[Cite as *State v. Turner*, 2009-Ohio-4385.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-54 (C.P.C. No. 08CR07-5288)
v.	:	(REGULAR CALENDAR)
William F. Turner,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 27, 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.

BROWN, J.

{¶1} William F. Turner, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a jury verdict, of improperly discharging a firearm at or into an occupied structure, with specification, in violation of R.C. 2923.161, which is a felony of the second degree; having a weapon while under disability, in violation of R.C. 2923.13, which is a felony of the third

degree; and tampering with evidence, in violation of R.C. 2921.12, which is a felony of the third degree.

{¶2} On the evening of July 10, 2008, appellant and his girlfriend, Tiara Brown, got into an argument at a store. Brown had found out that appellant had been with another woman the night before, and Brown deactivated appellant's cell phone. Appellant threw cans of soda at Brown. The two continued to fight while they went back to Brown's house. When Brown arrived at her house, she called the police, and appellant left. Brown then went to the home of her cousin Angelisha Griffin. Brown's cousins, Demetriona and Diamond, and Griffin's boyfriend were also at the house. Appellant walked by the house several times. The police came once while appellant was not there, and then they left. Appellant retrieved a gun from his house and then returned to Griffin's house. Griffin told him to leave, but appellant said he wanted his cell phone to be turned back on.

{¶3} Appellant raised a gun and shot at the house after Griffin yelled at appellant from the front door. Appellant fired another shot into the air and then fled. As a police officer arrived, the officer saw appellant run by, and, after a foot chase, the officer apprehended appellant. Appellant admitted that he shot the gun and later showed the police where he had hidden it.

{¶4} Appellant was indicted for felonious assault, improperly discharging a firearm at or into a habitation, having a weapon under disability, and tampering with evidence. A bench trial commenced on December 15, 2008. The court found appellant not guilty of the felonious assault charge, but guilty on the remaining charges. On December 19, 2008, the trial court imposed a two-year term of incarceration on the improperly discharging a firearm at or into a habitation charge to run consecutive to

concurrent one-year terms of incarceration on the remaining counts, and imposed a three-year term of incarceration for the firearm specification, for a total sentence of six years. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

> Appellant's conviction for violation of R.C. 2923.161 is against the manifest weight of the evidence.

{¶5} Appellant argues in his sole assignment of error that his conviction for improperly discharging a firearm at or into a habitation is against the manifest weight of the evidence. Our function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we find that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. Id. On the other hand, we will not reverse a conviction so long as the state of Ohio, plaintiff-appellee, presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-94, 1998-Ohio-533; *State v. Eley* (1978), 56 Ohio St.2d 169, syllabus.

{¶6} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. See *Martin* at 175. However, in conducting our

review, we are guided by the presumption that the jury, or the trial court in a bench trial, "is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Thus, a reviewing court must defer to the factual findings of the jury or judge in a bench trial regarding the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Concerning the issue of assessing witness credibility, the general rule of law is that "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. Indeed, the fact finder is free to believe all, part or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412. If evidence is susceptible to more than one construction, reviewing courts must give it the interpretation that is consistent with the verdict and judgment. *White v. Euclid Square Mall* (1995), 107 Ohio App.3d 536, 539. Mere disagreement over the credibility of witnesses is not sufficient reason to reverse a judgment. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24.

{¶7} R.C. 2923.161 provides, in pertinent part:

> (A) No person, without privilege to do so, shall knowingly do any of the following:
>
> (1) Discharge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual[.]

{¶8} Appellant argues that the conviction for discharging a firearm at or into a habitation was against the manifest weight of the evidence. Appellant contends Brown

testified only that she saw a blue flash, and Griffin testified it was dark and she did not see a gun, but saw it fire. Appellant contrasts this testimony with his own, which was that he fired the gun not at the house, but into the ground and then into the air. Appellant also points out that minimal physical evidence supported the state's version of the events. Appellant also claims that, although Columbus Police Detective Russ Wiener described a "chip" in a brick under the window of the house, he did not describe it as a bullet hole, and the state offered no expert to testify that the "chip" was the result of a bullet strike. (Tr. 92.) Appellant further points out that there was no bullet casing recovered at the scene.

{¶9} At trial, Brown was the first to testify. We first note that Brown did not want to testify and discussed her unwillingness several times with the trial court. She asked the trial court if she could refuse to testify and plead the Fifth Amendment privilege, but the court told her she was required to testify. The trial court allowed the state to question Brown as if she had been called by the court. Brown testified at first that, while appellant was standing in Griffin's front yard and she was inside the house, she saw "something" in appellant's hand as he raised it in front of him, and she saw a blue flash. (Tr. 38.) She then changed her testimony and said she did not know if his hand was up or down, as no porch light was on and it was dark. She said she assumed the flash was a gun and she fled to the back of the house. She called the police and told them that appellant was firing a gun. In her statement to police, Brown indicated that appellant pointed a gun. She said she saw a bullet strike a brick under the front window. Brown said she thought the gun was a Beretta because "I remember seeing it, and that's what it was," and then said it was "dark" in color. (Tr. 45-46.) On cross-examination by defense counsel, Brown said she exaggerated to the police at the time, and she did not see the gun. She said she saw

the flash of the gun and it was "down," and appellant could have easily been firing at the ground. (Tr. 39.)

