[Cite as *State v. Washington*, 2009-Ohio-6665.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-424
v.	:	(C.P.C. No. 08CR-10-7426)
Kenneth T. Washington,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 17, 2009

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*, for appellee.

Kirk A. McVay, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Defendant-appellant, Kenneth T. Washington ("appellant"), appeals his convictions from the Franklin County Court of Common Pleas. Having concluded that sufficient evidence supports the convictions, and they are not against the manifest weight of the evidence, we affirm.

{¶2} The Franklin County Grand Jury indicted appellant on one count of aggravated murder and murder, two counts of attempted aggravated murder and felonious assault, and three counts of aggravated robbery and kidnapping. Each count contained a firearm specification. The charges alleged that appellant aided and abetted Allen Keith Jones to commit crimes against Rick Bruce, Marcus Bruce, and Sherman Adams on September 26, 2008. Appellant pleaded not guilty, and a jury trial ensued.

{¶3} Marcus Bruce testified as follows for plaintiff-appellee, the state of Ohio ("appellee"). Marcus and Rick are brothers, and Marcus and Adams are cousins. On September 26, 2008, Marcus, Rick, and Adams walked to a gas station around 3:00 a.m. to buy a cigar. Marcus saw appellant, Jones, and Jonathan Palmer at the gas station. Appellant shook Rick's hand. Appellant tried to shake Marcus' hand, but Marcus rebuffed him. Marcus suspected appellant of breaking into his apartment, and appellant previously punched Marcus after he confronted appellant about the break-in. Rick told appellant that Marcus was not being disrespectful and that he just did not want to shake hands. Jones said, "that's why my n_____ knock both y'all out." (Vol. I Tr. 73.) Marcus interpreted this as a reference to his previous fight with appellant. Appellant grabbed a gun from the hood of a car. Marcus identified State's Exhibit E15 as the gun appellant retrieved. Appellant put the gun in the waistband of his pants. Appellant said, "y'all talking about clearing n_____ out." (Vol. I Tr. 77.)

{¶4} Marcus, Rick, and Adams left the gas station and walked toward Marcus' home. Jones and appellant approached them from behind. Jones and appellant were a couple feet apart; Jones came from their left and appellant from their right. Jones and

appellant arrived about the same time, and Jones brandished a gun. Jones and appellant were wearing black hoodies. Marcus testified that State's Exhibit E16 resembled one of those hoodies. Jones said, "get on the ground." (Vol. I Tr. 82.) Marcus thought Jones was speaking to him, and Marcus raised his hands. Rick, Adams, and appellant just stood there. Jones picked Marcus' pockets and kept saying "get on the ground." (Vol. I Tr. 83.) Marcus remained standing with his hands up, and Jones punched him. Jones "kept telling us to get on the ground and we just stood there and I kept repeating we don't have shit, we ain't got shit. I kept saying that." (Vol. I Tr. 84.) Appellant said, "shoot that n_____, bro." (Vol. I Tr. 84.) Marcus, Rick, and Adams lay on the ground. Jones shot Marcus and Adams in the legs, and Jones shot Rick three times. Jones and appellant fled.

{¶5} On cross-examination, Marcus testified that appellant wore a black hoodie at the gas station, but he conceded that the gas station surveillance video depicted appellant wearing a black shirt, and not a hoodie. The video did not show anyone with a gun. The video showed that the car that appellant approached had its lights on, and the lights went off after appellant approached it. There were "gaps" in the surveillance video, and the video was "[c]hoppy." (Vol. I Tr. 129-30.)

{¶6} Adams testified as follows. Marcus, Rick, and Adams went to a gas station during the early morning hours of September 26, 2008. Adams saw appellant, Jones, and Palmer at the gas station. Adams first testified that nothing unusual happened at the gas station, but later Adams clarified that appellant grabbed a gun from the hood of a car. Marcus, Rick, and Adams left the station and walked toward the

Bruces' home. Appellant and Jones approached the three on the way. The three had been walking on the left side of the street and switched to the right side when appellant and Jones approached. Appellant and Jones approached at about the same time, and they were wearing black hoodies. Jones had a gun and "told us to get on the ground. And when he did it he said Marcus' name." (Vol. I Tr. 138.) Appellant and Jones picked Marcus' pockets and threw Marcus' cell phone. Appellant punched Marcus. Appellant said, "kill that n_____." (Vol. I Tr. 140.) Jones shot Marcus and Adams, and Jones shot Rick three times. Jones and appellant fled.

