[Cite as *State v. Swann*, 2010-Ohio-6532.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-335
v.	:	(C.P.C. No. 05CR09-6331)
Christopher J. Swann,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 30, 2010

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert,* for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Christopher J. Swann ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted appellant of felonious assault, with specification, in violation of R.C. 2903.11, a felony of the second degree. For the following reasons, we affirm.

{¶2} The grand jury indicted appellant for felonious assault with a firearm specification and having a weapon while under a disability for his role in a shooting that occurred on June 25, 2005. Appellant pleaded not guilty, waived his right to a jury trial on the weapon count, and tried the felonious assault count to a jury. The jury returned a verdict finding appellant guilty of felonious assault and the firearm specification. The trial court acquitted appellant of the weapon count.

{¶3} Appellant appealed to this court, and we reversed. *State v. Swann*, 171 Ohio App.3d 304, 2007-Ohio-2010. The plaintiff-appellee, state of Ohio ("the state"), then appealed to the Supreme Court of Ohio. The Supreme Court reversed this court and remanded the matter to this court. *State v. Swann*, 119 Ohio St.3d 552, 2008-Ohio-4837. On remand, this court again reversed appellant's conviction and remanded the matter to the trial court for a new trial. *State v. Swann*, 10th Dist. No. 06AP-870, 2008-Ohio-6957.

{¶4} On remand, appellant waived his right to a jury trial. After a bench trial, the trial court found appellant guilty of felonious assault, with a firearm specification.

{¶5} Appellant timely appealed, and he raises the following assignment of error:

> THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶6} 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).

{¶7} In determining whether a verdict is against the manifest weight of the evidence, we sit as a "thirteenth juror." *Thompkins* at 387. 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.' " Id., 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.

{¶8} With these standards in mind, we turn to the evidence before the trial court.

{¶9} John Stith testified to the following. After dark on the night of June 25, 2005, he heard gunshots coming from outside his home at 588 East Kossuth, at the corner of Kossuth and Wager Streets in Columbus. He "went outside ranting and raving about the shooting." (Vol. I Tr. 27.) Someone said, "f * * * you," and shouted his name. (Vol. I Tr. 28.) When asked if he saw anyone, Stith responded: "I think [appellant]." (Vol. I Tr. 28.) He had seen appellant, who lived two houses north of Stith on Wager, earlier that day. Stith had known appellant for about six years and had seen him nearly every day during that time. Immediately after hearing the expletive shouted at him, Stith was shot in the neck.

{¶10} Stith said the man who shot him was wearing a white shirt around his head. He did not see a gun, but saw "the fire when the gun went off." (Vol. I Tr. 33.) He was shot a second time and hit in the leg. He said the shooter was standing next to some bushes in front of a home at 870 Wager, appellant's home.

{¶11} When police arrived, Stith told them that appellant, who is known as Kurt, had shot him. At trial, he said that he was certain it was appellant who shot him. He recognized appellant's voice when he shouted the expletive.

{¶12} Columbus Police Officer Julie Leach testified. She responded to a call regarding the shooting. She recovered a projectile from the front porch of a home at 575 East Kossuth, which is on the southwest corner of Kossuth and Wager Streets, across from Stith's home.

{¶13} Columbus Police Sergeant James Branam testified that he responded to a call regarding the shooting and attended to Stith. Stith's grandmother told him that a man named Kurt had shot Stith. Officers searched for appellant, but were unable to find him. Sergeant Branam recovered spent bullet casings from the porch and area in front of the home at 870 Wager. He testified that they were from a 9mm weapon. He stated that, when fired, a 9mm weapon would appear to have fire coming out. The fire would appear brighter in an unlit area. On cross-examination, Sergeant Branam testified that nearly all 9mm pistols will eject a spent casing to the right.

{¶14} Columbus Police Officer Sontino Williams testified that he and his partner were the first officers to arrive on the scene. He attended to Stith, who said that appellant had shot him in the alley behind the house.

{¶15} Heather McClellan, a forensic scientist at the Columbus Division of Police, Crime Laboratory, testified to the following. Ms. McClellan specializes in firearms identification. She analyzed four spent casings recovered from the scene and determined that they had all been fired from the same weapon, a 9mm semiautomatic pistol. She also analyzed the single projectile recovered from the scene. Because the projectile was only a fragment, she could not determine the caliber to match it to a weapon. As for whether a 9mm weapon typically ejects to the right, McClellan said that the way a shooter holds a weapon is more significant than how the firearm was manufactured, for purposes of determining the direction a weapon will eject a spent casing.

{¶16} Kavar Thompson testified that, in 2005, he was living in a house at the corner of Wager and East Columbus Streets, one block north of Stith's house and

immediately north of appellant's house. On the night of the shooting, Thompson was on the street corner talking to a friend, while sitting on a bicycle. He "heard gunshots in the air." (Vol. II Tr. 182.) He saw appellant, a man named Marty (later identified as Delmar Carlisle), and a man named Dre (later identified as Andre Sharp) in the area. Only appellant and Carlisle had guns—one long gun and one short gun. He thought appellant was shooting the long gun. He asked the men what kind of guns they were, and Carlisle responded that they were a chopper and a revolver.

{¶17} Shortly after, Thompson saw Stith come out of his house, yelling about the shooting. He rode toward Stith, told him who was doing the shooting, and returned on his bike to the corner of Wager and Columbus. Then someone shot Stith. The person who shot Stith had something like a shirt on his head and carried a long gun. Thompson thought at the time that it was appellant, but by trial was not confident.

