[Cite as *State v. Munoz,* 2011-Ohio-6672.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-475 (C.P.C. No. 10CR-11-6849)
Daniel S. Munoz,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 22, 2011

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Paul L. Wallace Co., LPA, and *Paul L. Wallace*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Daniel S. Munoz, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment but remand the matter with instructions.

{¶2} A Franklin County Grand Jury indicted appellant with one count of aggravated robbery in violation of R.C. 2911.01, two counts of robbery in violation of R.C. 2911.02, and one count of felonious assault in violation of R.C. 2903.11. All counts contained a firearm specification pursuant to R.C. 2941.145. The indictment arose out of

an altercation appellant had with L.S. Appellant entered a not guilty plea to the charges and proceeded to a bench trial.

{¶3} At trial, L.S. testified that he was outside by himself on the night of November 12, 2010 when appellant approached him and asked him if he had ever done anything to A.M., appellant's girlfriend. L.S. denied doing anything but said that appellant kept asking him questions about her. Appellant then hit him in the face. At this time, L.S. saw a gun in appellant's right hand. After appellant hit him a few more times, appellant asked L.S. for his wallet. L.S. gave appellant his wallet and appellant ran to a waiting van.

{¶4} Appellant admitted to approaching L.S. and asking him questions about A.M. He wanted to confront L.S. because A.M. told him that L.S. had slapped her in school. Appellant testified that he was calm about the conversation until L.S. pushed him and, at that point, appellant punched him a number of times. Appellant denied having a gun and denied taking L.S.'s wallet.

{¶5} The trial court found appellant guilty of both counts of robbery but not guilty of the aggravated robbery and felonious assault counts. The trial court could not find beyond a reasonable doubt that appellant had a gun during these offenses and therefore found him not guilty of all the firearm specifications. The trial court sentenced appellant accordingly.

{¶6} Appellant appeals and assigns the following errors:

> [I.] THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT RETURNED A VERDICT OF GUILTY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

> [II.] THE TRIAL COURT ERRED WHEN IT SENTENCED DEFENDANT-APPELLANT TO A MANDATORY PRISON TERM PURSUANT TO SECTION 2929.13 (F) OF THE OHIO REVISED CODE.

Appellant's First Assignment of Error- Manifest Weight of the Evidence

{¶7} Appellant contends in this assignment of error that his convictions were against the manifest weight of the evidence.[1] We disagree.

{¶8} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. When presented with a challenge to the manifest weight of the evidence, an appellate court may not merely substitute its view for that of the trier of fact, but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and 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. at 387. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.; *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶12.

[1] Although this assignment of error clearly sets forth a challenge to the manifest weight of the evidence, appellant also argues in his brief that his convictions are not supported by sufficient evidence. This court reviews assignments of error, not arguments. *State v. Norman*, 10th Dist. No. 10AP-680, 2011-Ohio-2870, ¶13, fn. 1. However, while sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. Braxton,* 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶15 (citing *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462). "Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." Id. In that regard, our consideration of appellant's manifest weight argument will resolve appellant's sufficiency concerns. *State v. Sowell*, 10th Dist. No. 06AP-443, 2008-Ohio-3285, ¶89.

{¶9} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶6. 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.' " Id. (quoting *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Accordingly, we afford great deference to the jury's determination of witness credibility. *State v. Redman*, 10th Dist. No. 10AP-654, 2011-Ohio-1894, ¶26 (citing *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶55). See also *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus (credibility determinations are primarily for the trier of fact).

{¶10} In order to find appellant guilty of the first count of robbery in this case, the trial court had to conclude beyond a reasonable doubt that appellant, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, inflicted, attempted to inflict, or threatened to inflict physical harm on another. R.C. 2911.02(A)(2). In order to find appellant guilty of the second robbery count, the trial court had to conclude beyond a reasonable doubt that appellant, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, used or threatened the immediate use of force against another. R.C. 2911.02(A)(3). "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing. R.C. 2901.01(A)(1).

{¶11} Appellant contends that his convictions are against the manifest weight of the evidence because the State failed to prove that he committed or attempted to commit

the underlying theft offense. He claims that there could be no theft offenses because the trial court found that he did not possess a gun during the fight and, therefore, did not take the victim's wallet by threat of a gun. We disagree.

