**[Cite as *State v. Jackson*, 2011-Ohio-4362.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| v. | : | No. 10AP-693 (C.P.C. No. 09CR-10-6130) |
| Mickale A. Jackson, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on August 30, 2011

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

*Robert D. Essex,* for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

**{¶1}** Defendant-appellant, Mickale A. Jackson ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict convicting him of aggravated burglary, aggravated robbery, and kidnapping, along with multiple firearm specifications. For the following reasons, we affirm that judgment.

**{¶2}** On August 8, 2009, appellant and a co-defendant, Daniel Durr ("Durr"), gained entry into the apartment of Anita Davidson ("Ms. Davidson"), who lived at 19 Hawkes Avenue, Apartment A, in Columbus, Ohio. The two men eventually held Ms.

Davidson and an acquaintance, Charles Wallace ("Mr. Wallace"), at gunpoint while they stole Mr. Wallace's wallet and Ms. Davidson's purse and prescription medication, before escaping in a vehicle waiting to drive them away. As a result of this event, appellant and several co-defendants were indicted by the Franklin County Grand Jury for aggravated burglary, two counts of aggravated robbery, four counts of robbery, two counts of kidnapping, and tampering with evidence. With the exception of the tampering charge, all of the offenses were also indicted with three-year firearm specifications.

**{¶3}** A jury trial was commenced on April 12, 2010. The State of Ohio ("the State") introduced the testimony of the two victims, a co-defendant, several police officers, a firearms expert, and a DNA expert.

**{¶4}** Mr. Wallace testified he went to Ms. Davidson's apartment some time before midnight on the night of August 7, 2009. He and Ms. Davidson had a few drinks. A little while later, Durr came to see Ms. Davidson. Ms. Davidson introduced Durr as her nephew. While Ms. Davidson and Durr talked, Mr. Wallace continued drinking and smoked a blunt of marijuana. Durr left after a short stay. Mr. Wallace and Ms. Davidson then left the apartment to buy more alcohol. Mr. Wallace and Ms. Davidson returned to the apartment with beer. Subsequently, Durr also returned to the apartment, bringing appellant with him.

**{¶5}** Mr. Wallace testified Durr and appellant made conversation for approximately 10 to 15 minutes and then left. Shortly thereafter, Ms. Davidson received a two-way call from Durr while she was in the bedroom. She called out to Mr. Wallace to open the front door and let Durr in the apartment. Upon opening the door, Mr. Wallace let both Durr and appellant inside the apartment again. When Mr. Wallace and Ms.

Davidson were seated, Durr pulled a gun out of his waistband. Appellant advised that he too had a gun. Durr forced Mr. Wallace to get down and crawl on his hands and knees and ordered Ms. Davidson to take off her shirt. One of the men went through Mr. Wallace's pockets and removed his wallet. Meanwhile, Ms. Davidson was screaming that someone was trying to kick in the front door. When Durr went to the door, Mr. Wallace had an opportunity to run to the rear of the apartment. Mr. Wallace testified he threw a television through a bedroom window and escaped through the broken window.

**{¶6}** After jumping through the window, Mr. Wallace testified he began running. He noticed a car parked nearby with the engine running. He then saw three men coming around the side of the building. He recognized two of the men as Durr and appellant. The three men got into the car and the car drove away from the area. Mr. Wallace was given a phone from a nearby neighbor in order to speak to a 911 operator. He testified he was later able to retrieve his keys from inside the apartment. However, his wallet, which had contained approximately $70, was found empty.

**{¶7}** Ms. Davidson's testimony about the event was similar in most respects to that of Mr. Wallace. On the night of the robbery, Ms. Davidson testified she smoked marijuana and consumed alcohol. During that time period, she was visited by Mr. Wallace and by Durr and appellant. Durr was a frequent visitor to her apartment. Durr first arrived at her apartment alone. He left and then returned with appellant, with whom Ms. Davidson was also acquainted. Appellant used the restroom and ate pizza. Ms. Davidson gave Durr two Percocets for a migraine headache. After 15 minutes or so, the men left. Approximately 15 minutes later, Durr called her and asked her to open the door to her apartment because someone was outside. Mr. Wallace opened the door and Durr

and appellant entered. There was a brief conversation before Durr showed her his gun. Ms. Davidson asked Durr to put the gun away. However, he pointed the gun at her and said "Nothing personal, Ms. Queenie,[1] just give me all you got." (Tr. 258.)