{¶18} On cross-examination, Thompson said that the long gun, or "Chopper," was about three feet long. (Vol. II Tr. 196.) He said that Carlisle carried the short gun, or revolver. Defense counsel, however, had Thompson read his testimony from the first trial, where Thompson had testified that Sharp, not Carlisle, carried the revolver. Thompson had also testified in the first trial that appellant and Sharp were doing the shooting, not appellant and Carlisle. At this trial, Thompson said that appellant and Carlisle were the shooters and that Sharp had left the immediate area.

{¶19} Thompson said that the shooter leaned from behind the bushes in front of 870 Wager, holding the long gun at waist height. The record reflected that, when he demonstrated the shooter's actions, Thompson was bending at the waist, bending forward, and holding both arms out in front of him as if firing a weapon to his left. The

shooter wore a white T-shirt and another white T-shirt tied on his head. On redirect examination, Thompson said that he was 100 percent positive that he saw appellant in the alley, wearing a white shirt and another white shirt on his head, a few minutes before Stith was shot.

{¶20} The defense called Delmar Carlisle, also known as Marty, to testify. Carlisle refused to answer most of the questions asked of him, pleading the Fifth Amendment. Carlisle stated that he had seen appellant on the street before, but that appellant had never given him anything. He denied that appellant had raised him like a little brother. He also said that he knew Tia Holland from the street.

{¶21} Tia Holland testified to the following. Holland and appellant supported Carlisle, whom she referred to as a "deprived neighborhood boy." (Vol. II Tr. 266.) Appellant and Carlisle had a big brother-little brother, or even father-son, relationship. Carlisle lived with Holland until May 2005, when she became aware of gun charges against him. Appellant and Holland lived together and had been in a relationship for 11 years.

{¶22} The day after the shooting, Holland and Carlisle had a conversation in which Carlisle admitted that he had shot Stith. He said that he did not mean to kill Stith, but just wanted to scare him or "shut him up." (Vol. II Tr. 277.) Carlisle said that he shot Stith from a front porch. Carlisle said that he threw the gun down the sewer. He also said that he would turn himself in to police.

{¶23} On the night of the shooting, Holland and appellant were at the home of appellant's aunt and uncle, just a block or two away from where the shooting occurred. Holland and appellant had attended a family reunion earlier that day, and they were

both wearing purple reunion T-shirts. Upon hearing the gunshots, they went to the area immediately. Sharp came toward them and said that Carlisle had shot Stith.

{¶24} Appellant testified on his own behalf. Appellant confirmed that Carlisle was like a little brother to him, as was Sharp. On the day of the shooting, appellant had attended a family reunion with Holland. They were both wearing purple reunion T-shirts. He left the reunion and went to his uncle's house, where he stayed (still wearing the purple shirt) until the shooting. Appellant said that his father owned the home at 870 Wager, although it was in foreclosure and his father was not living there at the time of the shooting.

{¶25} In closing arguments, defense counsel argued that the physical evidence indicated that shots were fired from the porch at 870 Wager, not from the street. He also argued that Carlisle, not appellant, shot Stith. As noted, however, the trial court found appellant guilty of felonious assault, with a firearm specification.

{¶26} Under R.C. 2903.11(A), a person is guilty of felonious assault if he causes or attempts to cause physical harm to another by means of a deadly weapon. Stith testified that appellant shot him in the neck and leg, causing serious injury. Although Thompson testified that he was no longer certain that appellant was the person who shot Stith, he corroborated Stith's testimony that appellant was in the area with a gun, along with either Carlisle or Sharp. Taking this testimony as true, there was sufficient evidence to show that appellant attempted to cause harm to Stith by means of a deadly weapon.

{¶27} In arguing that the court's verdict was against the manifest weight of the evidence, appellant notes the trial court's statements that it found Thompson's

testimony to be the most credible. Appellant contends that Thompson was uncertain about whether appellant was the shooter and that Thompson had a lengthy criminal record.

{¶28} We conclude, however, that the trial court's decision was not against the manifest weight of the evidence. As the trial court indicated, the case turned on the credibility of the testifying witnesses. The court believed Stith and Thompson, finding that they had nothing to gain by implicating appellant, rather than Carlisle. The court also found that Holland, who had a close relationship with appellant, was not credible.

{¶29} Stith was positive that appellant was the person who shot him. He had known appellant for many years, knew his voice, and saw his face.

{¶30} Although Thompson was no longer positive that appellant was the shooter, he conceded that he had identified appellant immediately after the shooting and consistently thereafter, up until the second trial. He was certain that appellant was in the area and had been shooting guns with Carlisle immediately before Stith was shot. He even spoke to Carlisle about the guns. Although there was some uncertainty about the second person with appellant at the time Stith was shot, Thompson placed appellant at the scene with a long gun. And his description of what appellant was wearing—a white T-shirt and another T-shirt on his head—was consistent with Stith's description of what the shooter was wearing.

{¶31} At trial, defense counsel argued that the physical evidence showed that the shots came from the porch, and that a shooter on the porch of 870 Wager was consistent with Carlisle's confession to Holland. As the trial court found, however, shots

fired from the porch could not have reached Stith in the street. And, in any event, additional spent casings could have been removed before police arrived.

{¶32} To be sure, Holland testified that she was with appellant throughout the evening and that he was wearing a purple T-shirt, which does not match Stith's description of the shooter. As the trial court indicated, however, Holland's testimony was not without bias, as she had been in a long-term relationship with appellant.

{¶33} For all these reasons, we conclude that the trial court's judgment was not against the manifest weight of the evidence, and we overrule appellant's assignment of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and DELANEY, JJ., concur.

DELANEY, J., of the Fifth Appellate District, sitting by assignment in the Tenth Appellate District.