[Cite as *State v. Collins,* 2011-Ohio-2944.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-835 (C.P.C. No. 09CR-11-6956)
Danny Collins, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 16, 2011

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Danny Collins, Jr., defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a bench trial, of aggravated robbery, in violation of R.C. 2911.01, a felony of the first degree.

{¶2} On November 11, 2009, Yesenia Martinez and her brother-in-law, Heriberto Gonzalez, were operating a taco truck. At approximately 1:20 p.m., appellant rode his

bicycle up to the stand, forced his way into the truck, and demanded money from Martinez. Martinez ran from the truck and, when she looked back, she saw appellant holding something in his hand that was either a gun or knife. She ran to a nearby business. Several persons from the business returned with Martinez to the truck, and those persons engaged in a physical confrontation with appellant as he tried to leave on his bike. During the confrontation, appellant cut one person with a knife. The group was able to restrain appellant until police arrived.

{¶3} Appellant was indicted on one count of aggravated robbery, a felony of the first degree; one count of robbery, a felony of the second degree; one count of robbery, a felony of the third degree; and one count of felonious assault, a felony of the second degree. A bench trial commenced on June 7, 2010. The trial court subsequently found appellant guilty of aggravated robbery, but not guilty of the remaining counts. A sentencing hearing was held on July 30, 2010, after which the trial court sentenced appellant to a prison term of five years. The court entered its judgment on August 3, 2010. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

> THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF AGGRAVATED ROBBERY AS THAT VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶4} Appellant argues in his assignment of error that the trial court's judgment was against the manifest weight of the evidence. This court's function when reviewing the

weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In order to undertake this review, we must weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we find that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. Id. On the other hand, we will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-94, 1998-Ohio-533.

{¶5} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. See *Martin* at 175. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Thus, a reviewing court must defer to the factual findings of the jury or judge in a bench trial regarding the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Concerning the issue of assessing witness credibility, the general rule of law is that "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. Indeed, the fact finder is free to believe all, part, or none of the testimony of each witness

appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412. If evidence is susceptible to more than one construction, reviewing courts must give it the interpretation that is consistent with the verdict and judgment. *White v. Euclid Square Mall* (1995), 107 Ohio App.3d 536, 539. Mere disagreement over the credibility of witnesses is not sufficient reason to reverse a judgment. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24.

{¶6} Appellant was convicted of aggravated robbery, in violation of R.C. 2911.01(A), which provides, in pertinent part:

> No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.

{¶7} With regard to appellant's sufficiency of the evidence argument, we find there was sufficient evidence to support the verdict. Martinez testified that appellant opened the door to the taco truck and pushed her in the chest. He then asked her for money. Appellant grabbed her by the shirt, but she escaped and ran out of the truck, leaving her brother-in-law in the truck. She then turned back and saw appellant had something in his hand. She was not sure if it was a gun or a knife. Martinez ran to a hair salon, and several of the people from the salon came outside. Martinez then saw her brother-in-law telling appellant to take the money. The people from the salon chased appellant and knocked him off his bike as he tried to flee. Appellant threatened the people from the salon with "what he had in his hand" and then cut one man under his arm.

Martinez testified she could not see what appellant had in his hand but thought it was a pistol or a knife. She said she discovered after police arrived that the object in appellant's hand had been a knife.

{¶8} Matthew Kitch, a police officer with the Blendon Township Police, testified that, when he approached appellant, who was being held to the ground by two others, he saw a knife on the ground near appellant. During an interview with appellant, appellant told Kitch that he made a sexual comment to Martinez, and eight to ten male Hispanics jumped him. Appellant admitted to Kitch that the knife was his and said he always carried it for self-defense.

{¶9} Viewing this evidence in a light most favorable to the prosecution, we find the state presented evidence that, if believed, demonstrated appellant displayed a weapon as Martinez fled from the truck, and he used the knife during the ensuing confrontation with the people from the salon. Thus, if believed, appellant had a deadly weapon, a knife, on his person, and displayed or brandished the knife in attempting a theft offense, and used the knife in fleeing immediately after the attempt. Therefore, we find the trial court's judgment was based upon sufficient evidence.

{¶10} With regard to appellant's manifest weight of the evidence argument, appellant, who lived near the scene of the crime, testified he was a heroin user at the time of the crime. He said he lied to Kitch during his interrogation when he said he was "clean," and he actually had gone to the taco truck to buy heroin. He said he had been going to the taco truck once or twice per week for three years to buy heroin from Gonzalez. Appellant testified that he had purchased heroin from Gonzalez on the day at issue. When he took the drugs home, he realized he had not been given the proper

amount, and he returned to the taco truck. When appellant confronted Gonzalez, Gonzalez denied he had "shorted" appellant. Appellant said he never pushed his way into the taco truck and never pulled his knife on anyone in the truck. Appellant said Martinez left the truck and then eight to ten men from the salon came outside. One of the men then punched him and the others started beating him. He grabbed his knife to defend himself. He said he told Kitch he had made a sexual comment to Martinez because he did not want to admit he was at the taco stand to buy heroin.

{¶11} The basis for the trial court's finding of guilt was simple: it did not believe appellant, and it believed the state's witnesses. Appellant contends that we should not believe Martinez because she was unsure as to whether appellant had a weapon when he entered the taco stand, and she was "all over the map" as to whether she saw appellant with a knife during the incident. We disagree with appellant's characterization of Martinez's testimony. Martinez's testimony was clear that she saw appellant holding "something" in his hand, either a knife or gun, as she ran from the taco truck. She was also certain that she saw appellant holding either a knife or gun and threatening the people from the salon with it. Although appellant urges us to believe the version of the events that he portrayed in his testimony, we see no reason to question the trial court's credibility determination, given the trial court was able to personally view the witnesses' testimonies and view their demeanors, gestures, and voices. Therefore, we find the trial court's decision was not against the manifest weight of the evidence.

{¶12} We also note that, although we have found that the evidence supported the trial court's verdict that appellant displayed a knife while actually attempting the theft offense, which was alone sufficient to find appellant guilty of aggravated robbery,

appellant argues that his admitted use of the knife in fleeing immediately after the attempt was insufficient to constitute aggravated robbery under R.C. 2911.01 because the use of the weapon must be in furtherance of the purpose to deprive. Appellant relies solely upon this court's decision in *State v. Turner* (Sept. 27, 1983), 10th Dist. No. 83AP-226, in which we found that, in order to constitute robbery under R.C. 2911.02, the use of force in fleeing must be in furtherance of a purpose to deprive. However, in *State v. Thomas*, 106 Ohio St.3d 133, 2005-Ohio-4106, the Supreme Court of Ohio, in addressing a certified conflict between *Turner* and the case before it, rejected the reasoning in *Turner* and found that R.C. 2911.02 plainly does not require that the force attendant to the theft offense be inflicted in furtherance of a purpose to deprive another of property. Therefore, we find appellant's reliance upon *Turner* is unfounded. For the foregoing reasons, we find the trial court's judgment was not against the manifest weight of the evidence or based upon insufficient evidence. Appellant's assignment of error is overruled.

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

Judgment affirmed.

KLATT and FRENCH, JJ., concur.