

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-137
Anthony D. Brown,	:	(C.P.C. No. 07CR07-5104)
Defendant-Appellant.	:	(REGULAR CALENDAR)
State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-169
Anthony D. Brown,	:	(C.P.C. No. 07CR07-5104)
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 30, 2010

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for
plaintiff-appellee/appellant State of Ohio.

Davis Law Office Co., L.P.A., and *Jeffrey R. Davis*, for
defendant-appellant/appellee Anthony D. Brown.

APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} These are consolidated appeals. In the first appeal, defendant-appellant/appellee, Anthony D. Brown ("defendant"), appeals from the judgment of the

Franklin County Court of Common Pleas, entered upon a jury verdict convicting him of multiple counts of murder, aggravated robbery, robbery, and kidnapping, all with firearm specifications, and upon a finding of guilt by the trial judge as to one count of having a weapon under disability. In the second appeal, plaintiff-appellee/appellant, State of Ohio ("State"), appeals from the trial court's refusal to make findings with respect to the repeat violent offender specifications included in defendant's indictment. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} Defendant's convictions arise from an incident that occurred on August 27, 2006, at 2408 Linden Avenue, in Franklin County, Ohio. During a botched, staged robbery conducted at this address, several people were attacked and held at gunpoint, forced to the floor, and robbed. One of the attackers continued to hold the victims hostage on the floor while another went to a bank to withdraw money using one of the stolen ATM cards. Following a struggle over the gun, Elisha Braxton was shot and killed.

{¶3} On July 20, 2007, defendant was indicted on three counts of aggravated murder, one count of aggravated burglary, two counts of aggravated robbery, two counts of second degree robbery, two counts of third degree robbery, and two counts of kidnapping. All of these counts were indicted with firearm specifications.¹ The aggravated murder, aggravated burglary, aggravated robbery, and kidnapping counts were also indicted with repeat violent offender specifications ("RVO").² Additionally, defendant was indicted on one count of having a weapon while under disability.

¹ Co-defendants Curtis Cunningham and Antwonn Smith were indicted on these same charges on September 19, 2006, and November 21, 2006, respectively.

² The RVO specifications alleged that on November 4, 1999, defendant was convicted of or pled guilty to a second degree robbery offense.

{¶4} This matter proceeded to jury trial on January 5, 2009, on all offenses except the one count of having a weapon while under disability, which was to be tried to the court, and the repeat violent offender specifications.

{¶5} The State called several witnesses over the course of the trial, which lasted several days. The testimony of the following witnesses is most relevant to this appeal: Victor Honny, Curtis Cunningham, and Tara Maynard.

{¶6} Tara Maynard ("Tara") testified her older sister, Elisha Braxton, who also went by the nickname "Punkin," was shot and killed during a robbery in August 2006. At the time of the robbery, Punkin lived approximately one block away from Tara's apartment on Linden Avenue. Punkin lived with her boyfriend, Antwonn Smith ("Antwonn"), who went by the nicknames "Twon" and "Dub," and Tara lived with defendant, whom she called "Tone" or "Toneloc."

{¶7} On Sunday, August 27, 2006, Punkin and Antwonn came to Tara's apartment to make breakfast. Defendant was sleeping at Tara's apartment. During a conversation at the apartment, Antwonn came up with a plan to make some money by robbing two men from Ghana named "Aboe" and "Atah."³ The men were friends with Tara and Punkin and Tara also had a sexual relationship with Atah. Tara and Punkin planned to meet up with Aboe and Atah at Atah's apartment and leave the door to the apartment unlocked so that Antwonn could rob them using a gun that Tara took from defendant. However, the plan fell apart when Antwonn was unable to find Atah's apartment, and then the three of them were spotted together at the apartment complex by Aboe. Worried that the two men may have seen his face, Antwonn decided to scrap the plan and everyone returned to Tara's apartment.

{¶8} Back at Tara's apartment, Antwonn, Tara, and Punkin hatched a new plan to bring Aboe and Atah to Tara's apartment. During this time, defendant was still lying down in the bedroom. However, given the size of her small apartment, Tara testified that a person in the bedroom could hear a conversation taking place in the living room and that they were all talking loudly enough for defendant to hear. The plan was for Antwonn to leave once Aboe and Atah were on their way to Tara's apartment. Punkin was to call Antwonn's cell phone once they arrived, and then Antwonn would commit the robbery. Tara and Punkin were to play along and call the police afterwards to make it look legitimate.

