suspect, Erb waited until October 21 to arrest appellant for the shooting so he could

build a stronger case. Erb identified appellant as the shooter in the video because of appellant's statements placing him at the bar and the similarities between the car and facial features of appellant and the shooter. Lastly, at the close of the prosecution's case, appellant stipulated that he had two felony convictions that involved the trafficking of cocaine.

{¶17} In his defense, appellant called his nephew, O'Brian Jarrett, who was at the Grub Pub during the shooting. Jarrett testified that he saw the shooter earlier in the night at the bar and he was wearing different clothing than that of appellant. He further stated that moments after he heard gunfire in the parking lot, he saw the shooter running away. However, the court found Jarrett's testimony to be "incredible." Initially when Jarrett was stating what occurred that night he was testifying without the aid of photographs or the surveillance tape. When he was presented with still pictures of the surveillance video, Jarrett identified appellant as the shooter. After appellant's physical reaction to Jarrett's testimony, Jarrett recanted his identification.<sup>1</sup> Further, Jarrett stated that the shooter in the video was a complete stranger to him despite the fact that the video shows the shooter leaning on his back. Jarrett also acknowledged that the shooter's car in the video is missing the same hubcap as appellant's car.

{¶18} After a thorough review of the record, we cannot say the court clearly lost its way by finding appellant guilty of two counts of felonious assault and one count of having weapons while under a disability for his role in the October 15, 2010 shooting so as to create a manifest miscarriage of justice requiring appellant's convictions to be reversed. As noted above, multiple witnesses, including Ness who physically saw appellant moments before the shooting, identified appellant as the shooter from the video. These witnesses based their identification on the similarities between the shooter's facial features, stature, car, and the

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1. The court noted on the record "that the defendant appears to be communicating, at least with hand gestures, to the witness that is testifying."

escape route taken by the shooter that is the logical route to the appellant's home. Courts have found that identifications from video surveillance tapes are enough to survive manifest weight and sufficiency of the evidence challenges. See *State v. Reading*, Licking App. No. 07-CA-83, 2008-Ohio-2748, ¶¶23-26 (Reasoning that identification from two persons based on their knowledge of the defendant's appearance was enough to support the conviction and was not against the manifest weight of the evidence despite the fact that those persons did not personally see the defendant commit the crime); *State v. Smith*, Cuyahoga App. No. 92561, 2009-Ohio-5010 (Finding that the video evidence of defendant stealing pharmaceutical totes was enough to convict defendant of crime and was not against the manifest weight of the evidence). Further, appellant admitted to Erb that he was present at the Grub Pub during the time of the shooting. Lastly, the evidence shows that appellant knowingly used a firearm on October 15 when he had been convicted of a prior felony offense involving a drug of abuse. The trier of fact, which has the primary responsibility of weighing the evidence and assessing the credibility of witnesses, found this evidence sufficient and reliable to prove that the appellant committed two counts of felonious assault and one count of having weapons while under a disability. Therefore, because appellant's convictions were not against the manifest weight of the evidence, we necessarily conclude that the state also presented sufficient evidence to support the convictions. Accordingly, appellant's first and second assignments of error are overruled.

{¶19} Assignment of Error No. 3:

{¶20} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING HIS MOTION TO MERGE ALLIED OFFENSES OF SIMILAR IMPORT AND FOR IMPOSING MULTIPLE SENTENCES FOR SAID ALLIED OFFENSES."

{¶21} In his third assignment of error, appellant argues that the trial court erred by failing to merge his conviction for having a weapon while under a disability with the felonious

assault conviction. In support of this argument, appellant claims that both offenses were committed by the same conduct of having and using the firearm to commit the felonious assault. Appellant also argues that the animus, to commit physical harm, was the same for both offenses.

