[Cite as *State v. Sealy*, 2010-Ohio-6294.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-1128 (C.P.C. No. 09CR-3268)
v.	:	(REGULAR CALENDAR)
Jamal R. Sealy,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 21, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Brian J. Rigg, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Jamal R. Sealy ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas convicting him of one count of aggravated murder, seven counts of aggravated robbery, two counts of robbery, and one count of failure to comply with the order of a police officer, along with the firearm specifications contained in each count.

{¶2} This matter arises out of a crime spree that spanned over five months. The following factual description of events was adduced at trial. The first incident occurred on January 14, 2009, when a man with a gun entered Bruce Lee's Chinese Restaurant. A

customer, John Brobst ("Brobst"), was waiting for his order when he saw the man point the gun at the hostess Tina Chau ("Chau"). The gunman threatened to shoot Chau and demanded money from the cash register. The gunman also demanded that Brobst remove the belongings from his pockets and place them on the table. Both Chau and Brobst complied with the gunman's demands. When the gunman left, Brobst called 911 and gave the dispatcher a description of the gunman and the direction in which he fled. Columbus Police Officer Phillip Rogers arrived at the scene and saw footprints with a distinctive tread pattern in the snow going in the direction described by Brobst. The footprints led to appellant's residence at 4008 Elaine Place, Columbus, Ohio. Officer Rogers knocked on the door but no one answered. Columbus Police Detective Jason Wood prepared a photo array that included appellant's picture and showed it to Chau and Brobst. Though Chau was unable to identify anyone from the photo array, on January 21, 2009, Brobst identified appellant as the gunman who robbed the restaurant.

{¶3} The next incident occurred on March 25, 2009, at the Marathon gas station on East Livingston Avenue. William Suber ("Suber"), a retired Army sergeant who testified that he often does odd jobs in the area, was at the Marathon station that day. Suber testified that he went to the Marathon station to sell a coat to the clerk that he knew as "Pops." In exchange for the coat and Suber taking out the trash, Pops gave Suber $4.00 and a cigar. When Suber went outside to smoke the cigar, he saw a man enter the store and then he heard a gunshot. Suber then saw this man come out of the store carrying a gun at waist level. Believing something had happened to Pops, Suber went to the post office across the street for help. Suber told postal employee Patrick LaRosa ("LaRosa") that someone had been shot, and LaRosa called 911. As the call was being

made, LaRosa and Suber observed a green sedan with tinted windows pull away. Surveillance video from inside the gas station showed a man enter the gas station, pull a handgun and shoot it at Pops. A single projectile was recovered from the scene. It was stipulated at trial that Pops, whose real name was Madi Ceesay, died of a single gunshot wound to the neck. In a photo array shown to him on May 26, 2009, Suber identified appellant as the man who entered the gas station with a gun on March 25, 2009. Suber also identified appellant at trial.

{¶4} On April 11, 2009, Columbus Police responded to a report of a robbery at the ComStation store on Hamilton Road. The surveillance video from inside the store showed a man enter the store with a gun drawn. The video shows the man point the gun at the store clerk and the clerk quickly putting cell phones into a bag provided by the gunman.

{¶5} This same ComStation store was robbed again on April 15, 2009. On this date, store manager Anthony Harris ("Harris") was working when a man entered the store with a gun demanding cash and cell phones. Though there were customers, two adults and a child, in the store during this time, the gunman fired two shots at the ceiling and instructed Harris to hurry. Harris hit the store's panic button as the gunman left. Customers Sheena Alexander ("Alexander") and Jawaune Franklin ("Franklin"), who were in the store during the robbery, saw a man enter with his gun drawn. Both Alexander and Franklin saw the gunman produce a bag, demand money and phones, and yell at Harris to hurry. Harris, Alexander, and Franklin were all shown photo arrays, and each one separately identified appellant as the gunman that robbed the store.

{¶6} The final incident giving rise to this indictment occurred on May 22, 2009 at the Mobile Mart on the corner of Livingston Avenue and Hamilton Road. Store clerk Omar Al-Mustafa ("Al-Mustafa") was working that day when a man entered, put a gun to Al-Mustafa's head, and demanded his wallet. Threatening to kill Al-Mustafa if the wallet was not produced, the gunman then reached in Al-Mustafa's pocket and took his wallet. At gunpoint, Al-Mustafa was forced to the register, where a female store clerk was standing. The gunman fired his gun into the air, then gave a bag to the female clerk and demanded cash and cigarettes. As he left the store, the gunman said, "if you want to stay alive, don't move, don't say anything until I leave." (Tr. 545-46.)

