[Cite as *In re the Matter of D.R.*, 2006-Ohio-7330.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of: D.R.,	:	
(Appellant).	:	
	:	No. 05AP-492
	:	(C.P.C. No. 04JU-10426)
	:	(REGULAR CALENDAR)

O P I N I O N

Rendered on August 17, 2006

George W. Leach, for appellant.

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*, for appellee, State of Ohio.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

SADLER, J.

{¶1} Defendant-appellant, D.R. ("appellant"), a minor, appeals the May 6, 2005 judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, which found appellant to be a delinquent minor having committed the offense of murder in violation of R.C. 2903.02. For the following reasons, we affirm.

{¶2} Appellant, who was born on July 16, 1989, was charged with murder by a complaint filed with the juvenile court on July 24, 2004. On November 15, 2004, the juvenile court determined that probable cause existed to believe that appellant committed the charged offense. Plaintiff-appellee, State of Ohio ("appellee"), filed a bind over motion seeking the juvenile court to relinquish jurisdiction of appellant in order to try appellant as an adult in the general division of the court of common pleas. The juvenile court denied the motion on February 18, 2005, finding that appellant was amenable to rehabilitation as a juvenile.

{¶3} The following facts are adduced from the adjudicatory hearing conducted by the juvenile court on April 7 and April 11, 2005. Arthur Hayden ("Hayden"), was the first witness called on behalf of the prosecution. Hayden testified that he was the boyfriend of the victim, Paulette Butler ("Butler"). On June 18, 2004, Hayden and Butler drove to Teresa's Pizza at the corner of East Livingston Avenue and South 22nd Street in Columbus, Ohio, to pick up a pizza. Teresa's Pizza is part of a two-store building, and is next to The Family Carryout. The Family Carryout is immediately northeast of the intersection, Teresa's Pizza is east of The Family Carryout, and the parking lot for the building is east of Teresa's Pizza.

{¶4} Hayden and Butler arrived at the pizza shop around 11:20 p.m. According to Hayden, he noticed two groups of two to four individuals standing in front of Teresa's Pizza. Hayden parked his vehicle in the parking lot, and Butler exited the vehicle and

walked towards the pizza shop entrance. Although Hayden could not see Butler in front of the pizza store, he knew that Butler stopped to talk to several individuals who were standing in front of the stores because he heard her voice.

{¶5} Approximately five or six minutes after Butler started talking with the individuals in front of the pizza shop, Hayden heard five gunshots fired. Immediately after hearing the gunshots, Hayden noticed two females run past his vehicle on East Livingston Avenue. Butler proceeded to Hayden's vehicle and told him that she was shot. After Butler collapsed in the passenger seat, Hayden, in a panic, pulled his vehicle out of the parking lot of Teresa's Pizza and signaled a nearby Columbus police officer that he needed assistance. The police officer removed Butler from the vehicle and laid her on the curb until the emergency squad took her to Grant Hospital, where she later died.

{¶6} The second witness on behalf of the prosecution was Sergeant Edward Powell ("Powell"), of the Columbus Division of Police. Powell testified that he was flagged down by Hayden around 11:30 or 11:40 p.m., on June 18, 2004, on East Livingston Avenue near the intersection of East 18th Street. After being told by Hayden that Butler had been shot, Powell radioed for medical assistance. Approximately one minute later, another police officer arrived at the scene.[1] Powell opened the passenger door to check on Butler, and Powell, with the assistance of the other police officer, laid Butler on the sidewalk until the emergency squad arrived.

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[1] The police officer was not identified at trial.

While waiting for the ambulance, Powell spoke with Hayden. Hayden indicated to Powell that Butler was shot at Teresa's Pizza. Based on that information, Powell dispatched officers to investigate the area around Teresa's Pizza. After Butler was taken to the hospital, Powell proceeded to the pizza shop to ensure the scene was secure. According to Powell, bullet casings and holes were found at the scene. One bullet hole was discovered in the newspaper dispenser near the entrance to The Family Carryout.