{¶22} Ohio prohibits the imposition of multiple punishments for the same criminal conduct pursuant to R.C. 2941.25. *State v. Brown*, Butler App. No. CA2009-05-142, 2010-Ohio-324, ¶7. The statute provides for the following:

{¶23} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶24} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶25} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court established a new two-part test to determine whether offenses are allied offenses of similar import under R.C. 2941.25. *Id.* at ¶46-52; *State v. Craycraft*, Clermont App. Nos. CA2009-02-013, CA2009-02-014, 2011-Ohio-413, ¶11. Under this new test, courts must first determine "whether it is possible to commit one offense and commit the other with the same conduct." (Emphasis deleted.) *Johnson* at ¶48; *State v. McCullough*, Fayette App. Nos. CA2010-04-006, CA2010-04-008, 2011-Ohio-992, ¶14. In making this determination, it is not necessary that the commission of one offense would always result in the commission of the other, but instead, the question is simply whether it is possible for both offenses to be committed with the same conduct. *Craycraft* at ¶11, citing *Johnson* at ¶48; *State v. Lanier*,

Hamilton App. No. C-080162, 2011-Ohio-898, ¶4.

{¶26} If it is found that the offenses can be committed by the same conduct, courts must then determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Johnson* at ¶49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50. If both questions are answered in the affirmative, the offenses are allied offenses of similar import and must be merged. *Blanda*, 2011-Ohio-411 at ¶15, citing *Johnson* at ¶50. However, if the commission of one offense will never result in the commission of the other, "or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Johnson* at ¶51; *Craycraft* at ¶11-12; *Roy*, 2011-Ohio-1992 at ¶11.

{¶27} Appellant claims that his convictions for having a weapon while under a disability and felonious assault should be merged. As discussed above, the elements of felonious assault pursuant to R.C. 2903.11(A)(1) and (2) are, "knowingly" "cause serious physical harm to another" and "cause or attempt to cause physical harm to another" "by means of a deadly weapon or dangerous ordinance." The elements of having weapons while under a disability in violation of R.C. 2923.13(A)(3) are, "knowingly acquire, ha[ve], carry, or use any firearm" and the defendant has been convicted of "any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse." "Firearm," as defined by R.C. 2923.11(B)(1) "means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant."

{¶28} The trial court found the charges of having a weapon while under a disability and felonious assault had different focuses. We agree with the trial court in that the offenses should not be merged because each has a separate animus. Although the convictions of felonious assault and having a weapon under a disability could be committed with the same conduct, *Johnson* clearly states that offenses should not be merged when those offenses

have two separate animi. *Id.* at ¶51. An inquiry into the animus of the crime looks to the defendant's purpose or immediate motive for engaging in the criminal conduct. *State v. Logan* (1979), 60 Ohio St.2d 126, 131. In this case, the record shows that appellant committed a felonious assault and had possession of the gun while under a disability. Thus, the convictions of felonious assault and having a weapon while under a disability should not be merged because appellant made a conscious and separate choice to possess a firearm and a conscious and separate choice to shoot Stiehl and Waver with the firearm. The Second and Fifth Districts have also taken this approach when presented with a conviction involving a firearm that includes a conviction for having a weapon while under a disability. The Second District reasoned that the felonious assault and having a weapon while under a disability convictions should not merge because the animus of having a weapon while under a disability is the "conscious choice to possess a weapon. Felonious assault requires a conscious choice to attack someone using a weapon." *State v. Elder*, Richland App. No. 2011-CA-00058, 2011-Ohio-4438, ¶7-8. Similarly, the Fifth District found the defendant's carrying a concealed weapon and having a weapon while under a disability convictions were not allied offenses because the defendant acquired the gun sometime before he concealed the weapon and thus each offense was done with a separate and distinct act. *State v. Young*, Montgomery App. No. 23642, 2011-Ohio-747.

{¶29} Thus, the trial court did not err by failing to merge appellant's convictions for having a weapon while under a disability and felonious assault stemming from the October 15, 2010 shooting. Appellant's third assignment of error is overruled.

{¶30} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.