

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-11-1088

Appellee

Trial Court No. CR0201101176

v.

Steven T. Upham

DECISION AND JUDGMENT

Appellant

Decided: January 18, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Andrew J. Lastra, Assistant Prosecuting Attorney, for appellee.

Stephen D. Long, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, following a jury trial, in which appellant, Steven Upham, was found guilty of one count of complicity in the commission of attempted murder, with a firearm specification, in violation of R.C. 2923.03(A), 2923.02, 2903.02 and 2941.145, and not guilty of one count of complicity in the commission of felonious assault, with a firearm specification,

in violation of R.C. 2923.03(A), 2903.11(A)(2) and 2941.145. Following his conviction, the trial court sentenced appellant to serve a total of 13 years in prison, three of which were mandatory due to the firearm specification. On appeal, appellant presents the following as his sole assignment of error:

The jury's verdict in finding Mr. Upham guilty of attempted murder was contrary to the manifest weight of evidence.

{¶ 2} The undisputed facts are as follows. On January 22, 2011, around 11 p.m., Lindsey Steele received a telephone call from appellant, a former boyfriend, who asked her to pick him up at the home of Angela Thomas and John Tingley and drive him somewhere to buy heroin. After arriving at the house, Steele slid into the front passenger seat of her blue Kia Spectra and asked appellant to drive the vehicle while another man, Loren Osley, got into the back seat of the car.

{¶ 3} After driving a few blocks to the corner of Funston and Gradolph streets in Toledo, appellant stopped the car, pulled a gun out of his pocket, and pointed it at Steele's head. Appellant then pulled the trigger; however, the gun did not fire. Steele leaned back against the car door and started screaming, after which appellant pulled the trigger again. This time, the gun went off, hitting Steele on the left side of her head, and exiting out the front passenger window.

{¶ 4} After the gun fired, Steele began kicking at appellant. At some point, Osley and appellant both got out of the vehicle, after which Steele was able to get into the driver's seat and drive to a Stop and Go store where she received help and was taken to a

nearby hospital. Appellant and Osley returned to Thomas' and Tingley's home, and appellant began preparing heroin in the kitchen. While appellant was at the house, police called appellant on his cell phone and he made arrangements to turn himself in.

{¶ 5} On January 31, 2011, a Lucas County Grand Jury indicted appellant on two counts of complicity in the commission of felonious assault with a firearm, both second degree felonies, in violation of R.C. 2903.11(A)(2), with attached firearm specifications, in violation of R.C. 2941.145 (Counts 1 and 2), and one count of attempted murder in violation of R.C. 2923.03, 2923.02 and 2903.02, a first degree felony, with an attached firearm specification, in violation of R.C. 2941.145 (Count 3). A jury trial was held on April 12 and 13, 2012, at which testimony was presented by Lindsey Steele, Angela Thomas, John Tingley, Toledo Police Sergeant Daniel Raab, and Toledo Police Detectives Terry Cousino and Sherri Wise.

{¶ 6} Steele testified that she asked appellant to drive her car because she felt ill. Steele further testified that she had a previous romantic relationship with appellant, and that they used heroin together in the past. Steele stated that she and appellant purchased heroin from Osley, aka "Zo." Steele further stated that, after appellant and Osley entered the car, appellant looked at Steele and said "So you think you're going to turn me in?" Steele explained that appellant was referring to Steele's decision to tell a friend that appellant robbed a nearby garage, which resulted in appellant serving a jail sentence.

{¶ 7} Steele testified that she knew the gun in appellant's hand belonged to Osley, because she previously had seen Osley with the gun. Steele further testified that, after

appellant pulled the trigger the first time, she began screaming and leaning against the car door. When he pulled the trigger the second time and hit Steele, she began kicking appellant in the head and chest. Steele stated that the gun fired a third time after she kicked appellant, and that the bullet missed her and went through the rear passenger-side window.

{¶ 8} Steele said that she stayed in the hospital four days and received more than 100 stitches in her head. The only long-term injury she reported was sensitivity to lights in her left eye.

{¶ 9} On cross-examination, Steele testified that she had not used heroin since January 20, 2011, and did not remember telling police that she had been clean for one and one-half weeks before the day of the shooting on January 22. Steele also testified that, after the gun failed to fire the first time appellant told Osley the gun had no bullets, and Osley assured appellant that the gun did have bullets and also told appellant to “bust in her [Steele’s] head.” Steele stated that she thought Osley wanted appellant to kill her.