{¶9} When Aboe and Atah were enroute to the apartment, Antwonn left, immediately followed by defendant. Tara believed that defendant planned to participate in the staged robbery.

{¶10} Soon after Aboe and Atah arrived, Curtis Cunningham ("Curtis") knocked on the door, asking for a cigarette. Curtis continued to hang around and kept looking over his right shoulder. Then, Antwonn, who brandished a gun, and defendant pushed their way into the apartment and forced everyone to get down on the floor. Antwonn and defendant robbed Aboe and Atah of their wallets and also stole a ring from Punkin. Additionally, the men threatened Aboe and forced him to provide a PIN for his ATM card. After obtaining a PIN, Antwonn left for the bank, while defendant remained at the apartment with the gun.

{¶11} Tara testified that Antwonn and defendant continued to communicate via cell phone. Defendant eventually walked into the bedroom. Shortly thereafter, Tara heard a rumbling in the bedroom and realized either Aboe or Atah was fighting with

³ "Aboe" and "Atah" are Victor Honny and Sam Corpola, respectively.

defendant. Next, Tara heard a gunshot. Tara and Punkin tried to run out the door of the apartment, but as the struggle between the men progressed into the living room, they were knocked into a wall. Tara saw defendant and Aboe fighting over the gun. She testified that defendant looked at her and said, "Tara, get him off me." (Tr. 416.) She and Punkin were both trying to keep the gun from discharging and thus were caught up in the struggle. As she was trying to get out of the way, she heard a "pop." Defendant ran out the door with the gun as Tara realized that Punkin had been shot.

{¶12} Tara testified that she initially lied to the police and reported that Aboe had shot her sister, claiming she was afraid of Antwonn and defendant. She then told police that she had been robbed by two unknown men. However, after leaving the police station, Tara told the father of her child her version of what really happened. Eventually, word got back to the police and she subsequently confessed that the robbery had been staged, that she had been in on it, and that defendant was the person responsible for shooting Punkin.

{¶13} Tara identified defendant in court and also re-affirmed her identification of defendant via police photo arrays, which were shown to her within a couple of days of the incident. While Tara testified that the robbers had their shirts pulled up over their faces and their ball caps pulled down so that only their eyes were visible, she also testified that she knew it was Antwonn and defendant and she could tell the two apart, based upon the differences in their skin tone.

{¶14} Tara further testified that defendant called her at a relative's house after the shooting and requested to meet with her. Defendant sent one of his sisters to pick her up and bring her to an apartment to discuss what happened. Defendant informed Tara that he had gotten rid of the gun and that the incident was an accident. Defendant also asked

where Aboe lived and told her he was going to kill Aboe. When asked about her discussions with police, Tara told defendant she had lied to the police.

{¶15} Finally, Tara admitted she had never been arrested or indicted for the role she played in her sister's death. She also acknowledged that no promises had been made to her by the State with respect to this.

{¶16} Victor Honny, who goes by the nickname "Aboe," testified he was born in Ghana and became a United States citizen approximately two years ago. Aboe testified he had known Punkin for almost three years. He had also met her sister Tara on a couple of occasions. On the date of the incident, Aboe's friend "Atah" asked him to contact Tara. Arrangements were made for them to meet at Atah's apartment. While at Atah's apartment, Aboe saw Tara, Punkin, and an unknown male riding in Punkin's car. Aboe then called Punkin on her cell phone. She explained she was taking her brother to work and would call him back. She later called back and the girls asked Atah to meet at Tara's apartment instead. Aboe agreed to drive Atah to Tara's apartment.

{¶17} Shortly after their arrival at Tara's apartment, someone knocked at Tara's door. Punkin answered the door and went outside with the man, whom Aboe described as a thin, older man. When Punkin came back inside the apartment, the thin, older man was being pushed inside by two younger men. Aboe described the two younger men as wearing t-shirts pulled up above the nose and caps pulled down low on their heads. The younger men announced everyone was being robbed and one of the men pulled out a gun.

{¶18} Aboe and the others were ordered to the floor and made to empty their pockets. The men put pillows or cushions over his head so that he could not see them. The men also beat Aboe and hit him with a wooden stick when he resisted. They took

Aboe's wallet, which included cash and his ATM card, as well as his wedding ring and an earring. The men also threatened to kill him if he did not provide the PIN to his ATM card. Aboe provided a PIN and one of the men left with the ATM card, while the other man remained at the apartment with the gun.