{¶12} The trial court concluded that the State did not prove that appellant had a gun during these events. However, a robbery can be committed without a gun. See *State v. Johns*, 8th Dist. No. 90811, 2008-Ohio-5584, ¶16 (robbery can be committed without a weapon); *State v. Delany*, 10th Dist. No. 04AP-1361, 2005-Ohio-4067, ¶12 (force element of robbery can be satisfied without gun). In the present case, L.S. testified that appellant approached him and began questioning him about his girlfriend. After some questions, appellant punched L.S. a number of times, causing L.S. injuries to his face and head. Appellant admitted to hitting L.S. a number of times during the fight. Even without a gun, this evidence demonstrates that appellant inflicted or attempted to inflict physical harm on L.S. and also used or threatened the immediate use of force. *State v. Green*, 10th Dist. No. 03AP-813, 2004-Ohio-3697, ¶18 (altercation involving choking, wrestling, and hit on head, even without gun, establishes use of force to support robbery conviction). Additionally, L.S. testified that appellant took his wallet from him after the punches. That testimony indicates that the infliction of harm and/or use of force occurred either while attempting or committing a theft offense or in fleeing immediately after the attempt or offense. While appellant denied taking the wallet, the trial court obviously believed L.S.'s testimony and did not believe appellant's denial. A conviction is not against the manifest weight of the evidence because the trier of fact believed the State's version of events over the appellant's version. *State v. Norman*, 10th Dist. No. 10AP-680, 2011-Ohio-2870, ¶12.

{¶13} Appellant's convictions are not against the manifest weight of the evidence. Accordingly, we overrule his first assignment of error.

Appellant's Second Assignment of Error- Sentencing

{¶14} Appellant contends the trial court erroneously sentenced him to a mandatory term of prison and seeks a new sentencing hearing based on that error. The State agrees that the trial court's sentencing entry erroneously states that appellant's prison term is mandatory, but argues that the error is a clerical error that can be resolved with a remand for the trial court to correct the error. See Crim.R. 36 ("Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time."). We agree with the State.

{¶15} A trial court can correct clerical errors in judgments. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶19. "The term 'clerical mistake' refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment." Id., quoting *State v. Brown*, 136 Ohio App.3d 816, 819-20, 2000-Ohio-1660. Although courts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth, " '[n]unc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.' " *State ex rel. Mayer v. Henson,* 97 Ohio St.3d 276, 2002-Ohio-6323, ¶14, quoting *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164, 1995-Ohio-278.

{¶16} A review of the sentencing hearing indicates that the trial court did not impose a mandatory prison term. In deciding to impose a prison term, the trial court

stated that "[u]nder the circumstances, I cannot find the presumption against -- the presumption for a prison term on a felony 2 to be overcome." (Tr. 210.) Thus, the trial court imposed a prison term not because it had to, but because appellant failed to rebut the presumption for a prison term for a felony of the second degree. R.C. 2929.13(D)(1). The trial court's analysis is correct, as the mandatory sentencing provisions in R.C. 2929.13(F) do not apply in this case. For some reason, however, the trial court's judgment entry states that a prison term is mandatory pursuant to R.C. 2929.13(F).

{¶17} Based on this record, we conclude that the judgment entry's notation of a mandatory prison term, pursuant to R.C. 2929.13(F), is a clerical error. *State v. Cramer*, 12th Dist. No. CA2003-03-078, 2004-Ohio-1712, ¶63-64 (inclusion of mandatory prison term language in judgment entry was a clerical error, where trial court did not impose such a prison term at sentencing and mandatory sentencing provisions did not apply). Accordingly, we sustain appellant's second assignment of error and remand the matter for the trial court to correct the clerical error in its judgment entry so that it accurately reflects the sentence the trial court actually ordered. *State v. McAdams*, 11th Dist. No. 2010-L-012, 2011-Ohio-157, ¶17-21.

{¶18} In conclusion, we overrule appellant's first assignment of error and sustain his second assignment of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas but remand the matter with instructions for the trial court to fix its sentencing entry to accurately reflect the sentence actually ordered.

Judgment affirmed; case remanded with instructions.

TYACK and DORRIAN, JJ., concur.

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