

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-502
v.	:	(C.P.C. No. 09CR06-3339)
	:	
Dai Ressa Swanson,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 22, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for
appellee.

Yavitch & Palmer Co., L.P.A., and *Nicholas Siniff*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Dai Ressa Swanson, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. Because the guilty verdict is not against the manifest weight of the evidence and because the appellant's sentence is not contrary to law or an abuse of discretion, we affirm.

{¶2} On May 25, 2009, appellant and her husband, Tommy Swanson, hosted a Memorial Day party at their home. The party lasted for much of the day and well into the evening. Late that evening, appellant, Tommy, and a family friend, Thomas Frederick,

were in the living room when Tony Baldwin arrived. Baldwin was a friend of Tommy's. Over appellant's objection, Tommy invited Baldwin into their home. Both appellant and Tommy had been drinking.

{¶3} Not long after Baldwin's arrival, Tommy, appellant, and Baldwin got into a heated argument concerning a relationship Tommy had with Baldwin's wife 20 years ago. This subject had been a source of contention between Tommy, appellant, and Baldwin in the past. During the course of the argument, Tommy became angry with Baldwin. Tommy retrieved a gun and ordered Baldwin to leave the house. Baldwin left immediately and Tommy placed the gun on the coffee table. Frederick remained in the living room. Tommy and appellant continued to argue about Tommy's past relationship with Baldwin's wife. At some point during the argument, appellant picked up the gun. Appellant had never handled a gun before and she did not know if the gun was loaded. As the argument continued, appellant and Tommy exchanged some "ugly words." Ultimately, appellant pointed the gun in the direction of Tommy's head and pulled the trigger. No evidence was presented that established whether or not the hammer of the gun was cocked when appellant pulled the trigger.

{¶4} Tommy was shot in the head and fell to the floor. Because Frederick was on his way into the kitchen when the shot was fired, he did not see what happened. Appellant called twice for Tommy to get up. Tommy did not respond.

{¶5} Although appellant was aware that she had shot Tommy, she did not call 911 nor attempt to administer any first aid. Instead, she left the gun in the house and immediately exited out the front door. Frederick also left the house immediately without calling 911 or administering any aid to Tommy. Shortly thereafter, Tommy was found by

three of appellant's young children, who were upstairs when the shooting occurred. Tommy died as a result of one gunshot wound to his head.

{¶6} Appellant was apprehended early the following morning. She surrendered to police when she was identified as she walked down the street.

{¶7} The state indicted appellant with one count of murder. Appellant waived her right to a jury and the case was tried to the court. The trial court found appellant guilty of the lesser-included offense of reckless homicide with a gun specification. The court sentenced appellant to a maximum sentence of five years in prison for the homicide, plus an additional three years in prison for the firearm specification.

{¶8} Appellant now appeals and assigns the following errors:

[1.] The Trial Court violated Appellant's right to Due Process as Guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution by entering verdicts of Guilty, as the Court's verdict was against the manifest weight of the evidence.

[2.] The Trial Court violated Appellant's right to Due Process as Guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution by imposing the maximum sentence.

{¶9} In her first assignment of error, appellant argues that her conviction is against the manifest weight of the evidence. We disagree.

{¶10} 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. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶35. When presented with a challenge to the manifest weight of the evidence after a bench trial, a reviewing court must "review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in

evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered.' " *State v. Banks*, 10th Dist. No. 09AP-13, 2009-Ohio-4383, ¶14 (citing *Cleveland v. Whelms*, 169 Ohio App.3d 600, 2006-Ohio-6441, ¶16); see also *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. 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.' " *Thompkins* at 387 (quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175).

{¶11} A defendant is not entitled to a reversal on manifest weight grounds merely because conflicting or inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. Neither is a conviction 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. Gale*, 10th Dist. No. 05AP-708, 2006-Ohio-1523, ¶19; *State v. Williams*, 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶17. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Parks*, 10th Dist. No. 09AP-810, 2010-Ohio-2069, ¶9. The trier of fact is in the best position to take into account inconsistencies, along with the witness's manner and demeanor, and determine whether the witness's testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58. Consequently, an appellate court must ordinarily give great deference to the fact finder's determination of the witness's credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶74.

{¶12} Appellant was convicted pursuant to R.C. 2903.041, which provides in relevant part:

(A) No person shall recklessly cause the death of another or the unlawful termination of another's pregnancy.

{¶13} "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

{¶14} Appellant argues that Tommy's death was the result of an accident. She testified that she had not handled a gun before and did not know if the gun was loaded or how it worked. Nor was she familiar with the gun's safety mechanism. Appellant points out that if the hammer of the gun was cocked, it would have taken only two pounds of pressure on the trigger to fire the weapon. Appellant also testified at trial that she pointed the gun above her husband's head. Appellant contends that this evidence indicates she did not recklessly cause the death of her husband and that the trial court's verdict is against the manifest weight of the evidence.

{¶15} In response to appellant's argument, the state points to evidence that the shooting occurred during the midst of a heated argument. Appellant never denied that she pulled the trigger and caused the death of her husband. Although appellant testified at trial that she pointed the gun over her husband's head, less than 24 hours after the shooting, she admitted that she pointed the gun at Tommy's head. In essence, the state argues that pointing a gun at someone's head and pulling the trigger in anger constitutes

reckless conduct, even if the shooter was unfamiliar with the weapon, and did not know that the gun was loaded.

{¶16} This case largely turned on the trial court's assessment of appellant's intent. After reviewing the trial transcript, we find that the trial court's verdict is not against the manifest weight of the evidence. The trial court did not lose its way and create a manifest miscarriage of justice. The evidence at trial supports the trial court's finding that appellant acted recklessly when she picked up a gun in anger, pointed it in the direction of her husband's head and pulled the trigger without knowing whether the gun was loaded. This is not the exceptional case in which the evidence weighs heavily against the conviction. Therefore, we overrule appellant's first assignment of error.

{¶17} In her second assignment of error, appellant contends that the trial court abused its discretion when it imposed a maximum sentence. According to appellant, the trial court should not have imposed a maximum sentence because appellant had no criminal intent, displayed genuine remorse and had no prior history of criminal conduct. Again, we disagree.

{¶18} This court has held that we review a trial court's sentence to determine if it is clearly and convincingly contrary to law. *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941 (standard of review is clearly and convincingly contrary to law). However, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio held in a plurality opinion that an appellate court must apply a two-step approach when reviewing a trial court's sentence: (1) determine whether trial court adhered to all applicable rules and statutes in imposing the sentence; and (2) determine whether a sentence within the permissible statutory range constitutes an abuse of discretion).

Under either standard of review, the trial court did not err when it imposed a maximum sentence for reckless homicide.

{¶19} Appellant makes no attempt to argue, nor do we see any basis to argue, that the trial court failed to consider and apply the appropriate statutory sentencing criteria or that it imposed a sentence not authorized under the applicable statute. Therefore, appellant's sentence is not clearly and convincingly contrary to law.

{¶20} Nor did the trial court abuse its discretion when it imposed a maximum sentence. The facts here are egregious. During the course of a heated argument, appellant pointed a gun at her husband's head and pulled the trigger. The fact that appellant was unfamiliar with guns and did not know whether the gun was loaded does not significantly lessen the recklessness of her conduct. Appellant also fled the house after the shooting without calling 911 and without attempting to administer any aid to her husband. Appellant left her young children to find her husband's body. The trial court took great pains to identify its reasons for imposing the sentence. Those reasons reflect a careful and considered judgment, not an abuse of discretion. Therefore, we overrule appellant's second assignment of error.

{¶21} Having overruled both of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.