{¶19} Aboe testified the man with the gun talked on his cell phone while everyone was lying on the floor of the apartment. Eventually, the man moved his phone conversation into the bedroom. At that point, Aboe decided to attack him before the other man discovered the PIN he had been given was incorrect and came back to the apartment. Aboe and the man struggled over the gun in the bedroom. Aboe heard a gunshot. The man broke free from Aboe, but Aboe followed him into the living room, where the struggle continued. Others joined in, trying to help. The man with the gun told Tara she needed to tell him (Aboe) to release the gun because the man wanted to leave. The man continued to maintain control of the gun. During the struggle, Aboe heard Tara exclaim that her sister had been shot.

{¶20} Aboe testified that the police initially arrested him for the robbery, but later released him. Aboe further testified that he was unable to identify the robbers from the photographs that were shown to him by the police because he was not focusing on their faces.

{¶21} Curtis testified that in August 2006, he lived two doors down from Tara. He testified that a man named "Tony" also stayed at Tara's apartment. Curtis identified defendant as Tony. Curtis acknowledged knowing Tara's sister, Punkin, as well as a man associated with Punkin whom he knew as "Dub." Dub later became known to him as Antwonn Smith.

{¶22} On the afternoon of the incident, Curtis went to Tara's apartment, intending to knock on her door and bum a cigarette. Before he could knock, he was approached by Dub and Tony. The two men told Curtis he would be "thrown out a bone" (Tr. 311) if he could get Tara to open her door. Curtis testified he was confused by this because he knew the men could get into the apartment on their own and he was unsure why they were asking him for help. Although he complied with their request, he knew at the time they asked him to knock on the door that they were up to no good.

{¶23} When Punkin answered the door, Curtis could see two guys sitting inside the apartment. Punkin came outside and shut the door behind her. Soon thereafter, Dub and Tony came out of an empty apartment that was two doors down. The men had most of their faces covered. Punkin opened the apartment door and the two men pushed their way inside, pushing Curtis inside in the process. The men ordered everyone onto the floor and threw pillows over their heads, making it difficult to see.

{¶24} Curtis testified that the men had a gun. Dub took the wallets of the two men from Ghana, whom Curtis identified as being "Somalian." Because the "Somalian" men had only \$600, Tony and Dub took the ATM card of one of the Somolian men and forced him to provide his PIN. Then, Dub left to go to the bank while Tony stayed behind with the gun. Dub later discovered that he had been given the wrong PIN, so he called defendant, who forced the large Somolian to provide another PIN.

{¶25} Some time after this, the large Somolian (Aboe) attacked defendant. The two struggled over the gun. Tara and Punkin tried to help. Curtis testified that he heard two gunshots that day and that Punkin was struck and killed by the second shot. He stated that defendant had the gun at the time Punkin was shot. Defendant then ran off after everyone realized Punkin had been shot.

{¶26} Curtis admitted that he lied to police about the incident and did not reveal that he knew who the robbers were or that he had assisted in getting them inside the apartment. Furthermore, at the time this incident occurred, he admitted he was a crack addict with a serious habit who also got drunk on wine on a daily basis. However, he testified that these substances did not affect his ability to see, hear, or perceive events around him and that he was still able to work and do his job.

{¶27} As a result of this incident, Curtis testified that he had pled guilty to one count of robbery and initially received community control. However, due to a violation of that community control, he was recently arrested and returned to jail, where he was awaiting a revocation hearing and sentencing. As part of his original negotiated plea agreement, Curtis agreed to testify truthfully at defendant's trial.

{¶28} The State also introduced the testimony of several other witnesses, including the testimony of a forensic neuropathologist from the Franklin County Coroner's Office, who testified that Elisha Braxton died of cardiorespiratory arrest as a result of a gunshot wound. Additionally, the parties stipulated to the court that defendant was convicted of robbery and attempted felonious assault on November 4, 1999, thereby providing evidence of a prior underlying conviction with respect to the weapon under disability charge being tried to the court. After the State rested, the trial court dismissed one of the aggravated murder counts and the aggravated burglary count, pursuant to Crim.R. 29. Defendant rested without presenting any witnesses.