{¶7} As the gunman left, the female clerk called 911, and Al-Mustafa saw the gunman get into the passenger's side of a car with dark windows. Al-Mustafa also noted the car's license plate number, and this information was relayed to the police. Columbus Police Officers Gary Thompson and Terry Harris were in a patrol wagon when they heard the dispatch. The officers ran the plates of the vehicle described by Al-Mustafa, and it came back registered to appellant at 4008 Elaine Place. The officers saw a car matching a description of the getaway car at 4008 Elaine Place, and Officer Thompson saw appellant sitting in the driver's seat. Despite being ordered to get out of the vehicle, appellant remained in the car and fled.

{¶8} By this time, other officers were responding to the area. As Officers Thompson and Harris pursued appellant, they found that appellant had crashed his vehicle into another car in the complex. Appellant, however, was not in the car. The officers learned that appellant's girlfriend lived at 4002 Elaine Place. Columbus SWAT team responded to the scene, surrounded the apartment, and found appellant hiding

behind a bathroom door in 4002 Elaine Place. In appellant's car, Al-Mustafa's wallet, bags, a bandana, cigarettes, a black-hooded sweatshirt, and a handgun were found.

{¶9} On July 24, 2009, appellant was indicted by a Franklin County Grand Jury of one count of aggravated murder, seven counts of aggravated robbery, two counts of robbery, two counts of failure to comply with the order or signal of a police officer, and one count of kidnapping. All counts contained a firearm specification. A jury trial commenced on October 26, 2009, and the jury rendered a verdict on November 3, 2009 finding appellant guilty of all counts and specifications in the indictment. The trial court proceeded immediately to sentencing, and appellant was sentenced to life without the possibility of parole on the aggravated murder count, consecutive to 94 years on the remaining counts.

{¶10} This appeal followed, and appellant brings the following five assignments of error for our review:

> [1.] THE DEFENDANT WAS DENIED A RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT OVERRULED DEFENDAN'TS MOTION TO SEVER THE FIVE ROBBERY CASES.
>
> [2.] THE TRIAL COURT ERRED BY EXCLUDING SUGGESTIVE PHOTO ARRAYS OF THE DEFENDANT.
>
> [3.] THE TRIAL COURT ERRED BY NOT ALLOWING THE JURY TO CONSIDER A LESSER OFFENSE OF MURDER.
>
> [4.] THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT AND THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANT'S RULE 29 MOTION.
>
> [5.] THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶11} In his first assignment of error, appellant contends the trial court erred in denying his motion to sever the five robbery cases of which the indictment was comprised. Appellant filed a motion to sever prior to trial, and the trial court denied the motion from the bench on the day trial commenced. Appellant did not renew his objection to joinder of the charged offenses at the close of either the state's evidence or all the evidence; therefore, he has waived all but plain error. *State v. Williams*, 10th Dist. No. 02AP-730, 2003-Ohio-5204, ¶29, citing *State v. Saade*, 8th Dist. No. 80705, 2002-Ohio-5564, citing *State v. Walker* (1990), 66 Ohio App.3d 518, 522; *State v. Brady* (1988), 48 Ohio App.3d 41, 44. Under the plain error test, a reviewing court must consider whether, "but for the existence of the error, the result of the trial would have been otherwise." *State v. Wiles* (1991), 59 Ohio St.3d 71, 86. As will be discussed, however, there is no error, plain or otherwise in the trial court's denial of appellant's motion to sever counts in the indictment.

{¶12} As provided in Crim.R. 8(A), two or more offenses may be charged in the same indictment if they are of "the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." "The law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged are of the same or similar character." *State v. Lott* (1990), 51 Ohio St.3d 160, 163. Nonetheless, an accused may move to sever counts of an indictment on the grounds that he or she will be prejudiced by the joinder of multiple offenses. *State v. LaMar*, 95 Ohio St.3d 181, 193-95, 2002-Ohio-2128.

{¶13} To succeed on a motion to sever, a defendant "must furnish the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial." *Lott* at 163, quoting *State v. Torres* (1981), 66 Ohio St.2d 340, syllabus. An appellate court will not reverse a trial court's decision to deny severance unless the trial court has abused its discretion. Id. For an abuse of discretion to lie, a reviewing court must find that a trial court's ruling was unreasonable, arbitrary or unconscionable. *State v. Vasquez*, 10th Dist. No. 05AP-705, 2006-Ohio-4074, ¶6.