**{¶8}** Ms. Davidson testified Durr also pointed the gun at Mr. Wallace. Appellant then snatched Ms. Davidson's purse. Appellant told Durr to order Ms. Davidson to take off her clothing. When she refused, Durr ordered her to lift her shirt, which she did. Ms. Davidson also testified she heard appellant tell Mr. Wallace, "Don't move. I'll shoot you." (Tr. 263.) Appellant then reached behind his back and Ms. Davidson believed she saw the butt of a gun.

**{¶9}** While all of this was going on, Ms. Davidson heard several thuds at the front door and believed someone was trying to kick in the door. As the door opened and closed slightly several times, she could see someone standing at the door. Ms. Davidson testified she recognized that person as James Bosley ("Bosley"), another man with whom she was acquainted. As a result of that commotion, Mr. Wallace was able to escape through a window. At the same time, appellant and Durr ran out the front door. Ms. Davidson then called 911. She provided the dispatcher with the nicknames of all three men, a description of the likely getaway vehicle, and a description of the men and/or their clothing.

**{¶10}** Ms. Davidson testified she was later taken to the Inn Towne Motel to identify three suspects. She positively identified all three of them as the men who participated in the crime. The police later returned her purse, which included her

[1] Ms. Davidson testified her nickname is "Queenie."

identification and some cash and various papers, as well as some of her prescription medication.

**{¶11}** Durr testified as part of a plea agreement reached with the State. Durr was charged in the same indictment and pled guilty to two counts of aggravated robbery and one firearm specification. At the time of the trial, he testified he had not yet been sentenced but, as a result of his cooperation with the State, he hoped to receive a lesser sentence than the maximum 23-year possible sentence.

**{¶12}** Durr testified, that prior to his arrest, he had a serious drug addiction. Specifically, he had a problem with Percocet, cocaine, marijuana, and also alcohol. On the day of the incident, he consumed several Percocet, as well as other drugs and alcohol. During the course of the day, Durr was with Bosley, buying and selling drugs. He also stopped by Ms. Davidson's apartment several times. Durr testified Bosley came up with the idea to rob Ms. Davidson. Durr, Bosley, and appellant all discussed the robbery and Bosley provided the handguns to use during the robbery.

**{¶13}** Later that night, Bosley's girlfriend, Diamond Heller-Bennett ("Diamond"), drove the three of them to Ms. Davidson's apartment in Bosley's vehicle. While Bosley and Diamond waited in the car, Durr and appellant went to the door and were admitted into the apartment by Mr. Wallace. After a short stay, Durr and appellant left the apartment. Appellant and Durr went back to the vehicle to inform Bosley of Mr. Wallace's presence. Approximately five minutes later, Durr and appellant called Ms. Davidson to get back inside the apartment. They were again admitted by Mr. Wallace.

**{¶14}** Once inside, Durr testified he pulled out a gun. Initially Ms. Davidson thought it was a joke, but Durr said, "Nothing personal. Just give me everything." (Tr.

381.) Durr cocked and pointed the gun. Appellant also pulled out his gun and ordered Mr. Wallace to get on his knees and empty his pockets. Appellant told Ms. Davidson to lift up her shirt. Appellant also grabbed Ms. Davidson's purse. When appellant walked into the bedroom, Mr. Wallace took the opportunity to escape through the bedroom window. At about that same time, Ms. Davidson yelled that someone was kicking in the front door. Upon investigating, Durr discovered it was Bosley. The three men all ran back to the car. Durr and appellant handed their guns to Bosley, who placed them on the floor of the front passenger side of the vehicle. Diamond drove the men to the Inn Towne Motel so that Bosley could visit someone at the motel. As they pulled into the parking lot, a police car pulled in directly behind them. Shortly thereafter, they were arrested.

**{¶15}** On cross-examination, Durr admitted that he lied to the police during the interview following his arrest. However, he denied telling Dana Brock ("Mr. Brock"), another inmate at the county jail, that the robbery was not pre-planned or that he only went to Ms. Davidson's apartment with the intent to purchase Percocet but, later, once inside, decided on his own, to rob her.