{¶29} During discussions regarding jury instructions, defendant orally argued that the jury should be instructed to make a determination on the RVO specification, arguing that such a determination was a factual finding that must be made by a jury. However, the trial court declined to include any findings in the verdict forms regarding the RVO

specifications. While the trial court indicated it did have "some concerns about the constitutionality of the RVO specifications and the status of that since the Supreme Court decision in *Foster* and those related cases" (Tr. 649), the trial court further indicated "there may or may not be further discussion about that [the RVO specifications] at a later date, depending on a number of things that may occur, particularly jury findings and verdicts." (Tr. 651.)

{¶30} On January 15, 2009, a jury convicted defendant of two counts of murder, two counts of aggravated robbery, two counts of second degree robbery, two counts of third degree robbery, and two counts of kidnapping. Defendant was also convicted of the firearm specifications attached to all counts. In addition, the trial court convicted defendant of the offense of having a weapon under disability. Sentencing was scheduled for the following day, at which time the trial court also intended to address the issue of the RVO specifications.

{¶31} On January 16, 2009, counsel and defendant appeared for sentencing. Earlier that same morning, defendant filed a document entitled "Defendant's Motion to Dismiss Repeat Violent Offender Specification."⁴ While defendant had previously objected orally to the imposition of an enhanced penalty based upon the RVO specification, this was his first written objection to the constitutionality of the RVO specifications. In this memorandum, defendant argued that because he neither admitted to the RVO specification nor was found guilty of that specification by a jury, the trial court could not impose an additional one-to-ten year sentence. Defendant's memorandum

⁴ The trial court later granted defendant permission to re-caption his motion as "Defendant's Memorandum of Argument in Opposition to Application of Repeat Violent Offender Specification."

focused upon the mandatory RVO provision in the statute, arguing that he did not meet the criteria set forth in the statute.

{¶32} Although the State requested that the trial court continue the sentencing for seven days in order to provide it with time to respond to defendant's motion, the trial court only postponed sentencing for a few hours. The State presented the trial court with a memorandum opposing defendant's motion just shortly before the sentencing hearing reconvened on the afternoon of January 16, 2009.

{¶33} At the hearing, the trial court heard further arguments from both sides. Defendant continued to argue the criteria set forth in the mandatory provision of R.C. 2929.14(D)(2)(b) were not met, while the State argued the discretionary provision of R.C. 2929.14(D)(2)(a) was applicable.

{¶34} The trial court sentenced defendant to a total aggregate sentence of 41 years to life. He was sentenced to the maximum sentence that was not life without parole on the murder charge (15 years to life), but did not receive the maximum sentence on the aggravated robbery or kidnapping offenses. In addition, the trial court found the provision of the statute governing RVO specifications to be "problematic in the constitutional sense" in the absence of factfinding by the jury. (Tr. 815.) The trial court further determined that even if it reached the issue of the RVO specifications, it would decline to exercise its discretion to impose an additional one-to-ten year add on sentence.

{¶35} Defendant filed a timely appeal, asserting the following assignments of error for our review:

ASSIGNMENT OF ERROR ONE

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S
MOTION FOR ACQUITTAL AND ENTERING JUDGMENT
AGAINST THE DEFENDANT AS THE EVIDENCE WAS

INSUFFICIENT TO ESTABLISH THE IDENTITY OF THE
DEFENDANT BEYOND A REASONABLE DOUBT.

ASSIGNMENT OF ERROR TWO

THE VERDICT ENTERED WAS AGAINST THE MANIFEST
WEIGHT OF THE EVIDENCE.

{¶36} The State also filed an appeal, in which it asserted a single assignment of error for our review:

THE TRIAL COURT ERRED IN DISMISSING THE REPEAT-
VIOLENT-OFFENDER SPECIFICATIONS ON CONSTITU-
TIONAL GROUNDS.

{¶37} We shall begin by addressing defendant's assignments of error before addressing the assignment of error raised by the State.

{¶38} In his first assignment of error, defendant argues the evidence presented in the State's case-in-chief was insufficient to establish the element of identity beyond a reasonable doubt. As a result, defendant submits the trial court should have granted his Crim.R. 29 motion for acquittal. Defendant also argues the evidence on the identity element is insufficient to support his convictions.