{¶7} On cross-examination, Adams clarified that appellant said, "kill them n_____." (Vol. I Tr. 157.) Adams said that he, Marcus, and Rick were on the ground at the time. Adams confirmed that the gas station surveillance video did not depict appellant with a gun, and Adams said that appellant wore a hoodie at the gas station.

{¶8} Ron Simmons lived in the neighborhood of the shooting and testified as follows. After Simmons heard the shooting, he looked out a window and saw two men wearing dark clothing running across the street. After the men left his line of sight, he heard a car speed away.

{¶9} Tami Lang lived in the neighborhood of the shooting and testified as follows. Lang awoke to several young men arguing in her neighbor's front yard. Lang opened her door and the men saw her. Lang shut the door and heard the men cross the street. Afterward, Lang heard gunshots. On cross-examination, Lang testified that the argument occurred to the right of her house and the shooting occurred to the left of her house.

{¶10} Jeffrey Payne lived in the neighborhood of the shooting and testified as follows. Payne heard yelling followed by several gunshots. Payne looked out the window and saw two men; one man said, "don't run, take your shirts off, take your shirts off." (Vol. III Tr. 371.) The men took off their hoodies and walked away. The men left Payne's line of sight, and Payne went to his door and saw one of the men in a car speeding away. Payne assumed the other man was lying back in the car "or not being visible." (Vol. III Tr. 381.) On cross-examination, Payne admitted that he previously wrote in a statement to police that the men he saw after the shooting were wearing black T-shirts, and Payne admitted that he said in a recorded interview with police that the men were wearing black T-shirts. Payne explained, "I think that was just the way I was calling the hoodies. I was calling them T-shirts." (Vol. III Tr. 406.) Payne indicated that he was having difficulty communicating his thoughts to the police.

{¶11} Medic Jeffrey Jahn testified that he pronounced Rick dead at the shooting scene. Photo journalist Jonathan Edwards testified that he went to the scene after the shooting, around 4:00 a.m. Edwards said that he found a gun near the area of the shooting, and he informed the police. Detective Lawrence Bisutti confirmed that a gun, State's Exhibit E15, was found near the shooting, and that police also found a hoodie, State's Exhibit E16, near the area. Fingerprint expert Rhonda Cadwallader testified that appellant's thumbprint was on the magazine of the gun found near the shooting scene. Deborah Lambourne, from the Columbus Police Crime Lab, excluded appellant and Jones as contributors to DNA found on the gun. Lambourne explained that she found a

"mixture" of DNA on the gun. (Vol. III Tr. 530.) Lambourne concluded that Jones' DNA was on State's Exhibit E16, the hoodie.

{¶12} The prosecution rested its case. Appellant moved for a Crim.R. 29 acquittal, and the court denied the motion.

{¶13} Appellant testified as follows. Appellant was with Palmer and Jones at a gas station during the early morning hours of September 26, 2008. Jones drove to the station. Appellant wore a black T-shirt. Appellant shook Rick's hand and reached out to shake Marcus' hand. Marcus became aggressive and rebuffed appellant. Marcus repeatedly said "it gonna be a 187 tonight." (Vol. IV Tr. 620.) Appellant interpreted this as a reference to murder, and appellant considered this to be a threat. Appellant went to the hood of the car he was riding in to "cut the lights off." (Vol. IV Tr. 619.) Ultimately, appellant, Jones, and Palmer left the gas station. Jones was driving.

{¶14} Jones dropped off Palmer and stopped in front of a bus stop. Appellant and Jones saw Marcus, Rick, and Adams. Jones wanted to see what they were doing, but appellant said "it was a waste of time." (Vol. IV Tr. 630.) Jones got out of the car. Appellant followed shortly afterward, thinking he should make sure everything was alright. Appellant approached the group and saw Marcus "getting up or bending over * * * and * * * get back up." (Vol. IV Tr. 631.) Appellant saw Rick and Adams stand beside Marcus. Jones had a gun, and appellant heard shots. Appellant fled and heard more shots. Jones ran to the car and picked up appellant. Appellant testified that at no time did he instruct Jones to do anything before the shooting. Appellant testified that he surrendered to police upon learning that he was a suspect in the shooting. He admitted

that Marcus accused him of breaking into his home, but appellant denied the accusation. Appellant admitted that he punched Marcus and Rick after Marcus confronted him about the break-in.

{¶15} Appellant rested and renewed his Crim.R. 29 acquittal motion. The court denied the motion.

