[Cite as *State v. Tatum*, 2011-Ohio-907.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 10AP-626 (C.P.C. No. 09CR-05-3124)
v.	:	(REGULAR CALENDAR)
Curtis Wayne Tatum,	:	
Defendant-Appellant.	:	

D E C I S I O N

NUNC PRO TUNC[1]

Rendered on March 13, 2012

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

Kirk A. McVay, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Curtis Wayne Tatum, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas in which the court found him guilty, pursuant to a jury verdict, of attempted murder with specification, in violation of R.C. 2923.02, a felony of the first degree; felonious assault with specification, in violation of R.C. 2903.11, a felony of the second degree; aggravated robbery with specification, in violation of R.C.

[1] This decision replaces, nunc pro tunc, the original decision released on March 1, 2011, and is effective as of that date. This decision replaces the victim's name with initials.

2911.01, a felony of the first degree; and found him guilty, pursuant to a bench trial, of having a weapon while under disability, in violation of R.C. 2923.13, a felony of the third degree.

{¶2} In the early morning hours of August 2, 2008, a teenage female relative of the victim, D.R., telephoned D.R. and told her she was in distress, and asked that D.R. pick her up. Upon arriving in the area specified by the relative, D.R. saw appellant and several others, all of whom possessed large guns. D.R. testified at trial that she knew appellant prior to the incident as she had helped him in a dispute with drug dealers over money. Appellant approached D.R.'s vehicle, pointed a gun at her, and demanded money. D.R. gave appellant $500, and appellant and the others walked away. D.R. then called the police on her cell phone. From 20 feet away, appellant began shooting at her vehicle. The vehicle was struck by bullets at least ten times, and D.R.'s hand was struck by a bullet. D.R. fled the scene in her vehicle. Appellant was later arrested.

{¶3} Appellant was indicted on May 26, 2009, on counts of attempted murder with specification, felonious assault with specification, aggravated robbery with specification, robbery with specification, and having a weapon while under disability. A jury trial commenced May 24, 2010, on all of the counts, except having a weapon while under disability, which was tried to the court. The State of Ohio, plaintiff-appellee, dismissed the robbery with specification count after the presentation of the evidence. The jury found appellant guilty as to all counts before it, and the trial court found appellant guilty of the having a weapon while under disability count. After a sentencing hearing on June 2, 2010, the trial court sentenced appellant to prison terms of five years for the attempted murder count, three years for the aggravated robbery count, three years for the

having a weapon while under disability count, and three years on the firearm specification. The attempted murder and aggravated robbery terms were ordered to be served consecutive to one another but concurrent to the having a weapon while under disability term. The firearm specification was ordered to be served consecutive to all other sentences. The felonious assault count merged with the attempted murder count for purposes of sentencing. The aggregate sentence totaled 11 years, with a mandatory period of post-release control of five years. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT AS TO COUNTS ONE, TWO, THREE, AND FIVE OF THE INDICTMENT WHEN THE VERDICTS OF THE JURY AND THE COURT (AS TO COUNT FIVE) ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.
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> [II.] DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY AMENDMENTS VI AND XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN COUNSEL FOR DEFENDANT-APPELLANT ALLOWED DETECTIVE RICHARD BAIR, A NON-EXPERT AS TO BALLISTICS, TO TESTIFY WITHOUT OBJECTION AS TO HIS OPINION THAT THE BULLETS FIRED INTO THE VICTIM[']S CAR WERE FROM A LARGE CALIBER FIREARM.

{¶4} Appellant argues in his first assignment of error that the trial court's judgment with regard to all of the crimes for which he was convicted 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*, 78 Ohio St.3d 380, 1997-Ohio-52. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, 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} In the present case, appellant's arguments center on the general contention that, apart from D.R.'s testimony and her 911 call, there was no direct or circumstantial evidence proving that appellant was even present when shots were fired at D.R. Appellant contends the case hinges completely on the veracity of D.R.'s representations that appellant demanded money from her and then shot at her and her vehicle with a large gun, and the credibility of D.R.'s testimony was subject to allegations of fabrication, misperception, and the test of reasonable doubt. Specifically, appellant cites the following problems with D.R.'s testimony: (1) D.R.'s reticence to offer honest and complete responses to certain questions even on direct examination; (2) her outright refusal to simply answer "yes" or "no" questions asked on cross-examination; (3) the revelation throughout her testimony of her fundamental lack of forthrightness in her discussions with the police in their investigation of the case concerning the circumstances of the crimes alleged and her relationship to appellant, as well as her preparation for testimony with the assistant prosecutor who tried the case; (4) evidence, albeit denied by D.R., that appellant owed her money, disclosing motive for her to tell the police that appellant had robbed her; and testimony suggesting that individuals other than appellant fired shots at

D.R. and her car, to wit: (a) there were several other individuals present at the time of the shooting possessing firearms; (b) all bullet strikes to D.R.'s vehicle were to the front passenger side of the vehicle with none being on the driver's side of the car; (c) when shooting commenced, appellant was positioned in front of D.R., who was either standing just outside the driver's side door or seated in the driver's seat; and (d) detectives recovered .22 fragments from the car door that were similar to the others recovered, thereby proving that firearms other than the AK-47 allegedly possessed by appellant were fired during this incident.