{¶39} A Crim.R. 29 motion challenges the legal sufficiency of the evidence and whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *Id.* 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, all of 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; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶40} In determining whether a conviction is based on sufficient evidence, an appellate court does 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; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶41} Defendant has challenged the sufficiency of the evidence to establish his identity as the robber who also shot and killed Elisha Braxton. Because the testimony established that the robbers had their faces covered, defendant argues it was not possible to identify the robbers. Additionally, defendant has challenged the credibility of Tara Maynard and Curtis Cunningham, arguing that because they were both participants in the crime, their testimony must be considered with "grave suspicion" and is therefore unreliable.

{¶42} Initially, we find that defendant's assertions challenging the credibility of witnesses Tara Maynard and Curtis Cunningham are without merit. Appellate courts do not evaluate witness credibility in reviewing a sufficiency of the evidence claim. See *Yarbrough* at ¶79. See also *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus (in a civil or criminal trial, the credibility of the witnesses is primarily an issue for the trier of the facts). Furthermore, "[i]n 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." *State v. Smith*, 10th Dist. No. 08AP-736, 2009-Ohio-2166, ¶26, citing *Jenks*, paragraph two of the syllabus. Thus, in reviewing a sufficiency of the evidence claim, the witnesses are presumed believable.

{¶43} As to defendant's general assertion that the evidence on the identity element is insufficient to support his convictions, we disagree. Instead, we find the evidence to be sufficient to establish defendant's identity beyond a reasonable doubt.

{¶44} The evidence, if believed, firmly established that defendant was one of the individuals who participated in the robbery and who shot Elisha Braxton. Tara and Curtis both testified that defendant and Antwonn committed the robbery. Both witnesses were well acquainted with defendant prior to the incident. Tara testified that he had been living with her for approximately four weeks. (Tr. 377.) Curtis testified that he regularly saw defendant once or twice a day. (Tr. 303.) Additionally, both witnesses, along with Aboe, established that the occupants of the apartment were ordered to the floor and robbed of their valuables. Furthermore, the testimony was consistent in that both Tara and Curtis testified that Aboe attacked defendant and that during the struggle that followed, Punkin was shot.

{¶45} Tara also testified that she was able to tell the difference between Antwonn and defendant by their skin tone, which supports her assertion that defendant was the one who shot Punkin, even though the robbers kept their faces mostly hidden. This is further supported by the testimony of Curtis. When asked how he knew Antwonn was the one who left to go to the bank and defendant was the one who remained at the apartment

with the gun, Curtis testified, "[b]ecause, I mean, they talk. I know their voices by now." (Tr. 317.)

{¶46} Additionally, Tara testified that defendant had subsequently confessed to her that he accidentally shot Punkin. Although Aboe testified that he was unable to identify the robbers, this fact itself does not create an insufficiency in the identification of defendant as the perpetrator, given the plethora of evidence that, if believed, proves defendant's guilt. Therefore, in considering the evidence in a light most favorable to the State, as we are required to do, we find a reasonable juror could have found the essential elements of the crime were proven beyond a reasonable doubt, including proof of identity. Accordingly, defendant's first assignment of error is overruled.

{¶47} In his second assignment of error, appellant argues his conviction is against the manifest weight of the evidence.

{¶48} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? *Id.* at ¶25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; See also *State v. Robinson* (1955), 162 Ohio St. 486 (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276.

{¶49} "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." *Wilson* at ¶25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶50} A conviction should be reversed on manifest weight grounds only in 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.

{¶51} Defendant argues the jury clearly lost its way in finding the State had proven the identity of defendant beyond a reasonable doubt as the perpetrator of the crimes alleged in the indictment. Again, defendant argues his convictions are based solely upon the testimony of witnesses who are incredible, including the testimony of a known crack addict who was, himself, a co-conspirator, and the testimony of an un-indicted accomplice who admitted to having planned the robbery. As a result, defendant asserts a miscarriage of justice has occurred. We disagree.

{¶52} Even in a manifest weight review, the factfinder's determination as to the credibility of the witnesses is entitled to great deference, as the jury is in the best position to assess the credibility of the witnesses and their testimony. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28. An appellate court may not substitute its judgment for the judgment of the trier of fact on an issue of witness credibility, unless it is manifestly clear that the finder of fact unequivocally lost its way. *State v. Bliss*, 10th Dist. No. 04AP-216, 2005-Ohio-3987.