{¶7} The next witness to testify for the prosecution was John Royster ("Royster"), also known as "Babe," who was 18 years old at the time he testified. According to Royster, he had been acquainted with appellant for approximately two years. Royster stated that appellant was in a gang called "Mound and Berk" or "Mound and Berkley," as was another individual, D.F. Royster testified that although he did not have any problems with appellant personally, he did have problems and arguments with D.F. Though Royster knew appellant was associated with D.F., he was not certain if they were related.

{¶8} On June 18, 2004, at approximately 11:30 p.m., Royster was standing between Teresa's Pizza and The Family Carryout with his cousin, Dwayne Childs, when a hatchback automobile approached Teresa's Pizza proceeding east on East Livingston Avenue and turned left on South 22nd Street proceeding north. Royster's friend, Ernesto Bell ("Bell"), was inside the convenience store, and Melvin Edwards, an employee of

Teresa's Pizza, was standing near the door of the pizza shop. Royster indicated where the individuals were standing by referencing a diagram of the crime scene.[2]

{¶9} The northeast corner of East Livingston Avenue was illuminated by a streetlight as well as the lights in front of The Family Carryout and Teresa's Pizza. Royster stated that although the vehicle was silver, the way in which the streetlight cast its light on the vehicle, it appeared to have a yellow or golden tint.

{¶10} According to Royster, inside the vehicle were a driver and two passengers, one in the front passenger seat and one in the backseat. Royster testified that appellant was in the passenger seat leaning out of the passenger window of the vehicle with a gun in his right hand. Royster stated, "when they hit the corner they slowed the car down and [appellant] was just hanging out the car." (Tr. 57.) Royster testified that the vehicle was moving very slowly, and, referencing the diagram, indicated the shooting occurred near the northeast corner of the intersection. According to Royster, appellant was pulling the trigger and shooting, and that he heard five or six gunshots fired. Royster testified that appellant was wearing a black shirt. After he stopped firing his gun, appellant pulled up his shirt to cover his face after he stopped firing shots. Royster stated, "I was just looking at a light while [appellant] was just still shooting. Then when the - - the car stopped when

[2] The diagram, admitted by stipulation as the State's Exhibit 2, was a representation of the crime scene drawn to scale and included a depiction of the buildings, lights, and streets, as well as the location where bullets, shells, and holes were discovered.

he ran out of bullets, I just hit the ground." (Tr. 81.) Royster stated that he never saw Butler.

{¶11} After the shooting, Royster left the scene, but returned later and spoke with a Columbus police detective. Royster testified that at the time he told the detective that he did not have any information on the crime because he did not want to become involved. Additionally, he testified that he did not later report the crime to the police because he still did not want to become involved with the crime.

{¶12} Subsequent to the shooting, Royster was arrested for trafficking drugs. In exchange for dropping the drug trafficking charges, Royster agreed with the prosecutor to identify the individual who fired the gun on June 18, 2004, in a photo array and testify at trial.[3] Royster stated that he decided to testify on behalf of the prosecution, "[f]or an innocent lady that had nothing to do with nothing and she lost her life." (Tr. 65.)

{¶13} The final witness to testify for the prosecution was Bell, also known as "Rio," who was 16 years old at the time he testified. Bell testified that he knew appellant as "Munchman." According to Bell, though he never personally had problems with appellant, he was nearly involved in an altercation at school with D.F., a family member of appellant. Bell was not aware that appellant and D.F. were biologically related. He testified that he knew Royster had problems with D.F.

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[3] The record does not disclose the number or seriousness of the charges against Royster that were dismissed in exchange for his testimony.