{¶16} When the court gave its jury instructions, it told the jury that it could consider whether appellant was guilty for being complicit in the shooting incident. The jury found appellant guilty of one count of murder, one count of aggravated robbery, two counts of felonious assault, and three counts of kidnapping, and the jury found appellant guilty of the firearm specifications attached to these counts. The jury found appellant not guilty of the remaining offenses and specifications. The court merged the three kidnapping counts into the murder, felonious assault, and aggravated robbery counts, and the court sentenced appellant to prison.

{¶17} Appellant appeals, raising the following assignment of error:

> THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT AS TO COUNTS TWO, FIVE, SIX, EIGHT, TEN, ELEVEN, AND TWELVE, AND THE ASSOCIATED SPECIFICATIONS TO THOSE COUNTS OF THE INDICTMENT WHEN THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THOSE CONVICTIONS AND THEY ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

{¶18} In his single assignment of error, appellant argues that the record contains insufficient evidence that he committed kidnapping, but appellant does not challenge the sufficiency of evidence for his other offenses. We shall address appellant's sufficiency of the evidence challenge to the kidnapping offenses, although we are not required to because the trial court merged those offenses into others. See *State v. Smith*, 10th Dist. No. 08AP-736, 2009-Ohio-2166, ¶27; *State v. McKinney*, 10th Dist. No. 08AP-23, 2008-Ohio-6522, ¶39.

{¶19} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks,* paragraph two of the syllabus; *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶20} Kidnapping is defined in R.C. 2905.01(A) as the use of force, threat or deception to restrain another's liberty for the purpose of facilitating the commission of

any felony or flight thereafter, or to terrorize or inflict serious physical harm on them. The prosecution tried appellant for aiding and abetting Jones. In order to support a conviction for aiding and abetting, the prosecution must show that the defendant " 'supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal.' " *State v. Chatman*, 10th Dist. No. 08AP-803, 2009-Ohio-2504, ¶26, quoting *State v. Johnson* (2001), 93 Ohio St.3d 240, syllabus. The defendant's intent may be inferred from the circumstances surrounding the crime. *Johnson*, syllabus. Mere presence at the scene is not enough; the accused must have taken some role in causing the offense. *State v. McWhorter*, 10th Dist. No. 08AP-263, 2008-Ohio-6225, ¶18.

{¶21} The prosecution proved that appellant aided and abetted Jones in restraining the liberty of Marcus, Rick, and Adams to commit the other felonies of the shooting incident and to terrorize and inflict serious physical harm on them. Jones and appellant confronted Marcus, Rick, and Adams on a street during the early morning. The testimony indicated that Jones told all the victims to lie on the ground. For instance, Marcus testified that Jones "kept telling us to get on the ground." Likewise, Adams testified that Jones "told us to get on the ground." The record also established that the conduct of Jones and appellant conveyed the message that all of the victims were not at liberty to leave. Jones brandished a gun, and appellant did not try to diffuse the situation. Instead, appellant indicated intent that the gun be used when he ordered Jones to shoot. In fact, in response to the actions of Jones and appellant, the victims

did not flee and provided no resistance. And, all three victims lay on the ground before Jones shot them. The jury could have also properly inferred that appellant aided and abetted Jones by giving him a gun because (1) at the gas station, appellant was seen with the gun later found near the scene of the shooting, and (2) appellant's thumbprint was on the magazine of the gun retrieved near the shooting scene. Accordingly, sufficient evidence established that appellant aided and abetted Jones in kidnapping Marcus, Rick, and Adams. Because the evidence also established that appellant assisted Jones in the kidnapping with knowledge that a gun was being used, sufficient evidence supports the jury finding appellant guilty of the accompanying firearm specifications. See *State v. Hall*, 10th Dist. No. 08AP-939, 2009-Ohio-2277, ¶28.

{¶22} Appellant argues that his convictions are against the manifest weight of the evidence. Appellant raises this challenge against all of his offenses, and we shall review all of the offenses, including the kidnapping offenses, even though the trial court merged those offenses into others.

{¶23} In determining whether a verdict is against the manifest weight of the evidence, we sit as a " 'thirteenth juror.' " *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we determine "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 and a new trial ordered." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most

" 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶24} Appellant argues that his acquittal on some of the charges demonstrates that his convictions are against the manifest weight of the evidence. Appellant's argument is based on conjecture. We decline to speculate that a mixed verdict is "attributed solely to the jury's insecurity, confusion, or doubts as to the adequacy of evidence." *State v. Trewartha*, 165 Ohio App.3d 91, 2005-Ohio-5697, ¶16.