{¶7} D.R.'s testimony was as follows. D.R. testified that she was at a movie theater when her 16-year-old relative, "Juanna," telephoned her. Juanna was upset, in "distress," and needed a ride. D.R. went to pick up Juanna and had $500 in cash on her to pay her rent. When she arrived at the area and began looking for Juanna, she saw appellant with a "big gun," which she described as an AK-47. Appellant was with several others who also had big guns. As D.R. parked her car, she asked appellant if he knew where Juanna was located. At that point, appellant was standing in front of her car. Appellant said he did not know but then said "bitch, give me your money." She gave appellant her cash, and as he was running away, she got out of her car and called 911. She then heard her cousin "Shanise," who was nearby, scream. Appellant was pointing a gun at D.R.'s car and started shooting at the car. D.R. said she was inside the car talking to the 911 operator when appellant began shooting. Bullets hit the car and then struck her. She pulled her car out and drove to a nearby fire station. D.R. testified she had known appellant prior to the incident because she acted as a mentor for many inner-city teenagers, including appellant, who lived in the same type of low-income housing in

which she was raised. D.R. also explained that, about one week prior to the incident in question, appellant told her he had a drug problem and owed people money for drugs. She testified that, as part of their plan to gain appellant more time to pay these people back, on July 31 and August 1, 2008, she impersonated a drug dealer and left voicemails on appellant's phone threatening him if he did not pay her money for drugs. She said appellant did not actually owe her money. She admitted it was a bad plan, and she regretted the mistake. She thought appellant was setting her up for the present crime. She admitted she never told the police about this "plan" after appellant shot at her, that she knew his phone number, or that he had been at her house the week before. On cross-examination, D.R. testified she was outside her vehicle, standing by the driver's seat, when the shots were fired. She then immediately got into her vehicle when the first shot was fired. She denied that she introduced Juanna to drugs or had ever given drugs to her. She denied that she ever sold drugs or used drugs. She denied repeatedly that this present incident was the result of a drug deal "gone bad." She also agreed that, on the 911 tapes, she indicated three or four times that "Curt" and "Curtis" took $500 from her, was shooting at her, and eventually, she indicated Curtis had shot her. She also denied that the incident involved her attempting to collect a drug debt from appellant.

{¶8} Dean Collins, a city of Columbus police officer, testified that he wrote in the police report that the weapon used was a handgun or automatic handgun, which he determined based upon the bullet holes in the car.

{¶9} James Niggemeyer, a detective for the Columbus police department, testified D.R. picked appellant's image from a photograph array. He stated that D.R. never told him about the voicemails she left for appellant prior to the crime or that she had

made a plan to act as a drug dealer to whom appellant owed money. He also testified that the bullet holes were on the front passenger side of the vehicle. He said there would be no way for a person shooting from the front of the vehicle to make the bullet holes in the passenger side of the vehicle. Niggemeyer testified that there were also several bullet holes in the front of the vehicle. He further stated that there were bullet fragments found in the car, but they could not determine the caliber of the bullets.

{¶10} Richard Bair, a detective with the Columbus police department, testified that, even though he is not a ballistics expert and did not run any tests on the bullet fragments, he believed, based upon his experience and training, that the bullets are from a large-caliber firearm. Defense counsel emphasized on cross-examination that Bair was not a ballistics expert and questioned him on what experience and training he had to allow him to make that conclusion. He admitted he could not say for sure every weapon the bullets could have come from. He said it was possible that the bullets came from a low-caliber weapon. On one occasion, he referred to the bullet fragments that fell out of the door as .22-caliber fragments.