{¶14} Bell testified that on June 18, 2004, he walked to Teresa's Pizza and The Family Carryout around 10:30 p.m. He entered The Family Carryout to get something to eat. According to Bell, he observed a small tan vehicle with two individuals in it rapidly approach Teresa's Pizza and The Family Carryout. Bell was standing in the doorway of the convenience store with the door open at the time. Bell testified that there was nothing obstructing his field of vision during the shooting, and he observed appellant sitting in the passenger seat of the vehicle, hanging out of the passenger side window. According to Bell, as the vehicle approached the stores, appellant tried to conceal his identity by pulling the collar of his shirt up over his face. Referencing the diagram, Bell testified that the shooting occurred at the northeast corner of East Livingston Avenue and South 22nd Street near the streetlight. After Bell heard shots fired and one of the bullets strike an object, he stepped backwards into the store. When Bell stepped out of the store again, the vehicle sped off.

{¶15} Bell testified that immediately following the shooting, he went home and did not return to the crime scene that evening. Bell stated that he did not report any information regarding the shooting to either the police or his mother.

{¶16} Subsequent to the shooting, Bell was charged with domestic violence. On July 27, 2004, while at the courthouse for his domestic violence charge, Bell was approached by a Franklin County Assistant Prosecutor regarding the shooting that occurred on June 18, 2004. Bell entered into an agreement with the prosecutor such that

the prosecutor would drop his domestic violence charge in exchange for testimony regarding the shooting on June 18, 2004. He was interviewed by a Columbus police detective regarding the incident and identified appellant from a photo array as the individual that shot Butler. On cross-examination, Bell testified that he identified, during the interview, an individual in the photo array as the driver of the vehicle, but admitted that he was told that the individual he identified was in an institution on June 18, 2004, and thus could not have been the driver of the vehicle.

{¶17} At the close of the prosecution's case, appellant did not make a Crim.R. 29 motion for acquittal. Appellant did not testify in his own defense, or call any witnesses.

{¶18} The trial court adjudicated appellant a delinquent minor having found that he committed the offense of murder in violation of R.C. 2903.03. The trial court committed appellant to the Department of Youth Services until the age of 21 for violation of R.C. 2903.03, and imposed a concurrent period of three years for use or possession of a firearm pursuant to R.C. 2923.11.

{¶19} Appellant timely appealed, and asserts the following three assignments of error:

> First Assignment of Error:
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> Appellant was denied Due Process of law under the V and XIV Amendments to the U.S. constitution when he was convicted of purposeful Murder where there was no evidence nor testimony to support the mens rea of 'purposeful' Murder by Appellant.

> Second Assignment of Error:
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> Appellant was denied Due Process of Law when the Court abused her discretion by basing his conviction solely upon the testimony of unreliable witnesses in the absence of any other evidentiary proof.
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> Third Assignment of Error:
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> Appellant's convictions for Murder under R.C. §2903.02 and Possession or Use of a Firearm as defined in R.C. §2923.11 are not supported by evidence sufficient to satisfy the requirements of Due Process under the U.S. Constitutional Amendments V and XIV.

{¶20} Appellant's assignments of error, asserting that he was denied due process of law, challenge both the sufficiency and the manifest weight of the evidence. Our review of the sufficiency and the manifest weight of the evidence in a juvenile delinquency adjudication is the same as for criminal defendants. *In re Watson* (1989), 47 Ohio St.3d 86, 548 N.E.2d 210; see, also, *In the Matter of: Fortney*, 162 Ohio App.3d 170, 2005-Ohio-3618, at ¶19, 832 N.E.2d 1257.

{¶21} Appellant challenges the sufficiency of the trial court's finding of delinquency in his first and third assignments of error. Appellant contends that the prosecution failed to present evidence sufficient to meet the element of "purposefully" for the murder of Butler. In support of his contention, appellant argues that the testimony of Royster and Bell indicates that the passenger of the vehicle was shooting randomly, and was not specifically aiming at Butler or any other individual. Appellant asserts that the record lacks physical evidence linking him to the offense.

{¶22} Our role in reviewing a challenge to the sufficiency of the evidence of a criminal conviction was established by the Supreme Court of Ohio in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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.

See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶23} However, whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. An appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts" in determining whether the evidence is, in fact, sufficient. *Jackson*, supra, at 319. The weight given to the evidence and the credibility of witnesses are issues primarily for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 24 O.O.3d 150, 434 N.E.2d 1356. Thus, a conviction will not be disturbed on the sufficiency of the evidence unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached

by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484, 2001-Ohio-4, 739 N.E.2d 749; *Jenks*, supra.