{¶10} Griffin testified that she did not see the gun, but saw the flash from it. She said he was pointing the gun toward her front window. She did not think he was pointing the gun at them, but toward them. When he shot, everyone in the house dropped to the ground. She said the police found a chip in a brick in front of her house where the bullet struck. She had never seen that chip in the brick before. She said it "could" have been there before, but she had never noticed it and she doubted it was there before. (Tr. 64.) She said because it was dark, she could not see how appellant's arm was positioned or whether he was holding the gun directly at the window. She said after she went to the front door and started yelling at appellant, appellant shot the gun into the air.

{¶11} Detective Wiener testified he located a "bullet strike" on the front of Griffin's house, just below the front window. (Tr. 91.) The bullet strike was a "chip" on a brick. During the police interview with appellant, appellant said he fired the gun, but he was not trying to hit anyone. He was trying to shoot at the basement. He then fired a shot into the air. The gun appellant used was a Beretta. He said a "chip" is the best way to describe the bullet strike. No shell was ever recovered. Detective Wiener also said no crime scene expert looked at the chip to check the trajectory. He said the chip was three to four feet above the ground. He said it was possible that the bullet ricocheted off the ground and hit the brick. He could not say "for sure" that the chip was from a bullet. (Tr. 111.)

{¶12} Appellant testified that he went to Griffin's house to talk to Brown, and Griffin's boyfriend threatened him. He went back home and decided to go back to talk to Brown. Before he left, he retrieved the gun to protect himself. When he returned to

Griffin's house, Griffin was yelling at him and told him that her boyfriend would kill him. He pulled out his gun, pointed it at the ground, and shot, intending to scare everyone into silence. Griffin then began yelling at him from the door that her boyfriend would still kill him, so he shot another shot into the air. He said that he did tell the police that he shot at the basement, but he meant he shot in the general direction of the basement and into the ground. In the police interview with appellant, which was transcribed in court from a video recording, appellant said he shot "towards the basement of the house." (Tr. 209.) Appellant also said during the interview that he did not shoot at anyone.

{¶13} After reviewing the above testimony and evidence, we find the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense of discharging a firearm at or into a habitation were established beyond a reasonable doubt. Brown's initial testimony was explicit that appellant's arm was raised in front of him when he fired the gun. She later changed her testimony to say she could not see his arm position because it was dark outside and he could have easily been pointing downward, but her change in testimony was suspect, given her great reluctance to testify against appellant. Brown's change in testimony was also questionable because she was apparently able to identify the gun as a Beretta and testified "I remember seeing it, and that's what it was." (Tr. 45.) Also telling was that Brown indicated in her statement to police that appellant pointed a gun at them while they were inside the house.

{¶14} As for the "chip" in the brick below the window, which police identified as a bullet strike, Griffin said she could not be certain that the chip was not there before, but she doubted it. Our own review of the investigative photographs of the brick reveals the

"chip" was conical and deep, strongly suggesting a small object struck it with considerable force. The cement ledge beneath the brick has a significant amount of red brick dust on it and appears dry and fresh. The chip itself also appears fresh. The photographs of the rest of the wall surrounding the chip reveal no other chips or falling pieces, diminishing the likelihood that the chip was caused by natural deterioration. The bright red chip and the lack of any other chips on the wall make it unlikely that Griffin would not have noticed the chip had it been there before the incident in question.

{¶15} Furthermore, Detective Wiener testified that appellant told him that he was trying to shoot at the basement. Although appellant initially denied at trial that he ever told the police during the interview that he shot at the house and claimed he said he told them he shot at the ground, the recording of the interview revealed that he said he shot "towards the basement of the house," and he never mentioned that he shot toward the ground. If appellant had been truly aiming at the ground, he would have expressed such in more precise terms, particularly given the detectives found appellant was "articulate" and "smarter than most people [they] deal with." (Tr. 213.) Despite appellant's contention during his trial testimony that the police switched his words around and talked him into saying that he shot toward the house in order to add another charge, it was clear from the recording that he made his statement freely with no suggestion or prompting of any kind from the interviewer.

{¶16} Although appellant asks this court to believe his testimony over the other testimony and evidence discussed above, we have no reason to disturb the trial court's credibility determination in this respect. The trial court, acting as fact finder, was best able to view appellant during his testimony and apparently chose to disbelieve his version of

the facts. While the testimony on whether he fired toward Griffin's house was not overwhelming, we cannot find that the fact finder clearly lost its way. A reasonable trier of fact could have concluded that all of the essential elements under R.C. 2923.161(A)(1) were established beyond a reasonable doubt. For these reasons, appellant's assignment of error is overruled.

{¶17} Accordingly, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH, P.J., and KLATT, J., concur.