{¶14} The state can rebut a defendant's claim of prejudicial joinder in two ways. *LaMar* at ¶50. First, if the state shows that evidence of one offense would be admissible at a separate trial of the other offense as "other acts" evidence under Evid.R. 404(B), then joinder of the offenses in the same trial cannot prejudice the defendant. *State v. Tipton*, 10th Dist. No. 04AP-1314, 2006-Ohio-2066, ¶27, citing *LaMar* at ¶50; *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, ¶30; *State v. Coley*, 93 Ohio St.3d 253, 259, 2001-Ohio-1340. Second, a joinder cannot result in prejudice if the evidence of the offenses joined at trial is simple and direct, so that a jury is capable of segregating the proof required for each offense. Id., citing *State v. Johnson*, 88 Ohio St.3d 95, 109, 2000-Ohio-276; *State v. Mills* (1992), 62 Ohio St.3d 357, 362.

{¶15} In the case at bar, appellant contends this record presents "no suggestion that the five separate crimes are based upon the same act or transaction." (Appellant's brief at 8.) Appellant also argues the acts have no factual connection to each other and are not part of a common scheme, plan or course of criminal conduct. This is so, according to appellant, because the crimes involve different dates, people, and locations. We disagree.

{¶16} Evid.R. 404(B) permits evidence of "other crimes, wrongs or acts * * * as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident," so long as such evidence of other acts is not offered to show propensity. Evidence of crimes may be introduced to prove identity if the defendant " 'committed similar crimes within a period of time reasonably near to the offense on trial, and that a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes.' " *State v. Shedrick* (1991), 61 Ohio St.3d 331, 337, quoting *State v. Curry* (1975), 43 Ohio St.2d 66, 73. See also *State v. Lowe*, 69 Ohio St.3d 527, 1994-Ohio-345, syllabus ("To be admissible to prove identity through a certain *modus operandi*, other-acts evidence must be related to and share common features with the crime in question.").

{¶17} *Tipton* involved a defendant charged with robbery of two gas stations, namely a BP and a Sunoco. Noting that the two stations were robbed within ten minutes of each other and were located only ten miles and one highway exit from one another, this court found the robberies were temporally and geographically linked. Further, because the robberies followed a similar pattern of the defendant entering the station, brandishing a gun, and demanding money from the cash register and safe, this court found that the evidence of one robbery could have been introduced at the trial of the other under Evid.R. 404(B) to prove identity, and, thus, the defendant was not prejudiced by joinder of the offenses.

{¶18} Similarly, in *State v. Payne*, 10th Dist. No. 02AP-723, 2003-Ohio-4891, the defendant was charged with robbing at gunpoint two florists and a credit union. On appeal, the defendant argued the trial court erred in denying his motion to sever the trial

of each alleged robbery. The robberies in *Payne* occurred on April 25, 2001, May 11, 2001, and May 29, 2001. This court found the crimes "were of the same or similar character as each aggravated robbery was committed with the use of a firearm" and "were part of a course of criminal conduct." Id. at ¶26. Therefore, we found the state adequately rebutted the defendant's claims of prejudicial joinder.

{¶19} Here, the record contains evidence of five aggravated robberies and related offenses that occurred over a five-month period. The crimes are geographically linked as they all occurred within less than a two-mile radius of appellant's residence. In each crime, appellant was described as wearing dark clothing, entering a business brandishing a handgun, and demanding money from the cash register. In three of the robberies, appellant was described as firing the gun. Appellant's car was placed at three of the robberies, and he was positively identified by witnesses from four of the robberies. Clearly, the evidence here establishes the robberies followed a similar pattern and were geographically linked such that evidence of one could have been introduced by the state in a trial of each of the others under Evid.R. 404(B) to establish appellant's identity through his modus operandi. Thus, appellant was not prejudiced by the joinder of the offenses for trial.

{¶20} Though we need not consider the less stringent "simple and direct evidence" test to rebut appellant's claim of prejudicial joinder because the "other acts" test has been satisfied, we note that in this case, the second test has been satisfied as well. *State v. Gravely*, 10th Dist. No. 09AP-440, 2010-Ohio-3379, ¶38.