{¶24} R.C. 2903.02 states that "[n]o person shall purposely cause the death of another." As provided by R.C. 2901.22(A), "[a] person acts purposefully when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." A person intends the natural, reasonable, and probable consequences of his voluntary acts. *State v. Johnson* (1978), 56 Ohio St.2d 35, 38, 10 O.O.3d 78, 381 N.E.2d 637. (Citations omitted.) This court has determined that death is a natural and probable consequence of the act of pointing a firearm and firing it in the direction of another human being. *State v. Evans*, 10th Dist. No. 01AP-594, 2001-Ohio-8860.

{¶25} Testimony at trial established that on June 18, 2004, between 11:20 and 11:30 p.m., Royster was standing near Teresa's Pizza and Bell was standing in the doorway to The Family Carryout, near the corner of East Livingston Avenue and South 22nd Street. Additionally, both an employee of Teresa's Pizza and Butler, the victim, were standing in front of the pizza shop. The testimony established that appellant was a passenger of a vehicle that drove east on East Livingston Avenue and turned northward on South 22nd Street. According to the eyewitness testimony, appellant leaned out of the passenger side window of the vehicle while holding a firearm.

{¶26} At trial, the prosecution argued, and the evidence revealed, that the diagram, in combination with the witnesses' testimony, established that appellant fired a gun in the direction of Royster and Bell. The vehicle, with appellant leaning out of the passenger side window, stopped at the northeast corner of the intersection where Bell was standing near the doorway to The Family Carryout, which faces the street corner. Royster was standing nearby in between The Family Carryout and Teresa's Pizza. A bullet was recovered from a newspaper dispenser in front of The Family Carryout near where both Royster and Bell were standing.

{¶27} The evidence further revealed that Royster and Bell were acquainted with both appellant and with appellant's family member, D.F., who was also in appellant's gang. Both Royster and Bell had been involved in arguments with D.F. Thus, based on the above evidence, the trier of fact could reasonably conclude that Bell and Royster were appellant's intended targets.

{¶28} Under the doctrine of transferred intent, "the culpability of a scheme designed to implement the calculated decision to kill is not altered by the fact that the scheme is directed at someone other than the actual victim." *State v. Richey* (1992), 64 Ohio St.3d 353, 364, 595 N.E.2d 915, quoting *State v. Solomon* (1981), 66 Ohio St.2d 214, 218, 20 O.O.3d 213, 421 N.E.2d 139. Thus, "where an individual is attempting to harm one person and as a result accidentally harms another, the intent to harm the first person is transferred to the second person and the individual attempting harm is held

criminally liable as if he both intended to harm and did harm the same person." *State v. Mullins* (1992), 76 Ohio App.3d 633, 636, 602 N.E.2d 769. Therefore, under the doctrine of transferred intent, the fact that Royster and Bell escaped unharmed while Butler was killed does not change appellant's culpability for the murder of Butler.

{¶29} Whether or not Royster and Bell were the intended victims, the Supreme Court of Ohio has found that "an intent to kill may be presumed where the natural and probable consequence of a wrongful act is to produce death, and such intent may be deduced from all the surrounding circumstances, including the instrument used to produce death, its tendency to destroy life if designed for that purpose, and the manner of inflicting a fatal wound." *State v. Robinson* (1954), 161 Ohio St. 213, 53 O.O. 96, 118 N.E.2d 517, at paragraph six of the syllabus. Here, appellant discharged a firearm in the direction of other human beings; therefore, appellant engaged in an act in which death was a probable and natural consequence. *Evans*, supra. We find that, based on *Robinson* and *Evans*, the trial court, as the trier of fact, could reasonably conclude, based on the above facts and circumstances, that appellant purposefully caused the death of Butler.

{¶30} Accordingly, viewing the evidence in a light most favorable to the prosecution, the evidence introduced at trial was sufficient to support the trial court's finding that appellant was a delinquent minor having committed the offense of murder.