**{¶16}** Officer Kevin Singleton and Officer Brian Thiel testified they received a dispatch regarding a home invasion on Hawkes Avenue as they were traveling westbound on West Broad Street. Immediately thereafter, they spotted a vehicle matching the description of the vehicle involved in the crime traveling in the opposite direction on West Broad. The officers observed four people inside the vehicle. The officers performed a U-turn and followed the vehicle to the Inn Towne Motel parking lot. One of the passengers exited the vehicle and walked up the external stairs of the

building. Officer Singleton detained him while Officer Thiel detained the other three occupants of the vehicle until additional officers arrived.

**{¶17}** Upon looking inside the vehicle, Officer Thiel testified he observed multiple guns on the passenger side floorboard, as well as property that was later found to belong to Ms. Davidson. Officer Singleton testified he observed three guns lying on the right front passenger floorboard. He also observed a baggie in the pocket of the door, as well as a purse that was sticking out behind the rear driver's seat. Both officers identified photographs taken from inside the suspects' vehicle which depicted the guns, various pills, and the contents of Ms. Davidson's purse. The officers further testified they turned in the property that was collected to the police property room. Upon clarification, the officers acknowledged that the distance between the apartment on Hawkes Avenue and the location at the Inn Towne Motel where the suspects' vehicle was stopped was approximately one-half mile.

**{¶18}** The State of Ohio also introduced testimony establishing that the three handguns recovered from the suspects' vehicle, a Kel-Tec, a Glock, and a Llama, were all determined to be operable firearms. The three handguns were swabbed for the presence of DNA. In addition, DNA samples were collected from Bosley and from appellant in order to be compared to the swabs taken from the handguns.

**{¶19}** Lastly, Raman Tejwani, Ph.D., a forensic biologist with the Columbus police crime lab, testified all three weapons contained a mixture of DNA from at least two individuals. She testified that appellant could not be excluded as a contributor to the DNA recovered from the Glock handgun. Dr. Tejwani testified the frequency of that profile

appearing in the African-American population was 1 in 15.[2] With respect to the Llama handgun, Dr. Tejwani testified appellant could not be excluded as a contributor to the DNA recovered from that handgun, and the approximate frequency of that profile appearing in the African-American population was 1 in 1,635. However, Dr. Tejwani testified appellant was excluded as a contributor to the DNA collected from the Kel-Tec handgun. Finally, Dr. Tejwani testified Bosley could not be excluded as a contributor to the DNA recovered from all three handguns.

**{¶20}** Appellant did not present any witnesses on his own behalf, although he did submit one exhibit, the rights waiver of Durr. However, appellant's co-defendants, Bosley and Diamond, did present witnesses.

**{¶21}** Jerod Starks ("Mr. Starks") testified on behalf of Bosley. Mr. Starks testified he was an acquaintance of Durr and that Durr stole his 9mm Llama just days before the robbery at issue. Mr. Starks initially identified the Llama handgun introduced in the State's case as his stolen handgun, although he later indicated that because the gun did not have any distinguishing characteristics or marks, he could not verify it was in fact his gun.

**{¶22}** Mr. Brock also testified on Bosley's behalf. Mr. Brock had been incarcerated at the county jail with Durr. According to Mr. Brock, Durr informed him he had not formulated a plan to commit the robbery. Instead, Durr advised Mr. Brock he did not decide to commit the robbery until after he was inside Ms. Davidson's apartment. As a result, the other three individuals did not know that he was going to do anything other than buy pills from Ms. Davidson. Furthermore, Mr. Brock testified Durr related he had

[2] Appellant is African-American.

stolen a handgun from Ms. Davidson's apartment and attempted to sell it to the others in the vehicle. Finally, Mr. Brock admitted to also sharing a cell with Bosley.

**{¶23}** Diamond presented two witnesses to testify on her behalf, in addition to her own testimony. The other two witnesses provided no relevant testimony. Diamond testified that she drove the three men around in Bosley's car on the night of the incident. One of the locations to which she drove was Ms. Davidson's apartment on Hawkes Ave. She testified both Durr and appellant went inside the apartment while Bosley remained outside and she stayed in the car, talking on her cell phone. She further testified she had no knowledge that the robbery was going to occur.

**{¶24}** On April 20, 2010, the jury returned its verdicts, finding appellant guilty of aggravated burglary, two counts of aggravated robbery, and two counts of kidnapping.[3] The jury also found appellant guilty with respect to all of the associated firearm specifications. On June 23, 2010, a sentencing hearing was held. The trial court imposed a sentence of three years of incarceration on each of the five counts and further ordered that the two aggravated robbery counts be run consecutive to one another and consecutive to the six years of mandatory incarceration for the two firearm specifications, for a total of 12 years of incarceration. This timely appeal now follows, raising four assignments of error:

> First Assignment of Error: The evidence was legally insufficient to support appellant's convictions for Aggravated Robbery, Kidnapping and Aggravated Burglary.