{¶ 10} On redirect, Steele testified that Osley never pointed a gun at either her or appellant, and that appellant did not seem to be afraid of Osley. She further testified that appellant was the one who pulled the trigger all three times. Finally, Steele testified that Osley exited the vehicle after the first shot was actually fired.

{¶ 11} Thomas testified at trial that she has been friends with appellant since she was 15 years old, and that she is a recovering heroin addict. Thomas further testified that appellant, Osley, and Osley’s cousin, Little E, came to the house she shares with Tingley

around 4 p.m. on January 22, 2011. She further testified that, before appellant left the house around 11 p.m., he asked her “if [she] would forgive him no matter what he did.” Thomas stated that appellant and Osley returned 10 or 15 minutes after Steele picked them up, and that while appellant was talking to the police detective on his cell phone, appellant said “I didn’t mean to shoot her, she kicked the gun.” Thomas further stated that she did not know what had taken place until around 1:30 a.m. when Detective Wise came to the house and spoke to her.

{¶ 12} Tingley testified at trial that he is a heroin addict and a self-employed contractor, and that he knew both appellant and Steele through Thomas. Tingley further testified that when appellant and Osley returned to the house, appellant was holding a gun wrapped in a glove, which he handed to Osley. Tingley stated that he then took Little E and Osley home, and that Osley had the gun in his possession. Tingley further stated that, before leaving with Osley and Little E, he told appellant to leave his house.

{¶ 13} Sergeant Raab testified at trial that he went to the scene of the shooting in response to a “gunshot call.” Raab stated that he called appellant’s cell phone and that appellant told Raab “I’m sorry, is she okay?” Raab further testified that appellant promised during the call to turn himself in, after which appellant walked over to the scene of the shooting and was arrested. On cross-examination, Raab stated that appellant was “cooperative.” On redirect, Raab testified that he could draw no conclusion as to whether appellant was either drunk or high at the time of the shooting.

{¶ 14} Detective Cousino testified at trial that he inspected Steele’s Kia after the shooting and found both the front and rear passenger windows broken. Cousino further testified that he found a defect on the outside of the rear passenger-side window frame which, in his opinion, meant that the second shot was fired from outside the vehicle. On cross-examination, Cousino testified that police recovered both bullets, but no casings, and that the second bullet appeared to be more damaged than it would have been from hitting Steele in the head and then exiting the front passenger window. Cousino also explained that a semi-automatic gun ejects the shell casings, while a revolver does not.

{¶ 15} Detective Wise testified at trial that she was the lead investigator in the case, and that she interviewed appellant after the shooting. Wise also testified that she searched Thomas’ and Tingley’s home; however, no weapon ever was found. In response to a question from the jury, Wise stated that there was no proof that Osley was in the vehicle except through Steele’s testimony. Wise also stated that she observed blood on appellant’s shirt, and that he had fresh marks on his body from recent heroin injections.

{¶ 16} During Wise’s testimony a DVD containing redacted portions of an interview between Wise and appellant was played for the jury. On the DVD, appellant told Wise that Osley wanted him to kill Steele, and that appellant only held the gun to “scare” Steele because she snitched on appellant and Osley, resulting in both men going to jail for car theft. Appellant stated that Osley, who was sitting in the back of Steele’s Kia, had another gun, and that Osley would have shot appellant if he had not cooperated

in trying to “scare” Steele. Appellant also told Wise that he tried to talk Steele out of picking him up, but she came anyway. Appellant stated several times that he did not want to shoot anyone, and that he loves Steele.

{¶ 17} Appellant further stated that, after the gun went off the first time, Osley got out of the car and asked for the gun. Appellant repeated several times that the gun went off only once, when he was kicked by Steele, and that he did not see any blood inside the car. Appellant stated that the blood on his shirt was his own blood. Appellant said that he gave the gun to Osley, who took it and walked away from the car. Appellant stated that Osley did not go back to Thomas’ and Tingley’s house with him.

{¶ 18} After the above testimony and evidence was presented, the prosecution rested. Defense counsel then made a motion to dismiss pursuant to Crim.R. 29, which was denied. The trial court then inquired as to whether appellant desired to testify on his own behalf, to which appellant responded that he would remain silent. At that point, counsel for both sides presented closing arguments to the jury, and the court instructed the jury, after which the jury retired to begin deliberations. After a short period of deliberation, the jury returned its verdict of guilty as to Count 3, complicity to commit attempted murder, with a firearm specification, and not guilty as to Count 2, complicity to commit felonious assault. Per the trial court’s instructions, the jury did not deliberate as to Count 1, complicity to commit felonious assault, because it was a lesser included offense of Count 3.