{¶21} Evidence is "simple and direct" if the jury is capable of segregating the proof required for each offense. *State v. Cameron*, 10th Dist. No. 09AP-56, 2009-Ohio-6479,

¶40, citing *Mills*, supra. "The rule seeks to prevent juries from combining the evidence to convict the defendant, instead of carefully considering the proof offered for each separate offense." Id. The evidence of each offense presented in the case sub judice is simple and direct and not confusing or difficult to separate. Though part of a crime spree, the offenses were separate, and the offenses were not so complex that the jury would have difficulty separating the proof required for each offense. *Gravely*; *Tipton*.

{¶22} Consequently, we conclude appellant has failed to demonstrate error, plain or otherwise, in the trial court's decision to deny appellant's motion to sever the indicted offenses, and we overrule appellant's first assignment of error.

{¶23} In his second assignment of error, appellant contends the photo arrays used for pretrial identification were impermissibly suggestive. In this case, two photo arrays containing photos of appellant were prepared. The first contained a picture of appellant from 2007, the second had a more recent picture of appellant that was taken the day he was arrested following the May 22, 2009 robbery. Both arrays had appellant's picture in the number two position, which according to appellant, makes the arrays impermissibly suggestive.

{¶24} Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact, and, therefore, is in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. As a result, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Id. Then, the appellate court must independently

determine whether the facts satisfy the applicable legal standard, pursuant to a de novo review, and without giving deference to the conclusion of the trial court. Id.

{¶25} Before excluding identification testimony, a trial court must engage in a two-step analysis. First, there must be a determination that the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375. Second, it must be determined that the identification itself was unreliable under the totality of the circumstances. Id. See also *State v. Monford*, 10th Dist. No. 09AP-274, 2010-Ohio-4732, ¶38; *State v. Sherls*, 2d Dist. No. 18599, 2002-Ohio-939.

{¶26} Pretrial identifications may be suppressed only if they are both unnecessarily suggestive and unreliable under the totality of the circumstances. *State v. Broomfield* (Oct. 31, 1996), 10th Dist. No. 96APA04-481. "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243, 2253. Therefore, even if the identification procedure was suggestive, the subsequent identification is still admissible as long as it is reliable. Id.; *State v. Moody* (1978), 55 Ohio St.2d 64, 67. "Where a witness has been confronted by a suspect before trial, that witness' identification of the suspect will be suppressed if the confrontation procedure was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under the totality of the circumstances." *State v. Brown* (1988), 38 Ohio St.3d 305, 310, citing *Manson*.

{¶27} It is the defendant's burden to prove that the procedures utilized were both suggestive and unnecessary and that the testimony was or will be unreliable based upon the totality of the circumstances test. *Monford* at ¶41, citing *State v. Taylor*, 3d Dist. No.

1-03-20, 2003-Ohio-7115; *State v. Green* (1996), 117 Ohio App.3d 644. If the defendant fails to meet the first part of his burden, the court need not consider the totality of the circumstances test. *Green* at 653. See also *State v. Brown* (Aug. 17, 1994), 1st Dist. No. C-930217; *State v. Dunham* (May 25, 1983), 1st Dist. No. C-820391; *Reese v. Fulcomer* (C.A.3, 1991), 946 F.2d 247.

{¶28} Though appellant indicates Al-Mustafa and Suber were shown both photo arrays, our review of the evidence from the suppression hearing reveals that only Al-Mustafa was shown both arrays. The first array was prepared by Detective Wood and contained a 2007 photo of appellant. According to Detective Wood, the photo's placement in the array was chosen by a computer on a random basis. This array was shown to Brobst, who identified appellant on January 21, 2009. Al-Mustafa was presented this array on May 22, 2009, but he was unable to make an identification. The second array was prepared by Detective Clark on May 22, 2009 after appellant was arrested. The second array was shown to Al-Mustafa on May 23, 2009, and this time he did make an identification of appellant. The second array was also shown to Suber, Harris, Alexander and Franklin on various dates, and each independently identified appellant in the array.