{¶53} Defendant challenges the testimony of Curtis, arguing that Curtis is a chronic crack user who was drunk on wine at the time the offenses occurred and therefore, his ability to perceive the events was severely compromised. Defendant also challenges Curtis' testimony on the grounds that his testimony should be carefully examined because he received a substantial benefit as a result of his cooperation, which initially resulted in a sentence of community control, rather than prison.

{¶54} As the factfinder, the jury takes into account the witnesses' manner and demeanor of testifying. Here, the jury was aware of Curtis' drug usage and of the fact he had been using on the day of the incident. The jury also heard testimony from Curtis that such usage did not affect his ability to hear, see, or perceive events. The jury could have reasonably believed this testimony.

{¶55} Additionally, the jury was also aware of the "deal" that Curtis received in exchange for his truthful testimony. The jury had the prerogative to weigh his credibility and consider the weight of the testimony, in light of the fact that Curtis initially avoided any prison time and/or received a possible reduction in his sentence, conditioned upon his truthful testimony. See *Covington* at ¶28.

{¶56} Furthermore, in light of the inconsistency between Curtis' original statements to police about the robbery, in which he claimed he did not know the robbers, and his testimony at trial, the jury was free to determine which statements it believed were actually truthful.

{¶57} Defendant has also challenged the testimony of his un-indicted accomplice, Tara, on similar grounds. However, the jury could also exercise this same prerogative with respect to Tara's testimony and the fact that she had not yet been charged with any crime involving her sister's death. The same could be said for the inconsistent information she initially provided to the police. The jury apparently found that her testimony was credible and such a finding was not unreasonable.

{¶58} Additionally, the jury instructions provided by the court contained language advising the jurors that the testimony of a co-conspirator or accomplice was "subject to grave suspicion" and should be "weighed with great caution." (Jury Instructions, at 4.) We must presume the jury followed the court's instructions. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160.

{¶59} Furthermore, as discussed more fully in our analysis regarding defendant's first assignment of error, both Tara and Curtis were quite familiar with defendant and both testified that defendant participated in the robbery and shot Elisha Braxton. Tara also testified that during the struggle, defendant called her by name and told her to "get him [Aboe] off me." (Tr. 416.) This further corroborates her assertion that the robbery was committed by someone with whom she was very familiar. Given that Tara had discussed the plan while defendant was within earshot, and given that there was testimony that defendant left the apartment immediately after Antwonn heard Aboe and Atah were on their way, Tara could have easily determined that defendant intended to participate in the

robbery. Defendant's conversation with Tara the day after the robbery, during which he confessed to accidentally killing her sister, is further proof of defendant's guilt.

{¶60} Defendant has also claimed that Curtis did not explain how he knew that Antwonn and defendant were the robbers when he testified that they were both "masked up." (Tr. 310-11.) However, a reasonable juror could infer that defendant and Antwonn were not "masked up" at the time Curtis first had contact with them, based upon the testimony provided:

A. [Curtis] They were just covered-up from here to their eyes. So all you could see was the eyes. That is it.

Q. [State] How did you know who it was?

A. When I was headed to the door, they asked me, said, wait - - I said I am going in - - would I get the door open for them? And I am wondering, why you want to get the door open? Because you can go in there.

Q. So they said get the door open for us?

A. Yes.

(Tr. 311.)

{¶61} Based upon this exchange, a reasonable juror could infer that because Curtis knew that the men would be able to enter the apartment on their own, meaning he knew that they belonged there or would have permission to be there, he in fact knew who the men were because they were not "masked up" at the time he first had contact with them or recognized their voices.

{¶62} Therefore, based upon all of this, we cannot say that a reasonable jury would not carefully examine the testimony of Curtis and Tara, and considering the testimony of Aboe, whose factual recitation of events was consistent with their version of events, conclude that defendant committed the aggravated robbery, robbery, and kidnapping offenses at 2408 Linden Avenue and also shot and killed Elisha Braxton.

After weighing the evidence and considering the credibility of the witnesses, we find defendant's convictions are not against the manifest weight of the evidence. Accordingly, we overrule defendant's second assignment of error.

