

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080194
	:	TRIAL NO. B-0707106
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
MONTEZ COCKRELL,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a bench trial, defendant-appellant, Montez Cockrell, was convicted of two counts of felonious assault under R.C. 2903.11(A)(2), one count of felonious assault under R.C. 2903.11(A)(1), and one count of having weapons while under a disability under R.C. 2923.12(A)(2). The three felonious-assault convictions all had accompanying firearm specifications. The trial court sentenced Cockrell to serve a total of 11 years in prison. We affirm the findings of guilt but reverse the sentences imposed and remand the case for further proceedings.

Evidence presented at trial showed that Isiah Dykes and Kevin Leary, who were cousins, were standing outside when they saw a car drive by them that aroused their suspicions. Dykes saw Andrew Gilden in the front passenger seat of the car. Dykes knew Gilden because Gilden's friend had shot Dykes earlier in the year. Dykes also saw Cockrell seated behind the driver.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Dykes and Leary became even more suspicious when they saw Cockrell get out of the car and walk past them as he went into an apartment building. He stayed inside the building for only a few minutes. He then walked out and talked briefly with someone inside the car. When Cockrell walked back to the car, Dykes told Leary to get his gun because he felt that the occupants of the car were “up to something.”

Subsequently, Cockrell walked over to Leary and Dykes and started shooting. Dykes quickly fell to the ground, but he was not injured. One of the shots hit Leary in the leg. Leary returned fire and hit Cockrell. Both Leary and Dykes testified that Cockrell shot several times before Leary shot back.

Police officers found Cockrell at his uncle’s house not long after the shooting. He told the officers that he had been walking down the street when some unknown person, whom he could not describe, shot him. Cockrell first claimed that someone he did not know had carried him to his uncle’s house. But later he contended that a group of strangers had driven him there.

Cockrell also lied to police, telling them that his name was Tyrone Cockrell. He continued to lie until his mother showed up at the hospital and told police that his name was really Montez. The clothing that police found in Cockrell’s hospital room matched the description of the clothing that Dykes and Leary had given the police. Though Leary was not able to identify Cockrell, he did identify the clothing Cockrell had been wearing the night of the shooting. Police officers tested both Leary and Cockrell for gunshot residue, although only Leary’s test was positive.

In his first assignment of error, Cockrell contends that the state’s evidence was insufficient to support his convictions. Our review of the record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved beyond a reasonable doubt all the elements of felonious assault against Leary under R.C. 2903.11(A)(1),

felonious assault against both victims under R.C. 2903.11(A)(2), the accompanying firearm specifications, and having weapons while under a disability under R.C. 2923.13(A)(2). Therefore, the evidence was sufficient to support the convictions.²

Cockrell also argues that his convictions were against the manifest weight of the evidence. After reviewing the record, we cannot say that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse Cockrell's convictions and order a new trial. Therefore, the convictions were not against the manifest weight of the evidence.³

Cockrell's main argument is that Dykes and Leary's testimony was not credible. But matters as to the credibility of evidence are for the trier of fact to decide.⁴ We overrule Cockrell's first assignment of error.

In his second assignment of error, Cockrell contends that he was improperly sentenced. First he argues that the trial court erred by convicting him of two counts of felonious assault against Leary. We agree.

This court has held that felonious assault under R.C. 2903.11(A)(1) and felonious assault under R.C. 2903.11(A)(2) are allied offenses of similar import.⁵ Therefore, Cockrell could have only been convicted of those two counts if they were committed separately or with a separate animus as to each.⁶ The state argues that because Cockrell fired numerous shots at Leary, he could have been convicted of both causing physical harm to Leary under section (A)(1) for the shot that hit him and an attempt under section (A)(2) for each of the other shots.

² See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492; *State v. Robertson*, 1st Dist. Nos. C-070151 and C-070159, 2008-Ohio-2562.

³ See *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541; *Robertson*, supra.

⁴ *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433; *State v. Taylor*, 174 Ohio App.3d 477, 2007-Ohio-7066, 882 N.E.2d 945.

⁵ *State v. Smith*, 1st Dist. No. C-070216, 2008-Ohio-2469.

⁶ See *State v. Mitchell* (1983), 6 Ohio St.3d 416, 453 N.E.2d 593; *State v. Woods*, 1st Dist. No. C-060340, 2007-Ohio-1487.

In *State v. Smith*,⁷ the defendant fired at shot at several police officers, striking one in the knee. Though his gun jammed, he continued to try to fire more shots at the officers. We held that the defendant could not be convicted of two counts of felonious assault against the police officer he had shot under both sections (A)(1) and (A)(2), because they involved the same victim and the same conduct.⁸

We find no material difference between the facts in this case and the facts in *Smith*. Because, like *Smith*, two of the counts of felonious assault in this case involved the same victim and the same conduct, Cockrell could have only been convicted of one of them. Therefore, trial court should have merged the two counts of felonious assault against Leary for sentencing.

Cockrell also argues that the trial court erred by not advising him about post-release control at the sentencing hearing. When the trial court fails to notify a defendant that he is subject to post-release control at the sentencing hearing, the sentence is void.⁹ Consequently, we sustain Cockrell's second assignment of error. We affirm the trial court's findings of guilt, but vacate the sentences, and remand the case for a new sentencing hearing.¹⁰

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., PAINTER and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 10, 2008 on
per order of the Court _____.

Presiding Judge

⁷ 1st Dist. No. C-060991, 2008-Ohio-2561.

⁸ Accord *Robertson*, supra.

⁹ *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961; *State v. Martin*, 1st Dist. No. C-070017, 2007-Ohio-6662.

¹⁰ *Bezak*, supra; *Martin*, supra.