{¶29} Other than placement of his photo, appellant does not contend anything additional about the photo arrays or their manner of presentation was impermissibly suggestive. The first array contains appellant's picture taken in 2007 in which he has short hair and is shown with five other men exhibiting similar characteristics, such as hairstyle, skin tone, age, and weight. The second array, with appellant's picture taken in 2009, shows appellant with braids, and again this picture is shown with pictures of five other men with characteristics similar to appellant as he appeared in 2009. The photo

arrays were prepared by two different detectives, and each testified as to the computer's random placement of pictures in the arrays. There is no evidence that the placement of the pictures and appellant ending up in position number two in each photo array was anything beyond coincidence. In fact, in a similar circumstance, this court has stated, "[t]he fact that two photo arrays placed the intended suspect in the same numerical position is not unduly suggestive." *State v. Spencer* (Apr. 22, 1997), 10th Dist. No. 96APA09-1226; See also *State v. Smith* (Sept. 29, 1994), 8th Dist. No. 65636 (no undue suggestion in the fact that both suspects' pictures were placed in the same numerical position in the photo arrays).

{¶30} Our review of the evidence reveals nothing impermissibly suggestive about the identification procedure utilized in this case. As a result, it is not necessary to discuss whether the identifications were unreliable under the totality of the circumstances test. Accordingly, we overrule appellant's second assignment of error.

{¶31} In his third assignment of error, appellant contends the trial court erred by failing to instruct the jury on murder as a lesser-included offense of aggravated murder.

{¶32} The decision to give or refuse to give a jury instruction is entrusted to the considered discretion of the trial court and will not be overturned on appeal unless the record affirmatively demonstrates that the trial court abused its discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64. "An instruction on a lesser-included offense is required 'only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.' " *State v. Wilcox*, 10th Dist. No. 05AP-972, 2006-Ohio-6777, ¶21, quoting *State v. Thomas* (1988), 40 Ohio St.3d 213. " 'Thus, if due to some ambiguity in the state's version of the events involved in

a case the jury could have a reasonable doubt regarding the presence of an element required to prove the greater but not the lesser offense, an instruction on the lesser included offense is ordinarily warranted.' " Id., quoting *State v. Solomon* (1981), 66 Ohio St.2d 214, 221.

{¶33} According to appellant, the facts do not support the conclusion that murder had been committed during the commission or attempted commission of an aggravated robbery. We disagree. The evidence at trial demonstrated that at the Marathon gas station, the gunman pointed a gun at the clerk, demanded that the clerk give him the contents of the cash register and to hurry up or he would be shot. The evidence simply does not reasonably support an acquittal on the aggravated murder charge. Therefore, we find the trial court did not abuse its discretion when it denied appellant's request for an instruction on the lesser-included offense of murder. Consequently, we overrule appellant's third assignment of error.

{¶34} Since they are interrelated, we address appellant's fourth and fifth assignments of error together. Together these assigned errors challenge both the sufficiency and weight of the evidence and contend the trial court erred in denying appellant's motion for acquittal pursuant to Crim.R. 29.

{¶35} " 'Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.' " *State v. Seiber* (1990), 56 Ohio St.3d 4, 13, quoting *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. In ruling on a Crim.R. 29 motion, a trial court must construe the evidence in a light most favorable to the state. *State v. Busby*

(Sept. 14, 1999), 10th Dist. No. 98AP-1050. The standard of review applied to a denied motion for acquittal, pursuant to Crim.R. 29, is virtually identical to that employed in a challenge to the sufficiency of the evidence. *State v. Turner,* 10th Dist. No. 04AP-364, 2004-Ohio-6609, ¶8, appeal not allowed (2005), 106 Ohio St.3d 1547, 2005-Ohio-5343, citing *State v. Ready* (2001), 143 Ohio App.3d 748, 759.

{¶36} When reviewing the sufficiency of the evidence, an appellate court must:

> [E]xamine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶37} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. Rather, the sufficiency of the evidence test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, when reviewing the sufficiency of the evidence, an appellate court must accept the fact finder's determination with regard to the credibility of the witnesses. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Worrell,* 10th Dist. No. 04AP-410, 2005-Ohio-1521, ¶41 ("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.").

{¶38} As opposed to the concept of sufficiency of the evidence, "[t]he weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." *State v. Brindley,* 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16, citation omitted. In order for a court of appeals to reverse the judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court must disagree with the fact finder's resolution of the conflicting testimony. *Thompkins* at 387. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id. quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶39} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C000553.

Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston,* 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17.

{¶40} Appellant raises no specific arguments with respect to these assigned errors but, instead, makes the general assertion that there is not only insufficient evidence supporting his convictions but, also, that the convictions are against the manifest weight of the evidence. We do not find appellant's arguments persuasive.