{¶31} Each of appellant's assignments of error also challenge the finding of delinquency on manifest weight grounds.[4] Appellant asserts that the testimony of Royster and Bell lack credibility as they both provided testimony in exchange for dismissal of criminal prosecutions against them and was therefore unreliable. Additionally, appellant argues that their testimony was contradictory.

{¶32} Even though a conviction may be supported by sufficient evidence, it may still be reversed as being against the manifest weight of the evidence.[5] *Thompkins*, supra, at 387. In reviewing a manifest weight challenge, the court of appeals sits as a "thirteenth juror" and, after "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." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 485 N.E.2d 717. See, also, *Columbus v. Henry* (1995), 105 Ohio App.3d 545, 547-548, 664

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[4] We note that appellant raised two issues in his argument, but not in his assignments of error. Pursuant to App.R. 12(A)(1)(b), we are only required to pass on the assignments of error set forth in the merit brief. In his argument in support of his first assignment of error, appellant asserts that the trial court erred by failing to consider a lesser-included offense of murder. Because appellant has not set forth the failure of the trial court to consider a lesser-included offense of murder as an assignment of error, we decline to address this issue. In his argument in support of his second assignment of error, appellant asserts that the trial court "abused its discretion" by prejudicially interjecting comments and questioning the witnesses. Because appellant did not raise bias in his second assignment of error, we will only address the overall issue in appellant's second assignment of error regarding whether the trial court's finding of the witnesses' testimony to be credible was against the manifest weight of the evidence.

[5] Although appellant asserts that the trial court "abused its discretion" by relying on unreliable testimony, abuse of discretion is not the proper standard of review for a manifest weight of the evidence challenge, as discussed herein.

N.E.2d 622. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most "exceptional case in which the evidence weighs heavily against the conviction." *Thompkins*, supra, at 387.

{¶33} Additionally, while a trier of fact may note any inconsistencies and resolve or discount them accordingly, such inconsistencies do not render a conviction against the manifest weight of the evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212. Thus, it is within the province of the trier of fact to make determinations with respect to credibility. See *State v. Lakes* (1964), 120 Ohio App. 213, 217, 29 O.O.2d 12, 201 N.E.2d 809 ("It is the province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness"). See, also, *State v. Harris* (1991), 73 Ohio App.3d 57, 63, 596 N.E.2d 563 (even though there was reason to doubt the credibility of the prosecution's chief witness, he was not so unbelievable as to render verdict against manifest weight). Nevertheless, determinations of credibility and weight of testimony remain within the province of the trier of fact. *DeHass*, supra, paragraph one of the syllabus. Therefore, "an appellate court may not substitute its judgment for that of the trier of fact on the issue of witness credibility unless it is manifestly clear that the fact finder lost its way." *State v. Dillion*, 10th Dist. No. 04AP-1211, 2005-Ohio-4124 at ¶21, discretionary appeal not allowed, 108 Ohio St.3d 1414, 2006-Ohio-179, 841 N.E.2d 319.

{¶34} After reviewing the entire record, we find nothing to indicate that the trial court clearly lost its way or that any miscarriage of justice resulted as to require a new trial. The trial court, as the trier of fact, was in the best position to assess the testimony and credibility of the witnesses. Thus, the weight given to the evidence and the determination of the credibility of Royster and Bell, particularly with respect to the fact that each entered into agreements with appellee in exchange for testimony, was within the province of the trial court as the trier of fact. *DeHass*, supra, at paragraph one of the syllabus. Furthermore, it was within the province of the trial court to resolve not only the inconsistencies within the individual testimony of Royster and Bell, but also the inconsistencies between them. *Lakes*, supra, at 217. Consequently, we determine that the trial court's finding appellant a delinquent minor was not against the manifest weight of the evidence.

{¶35} For the above stated reasons, appellant's first, second, and third assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed.

Judgment affirmed.

McGRATH and FRENCH, JJ., concur.

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