{¶ 19} On April 14, 2011, a sentencing hearing was held, after which the trial court sentenced appellant to serve a ten-year prison term as to Count 1, with an additional three-year mandatory sentence for the firearm specification, for a total prison term of 13 years.¹ A timely notice of appeal was filed on April 20, 2011.

{¶ 20} In his sole assignment of error, appellant asserts that the jury's verdict was against the manifest weight of the evidence. In support, appellant argues that reasonable doubt remains as to whether or not appellant intended to kill Steele when he pointed a gun at her in a small car and pulled the trigger several times. Specifically, appellant argues that he told police he moved the barrel of the revolver so that no bullet would be in the chamber when he pulled the trigger the first time. Appellant also argues that he pointed the gun at Steele the second time because Osley wanted Steele dead and appellant was afraid of Osley. Appellant asserts that the gun discharged because Steele kicked him, and not because he intentionally pulled the trigger. Finally, appellant argues that his expressions of concern for Steele's welfare after the shooting are evidence that he did not intend to kill her.

{¶ 21} The Ohio Supreme Court has held, in cases where a defendant argues that his criminal conviction is against the manifest weight of the evidence, that:

¹ In its judgment entry journalized on April 15, 2011, the trial erroneously imposed a ten-year prison sentence for Count 1. However, on April 20, 2011, the trial court journalized a nunc pro tunc judgment entry correcting its error and sentencing appellant for his conviction as to Count 3.

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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

To determine whether a case is an exceptional case where the evidence weighs heavily against conviction, an appellate court must review the record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). An appellate court should reverse the conviction and order a new trial only if it concludes that the trier of fact clearly lost its way in resolving conflicts in evidence and created a manifest miscarriage of justice. *Thompkins. State v. Cowan*, 8th Dist. No. 97877, 2012-Ohio-5723, ¶ 30.

{¶ 22} Appellant was convicted of one count of complicity to commit attempted murder. R.C. 2923.03 states, in pertinent part, that:

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

* * *

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense * * *.

R.C. 2923.02 states, in pertinent part, that

(A) 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.

* * *

(E)(1) Whoever violates this section is guilty of an attempt to commit an offense. * * *

R.C. 2903.02 states, in pertinent part, that

(A) No person shall purposely cause the death of another * * *.

(D) Whoever violates this section is guilty of murder * * *.

{¶ 23} Pursuant to R.C. 2941.145, an offender who is found to have “had a firearm on or about the offender’s person or under the offender’s control while committing the offense and displayed the firearm, brandished the firearm, indicated that offender possessed the firearm, or used it to facilitate the offense” shall serve a mandatory three-year prison sentence.

{¶ 24} It is undisputed that appellant had a firearm in his possession and that he pulled the trigger at least twice, with the second attempt producing a bullet that hit Steele on the left side of her head. Both Steele and appellant stated that Osley was in the back seat of the Kia at the time of the shooting, although Steele’s impression that appellant

was not afraid of Osley differed from appellant's statement to Wise. Appellant's and Steele's versions of events differs in that appellant adamantly stated that he pulled the trigger only twice, and Steele testified that appellant pulled the trigger three times. However, Cousino's testimony that Steele's car had two broken windows tends to support Steele's account. Also, Thomas and Tingley both testified that Osley and appellant came back to their home minutes after the shooting occurred, which contradicts appellant's story to Wise that Osley disappeared after the shooting and did not return to the house. Wise's observation that both appellant and Steele's car were covered in blood stands in stark contrast to appellant's denial that he saw any blood in the car and that he did not know Steele had been hit by a bullet that came from his gun. Finally, the strongest testimony came from Steele, who testified that she knew appellant well, that he sat a few feet away from her in her own car and pulled the trigger of a gun three times, that the gun actually fired twice, and that one bullet hit her in the head while the second bullet broke out the car's rear passenger window.

{¶ 25} On consideration of the foregoing, and after conducting our own review of the entire record, weighing the evidence, making all reasonable inferences, and considering the credibility of the witnesses, we cannot find that the jury lost its way in finding appellant guilty of complicity in the commission of attempted murder.

Appellant's sole assignment of error is not well-taken.

{¶ 26} The judgment of the Lucas County Court of Common Pleas is affirmed.

Court costs are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

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