{¶41} As indicated previously, both Chau and Brobst testified that a man with a gun entered Bruce Lee's restaurant on January 14, 2009, and proceeded to point the gun at Chau while demanding money from the cash register. Brobst testified that the gunman also threatened him with the gun and demanded that Brobst empty his pocket contents onto the table. When the police arrived, Brobst described the direction in which the gunman fled. Because of the snow, Officer Rogers was able to follow footsteps with a distinctive tread pattern leading from the restaurant to the doorstep of appellant's residence at 4008 Elaine Place. Officer Rogers knocked on the door, but no one answered. Brobst identified appellant as the gunman from a photo array on January 21, 2009, and in the courtroom at trial.

{¶42} Suber testified that on March 25, 2009, he saw a man enter the Marathon gas station of which only the clerk, Madi Ceesay, was currently inside. Suber heard a gunshot, and then saw the man leave the station holding a gun at waist level. The audio from the surveillance video established that the man with the gun was demanding the

register contents and that the clerk would be shot if he did not comply. A muddy shoe print was found just outside the gas station, and the tread matched that of the tread in the footprint trail in the snow outside of Bruce Lee's restaurant. Suber identified appellant as the gunman in a photo array on May 26, 2009, and in court during the trial.

{¶43} ComStation's surveillance from April 11, 2009, showed a man dressed in dark clothing enter the store, draw a gun, and point it at the clerk. The video also showed the clerk quickly placing cell phones into a bag provided by the gunman. This store was robbed again on April 15, 2009, while two adults and a child were shopping. Harris, the store's manager, and the customers, Alexander and Franklin, all identified appellant as the man who entered the store with a drawn gun. All three witnesses also testified that appellant provided a bag, and demanded money and phones from Harris, and that appellant fired the gun while demanding that Harris act faster.

{¶44} Al-Mustafa also identified appellant as the man who entered the Mobile Mart on May 22, 2009, and pointed a gun at him. According to Al-Mustafa, appellant demanded his wallet and instructed that he would be killed if he moved. Appellant provided a bag, with which he instructed the store clerk to fill with money and cigarettes. Appellant fired the gun while instructing the clerk to move faster. Al-Mustafa was able to get the license number of the car appellant left in and it was registered to appellant at 4008 Elaine Place.

{¶45} After the Mobile Mart robbery, Officers Thompson and Harris found appellant in his car but, as they ordered him out of the vehicle, he fled. Appellant was later apprehended and Al-Mustafa's wallet, items from the Mobile Mart, a black-hooded

sweatshirt, and a gun that was identified by several of the witnesses as that used in the robberies was discovered in appellant's car.

{¶46} Clearly, if believed, the evidence in the case sub judice could convince the average mind of appellant's guilt of the robbery, aggravated robbery, aggravated murder, and failure to comply charges, and all the corresponding firearm specifications, beyond a reasonable doubt, and, therefore, we find sufficient evidence to support appellant's convictions of the same.

{¶47} Similarly, we cannot find that appellant's convictions are against the manifest weight of the evidence. Again, appellant makes the general assertion that his convictions are against the manifest weight of the evidence without directing us to any particular evidence in the record. It is well-established that a conviction is " 'not against the manifest weight of the evidence simply because the [trier of fact] believed the prosecution testimony.' " *State v. Moore*, 2d Dist. No. 20005, 2004-Ohio-3398, quoting *State v. Gilliam* (Aug. 12, 1998), 9th Dist. No. 97CA006757. The weight to be given to the evidence and the credibility of the witnesses are issues primarily for the trier of fact. *DeHass*, supra. Further, the jury is free to believe *all* or *any* of the testimony. *Jackson*, supra. The jury heard all of the evidence in this case and, after hearing such evidence, obviously found the state's witnesses to be credible. After carefully reviewing the trial court's record in its entirety, we conclude that the trier of fact did not lose its way in resolving credibility determinations, nor did the convictions create a manifest miscarriage of justice. The trier of fact was in the best position to determine the credibility of the testimony presented, and we decline to substitute our judgment for that of the trier of fact.

Consequently, we cannot say that appellant's convictions are against the manifest weight of the evidence.

{¶48} Finding that appellant's convictions are not only supported by sufficient evidence but also are not against the manifest weight of the evidence, we overrule appellant's fourth and fifth assignments of error.

{¶49} For the foregoing reasons, appellant's five assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.

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