[3] Co-defendants Bosley and Diamond were found not guilty of all charges tried to the jury. However, Bosley was charged with the additional crime of having a weapon under disability. That offense was tried to the bench. The trial court found him guilty of that offense.

> Second Assignment of Error: The court erroneously overruled appellant's motions for acquittal pursuant to Criminal Rule 29.
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> Third Assignment of Error: Appellant's convictions were against the manifest weight of the evidence.
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> Fourth Assignment of Error: In light of Oregon v. Ice, the trial court erred in failing to make the required findings under O.R.C. 2929.14(E)(4) to justify consecutive sentences.

**{¶25}** In his first assignment of error, appellant submits the evidence is insufficient to support his convictions. In his second assignment of error, appellant contends the trial court erred in overruling his Crim.R. 29 motions for acquittal. Because these assignments of error are interrelated, we shall address them together.

**{¶26}** 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. "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37. Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *Thompkins* at 386. 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.

**{¶27}** 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.

**{¶28}** In these two assignments of error, appellant, in essence, challenges the credibility of the witnesses. Appellant argues the jury clearly lost its way in convicting appellant of these crimes based upon the testimony of several witnesses who were not worthy of belief because they: (1) were either high and/or intoxicated during the time the offenses were committed; (2) admitted to lying to the police; or (3) were an accomplice whose testimony was biased and not credible in light of other testimony presented. Appellant further argues the trial court erred in failing to recognize that such evidence was insufficient to sustain a conviction and in overruling the Crim.R. 29 motions for acquittal.

**{¶29}** As stated above, sufficiency of the evidence tests whether the evidence introduced at trial is legally sufficient to support a verdict. As an appellate court, we do not assess whether or not the evidence should be believed. Instead, we assess the evidence from the standpoint that, if the evidence is believed, would it support a conviction. Here, we find the evidence presented, if believed, is more than sufficient to establish the elements of all of the crimes at issue.

**{¶30}** Appellant was convicted of aggravated burglary, two counts of aggravated robbery, and two counts of kidnapping. The aggravated robbery statute, set forth in R.C. 2911.01, provides in relevant part:

> (A) 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[.]

**{¶31}** The kidnapping statute is set forth in R.C. 2905.01 and provides in relevant part:

> (A) No person, by force, threat, or deception, * * * shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:
>
> * * *
>
> (2) To facilitate the commission of any felony or flight thereafter[.]

**{¶32}** Finally, the aggravated burglary statute, found in R.C. 2911.11, reads, in relevant part, as follows:

> (A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
>
> (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

> (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

**{¶33}** Appellant's convictions for aggravated burglary, aggravated robbery, and kidnapping are based upon conduct committed against Ms. Davidson and Mr. Wallace. We find the testimony presented by these witnesses, coupled with the testimony of the other witnesses, establishes the elements of all three offenses.

**{¶34}** Ms. Davidson testified she instructed Mr. Wallace to open the door for Durr following a two-way call during which Durr asked to be let back inside because there was someone outside. Mr. Wallace's testimony confirmed that he opened the door for appellant and Durr to enter the apartment, based upon Ms. Davidson's instruction. The actions of Durr and appellant were deceptive when they gained access to Ms. Davidson's apartment in this manner, as there is evidence demonstrating their actual intent was to commit a theft offense and/or rob Ms. Davidson and Mr. Wallace.

**{¶35}** Mr. Wallace testified that one of the men, most likely appellant, searched through his pockets and removed his wallet. Although the wallet itself was left behind, the contents of his wallet were stolen. Mr. Wallace also testified he was forced to get down onto the floor and crawl on his hands and knees. Similarly, Ms. Davidson testified appellant stole her purse. In addition, she was ordered to lift her shirt to ensure that she was not hiding anything there.