{¶63} We now turn to the State's sole assignment of error, in which the State contends the trial court erred in essentially dismissing the repeat violent offender specifications on constitutional grounds. The State argues the RVO procedures set forth under R.C. 2929.14(D)(2) and R.C. 2941.149(B) do not violate defendant's Sixth Amendment right to a trial by jury. The State further argues these procedures do not violate the principles established under *Apprendi*, *Blakely*, and *Foster*.⁵

{¶64} The State submits the trial court erred in failing to find defendant to be an RVO and in failing to impose an additional sentence on constitutional grounds for several reasons: (1) defendant's (and the court's) reliance upon the mandatory provisions of the RVO sentencing statute, R.C. 2929.14(D)(2)(b), was misplaced; the State contends the discretionary provision under R.C. 2929.14(D)(2)(a) is the applicable provision; (2) there is no indication the legislature intended to "resurrect" the findings portion of former R.C. 2929.14(D)(2)(b)(i) and (ii), which the Ohio Supreme Court severed in *Foster* but which are currently found in the more recently amended version of R.C. 2929.14(D)(2)(a)(iv) and (v), and therefore, those provisions remain severed; (3) even if the legislature did intend to "resurrect" the findings portion of the statute, stare decisis requires this court to sever those portions of the statute previously severed under *Foster*, leaving only the first three requirements in 2929.14(D)(2)(a) to be met; (4) the criteria under R.C. 2929.14(D)(2)(a)(i) through (iii) falls within the "prior conviction" exception set forth in

⁵ *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348; *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531; *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

Apprendi and *Blakely*, and is therefore constitutional; (5) defendant's objection to the constitutionality of the statute was untimely and therefore waived; and (6) the recently decided case of *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, indicates that trial courts still retain authority to impose enhanced penalties for RVO specifications without violating the Sixth Amendment, *Apprendi*, *Blakely*, or *Foster*.

{¶65} Defendant makes several arguments in opposition to the State's assertions regarding the RVO specifications and contends: (1) defendant's objection to the imposition of additional time pursuant to the RVO specification was neither untimely nor waived because the issue of the RVO specification would not become pertinent or ripe unless or until the jury returned guilty verdicts on the underlying offenses, and the failure to object to the "notice of intention to use judgment of prior conviction" was irrelevant; (2) the discretionary RVO specification under R.C. 2929.14(D)(2)(a) requires judicial factfinding, which is unconstitutional under *Apprendi*, *Blakely*, and *Foster*, in fact it contains the very same language that was severed in *Foster*, and (3) any error by the trial court in its determination as to the constitutionality of the RVO specification is harmless error because the trial court also properly exercised its discretion in refusing to impose an additional prison sentence based upon the RVO specification.

{¶66} On appeal, defendant concedes that only imposition of the discretionary RVO specification under R.C. 2929.14(D)(2)(a) is at issue, as he clearly would not meet the necessary criteria for mandatory penalty enhancement under R.C. 2929.14(D)(2)(b). Therefore, we shall focus our discussion upon the discretionary provision set forth in R.C. 2929.14(D)(2)(a).

{¶67} The relevant provision of R.C. 2929.14(D)(2)(a) reads as follows:

(2)(a) If division (D)(2)(b) of this section does not apply, the court **may** impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 [2941.14.9] of the Revised Code that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is * * * murder* * * and the court does not impose a sentence of life imprisonment without parole * * *.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.⁶

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.⁷

⁶ Substantially similar language was previously found in R.C. 2929.14(D)(2)(b)(i) and was severed by the Supreme Court of Ohio pursuant to *Foster* on the grounds that it required judicial factfinding and therefore violated the Sixth Amendment pursuant to *Apprendi* and *Blakely*.

⁷ Substantially similar language was previously found in R.C. 2929.14(D)(2)(b)(ii) and was severed by the Supreme Court of Ohio pursuant to *Foster* on the grounds that it required judicial factfinding and therefore violated the Sixth Amendment pursuant to *Apprendi* and *Blakely*.

R.C. 2929.14(D)(2)(a). (Emphasis added.)

{¶68} The State also cites to R.C. 2929.149, titled "Specification that offender is repeat violent offender," which provides in relevant part as follows:

(A) The determination by a court that an offender is a repeat violent offender is precluded unless the indictment, count in the indictment, or information charging the offender specifies that the offender is a repeat violent offender. * * *

(B) ***The court shall determine the issue of whether an offender is a repeat violent offender.***

(Emphasis added.)