{¶25} Appellant argues that Adams and Marcus were not credible in their testimonies that appellant aided and abetted Jones. For instance, appellant contends that the surveillance video disproves their testimonies that appellant possessed a gun, and appellant argues that this video bolsters his testimony that he did not have a gun. Marcus explained why the video would not have depicted appellant with the gun, however. Marcus testified that there were "gaps" in the surveillance video and that the video was "[c]hoppy." Moreover, appellant's thumbprint was on the magazine of the gun found near the scene of the shooting, and Marcus identified the gun as the one appellant possessed. Thus, physical evidence corroborated these victims' testimonies that appellant possessed a gun on the night of the shooting.

{¶26} Appellant asserts that the surveillance video disproves witness testimony that appellant wore a hoodie. Marcus conceded that the video depicted appellant wearing a black shirt, and not a hoodie. Even if appellant was not wearing a hoodie at the gas station, it was within the jury's province to believe the corroborating testimonies from Marcus and Adams that appellant wore a hoodie during the shooting. In fact, Payne saw appellant wearing a hoodie after the shooting. To be sure, Payne previously told police that appellant wore a T-shirt, but Payne was certain at trial that appellant wore a hoodie after the shooting. In any event, no matter what appellant was wearing, it is undisputed that appellant was present at the shooting.

{¶27} Appellant argues that neither Marcus nor Adams testified that appellant joined in Jones' order for them to get on the ground. As we have already concluded, the evidence proved that appellant assisted Jones in conveying the message that all of the victims were not at liberty to leave.

{¶28} Appellant also argues that Marcus and Adams were biased against appellant due to appellant's previous problems with Marcus. The jury could have considered that appellant's tumultuous history with Marcus motivated him to aid and abet Jones, however. See *State v. Henry*, 10th Dist. No. 04AP-1061, 2005-Ohio-3931, ¶42 (recognizing that motive is generally relevant in all criminal trials, even though the prosecution need not prove motive in order to secure a conviction).

{¶29} Appellant notes that Marcus testified that appellant said, "shoot that n_____" and that Adams testified on cross-examination that appellant said, "kill them n_____." This inconsistency does not exculpate appellant; he ordered Jones to shoot,

and Jones responded by shooting all three victims. Appellant notes that Adams testified that appellant and Jones picked Marcus' pockets, but Marcus testified that only Jones picked his pockets. Either way, Adams and Marcus unequivocally testified that Jones and appellant acted in concert to commit crimes against the victims, and the minor inconsistency about who picked Marcus' pockets does not undermine the jury's verdict.

{¶30} Appellant argues that the weight of the evidence supports his testimony that he was not culpable for the shooting incident. Appellant asserts that his testimony that he did not return to Jones' car upon fleeing suggests a disconnect between the intentions of Jones and appellant during the shooting. Appellant's own testimony that Jones picked him up while fleeing the scene refutes any disconnect, however. Appellant notes that he denied instructing Jones to do anything during the shooting incident, but the corroborated testimony of Marcus and Adams refutes this, and it was within the jury's province to believe the corroborated testimony. Appellant suggests that his credibility is bolstered by his willingness to surrender to the police. The jury did not adopt this inference, and it was not required to do so. See *State v. Koelling* (Mar. 21, 1995), 10th Dist. No. 94APA06-866. And, appellant's fleeing the scene and taking off clothing after the shooting negates appellant's claimed lack of culpability and, instead, evinces furtive conduct reflective of a consciousness of guilt. See *Henry* at ¶39-41.

{¶31} Appellant argues that the evidence supports his testimony that he arrived on the scene separately from Jones. In particular, appellant asserts that Lang's testimony about where the incident occurred in her neighborhood established that the argument she heard took place on the east side of the street and that the shooting took

place on the west side of the street, and appellant contends that Adams and Marcus established that appellant approached from their left as they walked on the west side of the street. Marcus and Adams both testified that appellant and Jones arrived at about the same time, and it was within the jury's province to believe these corroborating testimonies. And, despite when appellant approached the scene, the jury could conclude from all of the corroborating testimony and physical evidence that appellant arrived to assist Jones in trapping the victims and committing the crimes against them.

{¶32} In the final analysis, the trier of fact is in the best position to determine witness credibility. *State v. Carson*, 10th Dist. No. 05AP-13, 2006-Ohio-2440, ¶15. The jury accepted evidence proving that appellant aided and abetted Jones in the shooting incident, and appellant has not demonstrated a basis for disturbing the jury's conclusions. See *Brown* at ¶10. Accordingly, we hold that appellant's convictions are not against the manifest weight of the evidence. Having also rejected appellant's sufficiency of the evidence argument, we overrule appellant's single assignment of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.