**{¶36}** Both victims also testified Durr was using a handgun to facilitate these events. Moreover, Ms. Davidson testified at one point that she believed she saw the butt of a gun on appellant's person when he reached behind his back. She testified she heard appellant tell Mr. Wallace, "Don't move. I'll shoot you." (Tr. 263.) This clearly implied that

appellant had a weapon. Mr. Wallace also testified appellant explicitly stated he had a gun. In addition, Durr testified appellant had a gun. Furthermore, there were three firearms recovered from the getaway vehicle stopped approximately one-half mile from the scene of the crime, and appellant could not be excluded as a contributor to the DNA found on two of those weapons.

**{¶37}** However, even if appellant himself did not actually possess a weapon during the commission of these offenses, it is enough that his co-defendant, Durr, clearly possessed a weapon. Such evidence is sufficient to find appellant guilty. See *State v. Chapman* (1986), 21 Ohio St.3d 41, syllabus (an individual convicted of aggravated robbery and a firearm specification is subject to a mandatory three-year term of incarceration, regardless of whether he was the principal offender or an unarmed accomplice); *State v. Warren* (Dec. 31, 1992), 10th Dist. No. 92AP-603 (an individual may be convicted of aggravated robbery and the accompanying firearm specification, regardless of whether he was the principal offender or an unarmed accomplice); and *State v. Turner*, 10th Dist. No. 09AP-1126, 2011-Ohio-1089, ¶46, citing *State v. Hall*, 10th Dist. No. 08AP-939, 2009-Ohio-2277 (with respect to a conviction for the use of a firearm, the law supports the applicability of a firearm specification to an individual who assists another known to be using a firearm to commit a crime). Here, there is no dispute that Durr possessed, brandished, displayed, and/or used a deadly weapon to facilitate the offenses.

**{¶38}** In reviewing the evidence, we find there is evidence of a trespass committed by deception inside an occupied structure in which physical harm was threatened during the commission of other criminal offenses, and at least one of the

offenders also possessed a deadly weapon. Thus, there is evidence of an aggravated burglary.

**{¶39}** We find there is also sufficient evidence to support the aggravated robbery convictions. There is evidence demonstrating possession of a deadly weapon during the commission of a theft offense and during the flight immediately thereafter, and that possession of the weapon was indicated or at least one offender displayed or brandished the weapon. Therefore, we find sufficient evidence to support the aggravated robbery convictions and we find appellant aided and abetted an accomplice in the commission of those offenses.

**{¶40}** We further find sufficient evidence to support the kidnapping convictions. In order to demonstrate kidnapping, the State was required to demonstrate that appellant aided or abetted Durr in removing Ms. Davidson and Mr. Wallace from the place where they were found, or restrained their liberty, using force or threats, in order to facilitate the commission of a felony or flight thereafter. There is sufficient evidence to demonstrate that the liberty of Ms. Davidson was restrained during the robbery when she was held at gunpoint and ordered to lift her shirt. Additionally, the liberty of Mr. Wallace was restrained when he was forced down to the floor at gunpoint while someone searched his pockets and also forced him to crawl on his hands and knees.

**{¶41}** Based upon the foregoing testimony and evidence, we find there was sufficient evidence for the charges to be sent to the jury and sufficient evidence to support the convictions for aggravated burglary, aggravated robbery, and kidnapping. Accordingly, we overrule appellant's first and second assignments of error.

**{¶42}** In his third assignment of error, appellant argues his convictions for aggravated burglary, aggravated robbery, and kidnapping are against the manifest weight of the evidence.

**{¶43}** 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, ¶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.

**{¶44}** " '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.

**{¶45}** 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.

**{¶46}** Again, appellant challenges the credibility of the witnesses and argues the record lacks credible evidence to support the convictions. We disagree.

**{¶47}** The victims in this matter provided testimony which was generally consistent with one another. Both victims testified they were held at gunpoint and were robbed of personal property. Both victims identified appellant as a participant in the crimes.[4] In fact, Ms. Davidson knew both Durr and appellant from previous contacts. Furthermore, appellant was located in a vehicle stopped by police moments after the 911 call was dispatched and in close proximity to the scene of the crime. And, property belonging to Ms. Davidson was found inside the vehicle. Finally, two of the three firearms recovered from that vehicle contained a mixture of DNA evidence from which appellant could not be excluded as a contributor. Nevertheless, appellant contends that the victims

[4] While only Ms. Davidson was taken to the scene to identify appellant and his co-defendants, both Ms. Davidson and Mr. Wallace identified appellant in open court as one of the offenders during the course of the trial.

should not be believed, due to the fact that they undeniably consumed alcohol and drugs on the night of the offenses.