{¶69} Additionally, the term "repeat violent offender" is defined in R.C. 2929.01(CC) (formerly R.C. 2929.01(DD)) as a person who meets the following requirements:

(1) The person is being sentenced for committing or for complicity in committing any of the following:

(a) Aggravated murder, murder, any felony of the first or second degree that is an offense of violence, or an attempt to commit any of these offenses if the attempt is a felony of the first or second degree;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense described in division (CC)(1)(a) [(DD)(1)(a)] of this section.

(2) The person previously was convicted of or pleaded guilty to an offense described in division (CC)(1)(a) or (b) [(DD)(1)(a) or (b)] of this section.

{¶70} We find defendant's argument asserting that the trial court properly exercised its discretion in refusing to impose an additional prison sentence pursuant to R.C. 2929.14(D)(2)(a) to be persuasive. For that reason, we need not address the issue

of the constitutionality of the RVO specification in light of *Foster* and its severance of R.C. 2929.14(D)(2)(b)(i) and (ii).⁸

{¶71} Even if the trial court was incorrect in its belief that the imposition of enhanced penalties for RVO specifications is a matter that is required to be determined by a jury, rather than by the court, any such determination is of no consequence here, given the court's additional determination that, even if the statute was constitutional, it was declining to find defendant to be an RVO and declining to impose an additional prison term.

{¶72} At the sentencing hearing, the trial court found as follows:

Further, even if I were to accept the argument that is presented in the state's memorandum contra, and if I understand your memo accurately, Ms. Arsenault, Ms. Moore, you are suggesting that it is not mandatory but is discretionary.

I find the statute to be problematic in the constitutional sense, that in the absence of a factfinding by the jury, that I cannot constitutionally make a finding of fact that allows for imposition finding of repeat violent offender, that there is nothing before me in the record that allows me to find that the previous conviction was an offense of violence. But if I read the memo accurately, and ***even if we were to get to that point, which I am declining to do, I would further decline to exercise my discretion in that matter.*** Therefore, I am not finding Mr. Brown [defendant] to be a repeat violent offender.

(Tr. 815.) (Emphasis added.)

⁸ We note that the Ohio Supreme Court's recent decision in *Hunter* determined that trial courts could properly impose an additional prison term for an RVO specification without violating the Sixth Amendment or conducting the judicial factfinding ruled unconstitutional in *Apprendi*, *Blakely*, and *Foster*. However, we further note that *Hunter* involved a prior version of R.C. 2929.14(D)(2) – the version that existed prior to the decision in *Foster* -- which contained the language in R.C. 2929.14(D)(2)(b)(i) and (ii) that was severed under *Foster*. This version existed prior to the enactment of H.B. No. 95, which revised the portions of the statute that are relevant to the instant appeal. Notably, the amended version of R.C. 2929.14(D)(2) that is applicable to the instant appeal still contains the provisions of the statute which were severed in *Foster*.

{¶73} Despite the State's contention that the court's refusal to consider an enhanced penalty did not amount to a non-constitutional alternative holding, we disagree. Since the Ohio Supreme Court's decision in *Foster*, Ohio trial courts have generally been provided more discretion in imposing sentence. Post-*Foster*, a trial court now has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478. Specifically, the severance and excise of former provisions of R.C. 2929.14 now leaves no statute to establish presumptions for concurrent and consecutive sentencing or to limit the trial court's discretion beyond the basic "purposes and principles of sentencing" provisions set forth in R.C. 2929.11 and 2929.12. *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983.

{¶74} Here, even presuming that the trial court was incorrect and that the RVO provisions contained in R.C. 2929.14(D)(2)(a) and (b) are constitutional, the RVO provision contained in R.C. 2929.14(D)(2)(a) explicitly provides that the trial court may (but was not required to) impose an additional sentence as a result of an RVO determination, thereby leaving the determination of whether to enhance the penalty completely to the trial court's discretion. While it may have been unnecessary for the trial court to consider the constitutionality of the statute at issue, it was not error for the trial court to decline to impose additional penalties, given that such an imposition was within its own discretion and it was clearly evident during the hearing that the trial court did not intend to enhance the sentence here under any circumstances.

{¶75} Accordingly, the State's sole assignment of error is overruled.

{¶76} In conclusion, we overrule defendant's first and second assignments of error, as well as the State's single assignment of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK, P.J., and BRYANT, J., concur.