**{¶48}** However, we cannot say, after reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, as well as resolving any conflicts in the evidence, that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed. In the instant case, there is compelling evidence to support appellant's convictions.

**{¶49}** "The 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, citing *State v. Gray* (Mar. 28, 2000), 10th Dist. No. 99AP-666; see also *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, ¶8. The weight to be given to the evidence, as well as the credibility of the witnesses, are issues which are primarily to be determined by the trier of fact. *State v. Hairston*, 10th Dist. No. 05AP-366, 2006-Ohio-1644, ¶20, citing *State v. DeHass* (1967), 10 Ohio St.2d 230. The trier of fact is in the best position to take into account any inconsistencies, along with the witnesses' demeanor and manner of testifying, and determine whether or not the witnesses' testimony is credible. *Chandler* at ¶9, citing *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58. A jury, as the finder of fact and the sole judge of the weight of the evidence and the credibility of the witnesses, may believe or disbelieve all, part, or none of a witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 67; *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *Chandler* at ¶13. An appellate court must give great deference to the factfinder's

determination of the witness credibility. Id. at ¶19; *State v. Webb*, 10th Dist. No. 10AP-189, 2010-Ohio-5208, ¶16.

**{¶50}** The jury was well aware of the fact that Ms. Davidson, Mr. Wallace, and Durr all had consumed alcohol and/or drugs on the night these events occurred, and as a result, they were likely impaired to some degree. Thus, it was within the province of the jury to take this into consideration when weighing the evidence in order to determine whether or not it found their testimony credible. Furthermore, the testimony of Ms. Davidson, Mr. Wallace, and Durr was subject to cross-examination, at which point appellant's counsel had the opportunity to attempt to undermine their credibility. Based upon the evidence presented, the jury was free to determine that it believed the events relayed by the State's witnesses and that the State's witnesses were not so impaired as to be unable to perceive the events that occurred on that night. It was also within the province of the jury to determine that Durr's testimony, in whole or in part, was believable, despite any bias he may have had in testifying to improve his own situation, as a result of the corresponding testimony and evidence presented by the other witnesses.

**{¶51}** Based upon all of this, a reasonable jury could find that appellant was a knowing participant in the events that occurred that night, despite the contrary evidence presented by appellant's co-defendants, which suggested that Durr did not formulate the intent to commit the robbery until he was inside Ms. Davidson's apartment, thus leaving the other participants unaware of any "plan." A conviction is not against the manifest weight of the evidence merely because the jury believed the prosecution testimony. *State v. Houston*, 10th Dist. No. 04AP-875, 2005-Ohio-4249, ¶38 (reversed and remanded in part on other grounds); *State v. Stewart*, 10th Dist. No. 08AP-33, 2009-Ohio-1547, ¶22.

**{¶52}** Therefore, based upon this analysis and our analysis as set forth in appellant's first and second assignments of error, we overrule appellant's third assignment of error.

**{¶53}** In his fourth assignment of error, appellant argues the trial court failed to make the required findings set forth in R.C. 2929.14(E)(4) in order to justify the imposition of consecutive sentences. Appellant argues that these findings, which were previously found to be unconstitutional and were consequently severed pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, have been revived as a result of the decision of the United States Supreme Court in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, which appellant asserts has, in essence, overruled *Foster*.

**{¶54}** Subsequent to the filing of defendant's brief, the Supreme Court of Ohio decided a case involving an identical issue. In *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, Hodge argued that the trial court had erred in imposing consecutive sentences without making the statutory findings set forth in R.C. 2929.14(E)(4) and 2929.41(A), claiming that *Foster*'s holding that those statutory provisions were unconstitutional was no longer valid as a result of the United States Supreme Court's decision in *Ice*. Hodge further asserted that because the statutes had never been specifically repealed by the General Assembly, they were "revived" by the decision in *Ice*.

**{¶55}** The Supreme Court of Ohio rejected Hodge's arguments and held:

> * * * [T]he decision of the United States Supreme Court in *Oregon v. Ice* does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*. Because the statutory provisions are not revived, trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General

> Assembly enacts new legislation requiring that findings be made.

Id. at ¶39.

**{¶56}** Based upon the authority of *Hodge*, we overrule appellant's fourth assignment of error.

**{¶57}** In conclusion, appellant's first, second, third, and fourth assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

KLATT and FRENCH, JJ., concur.

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