{¶11} Appellant is correct that the evidence against him derives solely from D.R.'s testimony. We also agree that the credibility of D.R.'s testimony was subject to question in several respects. D.R.'s responses to questions, both on direct examination and cross-examination, seemed evasive or hyper-guarded at times. She often did not answer questions with simple "yes" and "no" responses and attempted to rephrase questions to suit her liking. In fact, the trial court warned D.R. at one point during the trial, outside of the presence of the jury, that she must directly answer the questions posed to her or face possible sanctions. It is also indisputable that D.R. admitted several times that she was

not voluntarily forthcoming with the prosecutor or police about the existence of the voicemails, their contents, or her prior interactions with appellant. During sentencing, the trial court indicated that it did not believe D.R.'s explanation for why she left the voicemails, and the trial court opined that it did not think the jury believed her testimony on this issue either. We also agree that D.R.'s explanation regarding the circumstances surrounding the voicemails was somewhat illogical and was dubious given her lack of candor with police and the prosecutor on the issue.

{¶12} As for the ballistics evidence, we disagree with some of appellant's interpretations thereof. Although we agree that the bullet strikes were all toward the front passenger side of the vehicle and several were in the passenger door, there was one strike on the front windshield and several on the front windshield pillars on the passenger side. Appellant could have still been standing generally in the "front" of the vehicle and made these entry holes. Furthermore, some of the holes on the passenger side door could have resulted from shots fired as she fled in her vehicle. The testimony was unclear whether D.R. was driving away at any point during the shooting or whether appellant was moving while he was shooting. Also, although Bair stated on one occasion during his testimony that detectives recovered ".22" fragments from the vehicle, he did not explain this statement. This description is also inapposite to his testimony that the fragments were too small to determine what kind of gun they came from. Thus, we cannot say that Bair's reference to ".22" fragments "proves," as appellant claims, that other firearms, besides the one possessed by appellant, were used to fire at D.R.

{¶13} Nevertheless, the ultimate question with which we are faced is whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. We cannot

find so. The state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offenses were established beyond a reasonable doubt based upon D.R.'s testimony. Although this court may consider the credibility of D.R. upon appellate review, the jury was best able to view her and observe her demeanor, gestures, and voice inflections. As indicated above, in our view, D.R.'s testimony about the reason for the voicemails was suspect. However, the jury could have found her testimony questionable on this point, and still believed her testimony that appellant took $500 from her and then shot at her. Regardless of whether the crime stemmed from a drug deal "gone bad" or some other circumstance, the jury had before it D.R.'s testimony and her 911 call that clearly indicated that it was appellant who had stolen $500 from her and then shot at her. The jury was free to believe all, part or none of her testimony, and apparently chose to believe this portion of her testimony. See *Hill* at 412. For these reasons, we find neither the jury's verdict nor the trial court's verdict was against the manifest weight of the evidence. Appellant's first assignment of error is overruled.

{¶14} Appellant argues in his second assignment of error that he received ineffective assistance of counsel in that his trial counsel allowed Detective Bair, a non-expert in ballistics, to testify as to his opinions that the bullets fired into the victim's car were from a large-caliber firearm. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. *McMann v. D.R.* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts employ a two-step process to determine whether the right to effective assistance of counsel has been violated. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. First, the

defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Id.

{¶15} An attorney properly licensed in the state of Ohio is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In demonstrating prejudice, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶16} In the present case, appellant argues that his counsel was ineffective because he failed to object to Detective Bair's testimony that the bullets fired into D.R.'s car were from a large-caliber firearm. Appellant contends Bair's testimony was highly damaging to any assertion the defense could make in closing arguments that individuals other than appellant fired weapons, and he was prejudiced by his counsel's failure to object. However, appellant provides no authority to support his proposition that Bair should not have been permitted to testify in this regard. Evid.R. 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perceptions of the witness and (2) helpful to a clear

> understanding of his testimony or the determination of a fact in issue.

{¶17} In this case, Bair was testifying as a lay witness. We find his testimony was properly admitted under Evid.R. 701. Bair indicated he was basing his opinion on his experience and training as a police officer for 14 years, time spent at the shooting range firing rounds, and past experience working crime scenes and recovering spent rounds. It is well-settled that a police officer may testify concerning matters that are within his experience and observations that may aid the trier of fact in understanding the other testimony pursuant to Evid.R. 701. For example, in *State v. Whittsette* (Feb. 13, 1997), 8th Dist. No. 70091, the court of appeals held that a police detective's testimony that he doubted a wound was caused by a particular caliber gun was properly admitted, pursuant to Evid.R. 701, based on his opinion of his familiarity with guns and past observances of gunshot wounds made by various caliber guns. In *State v. Norman* (1982), 7 Ohio App.3d 17, the court of appeals held that a police officer properly testified as a non-expert with regard to the shot pattern made by a 12-gauge shotgun. In *State v. Parker*, 2d Dist. No. 18926, 2002-Ohio-3920, a detective was permitted to testify, pursuant to Evid.R. 701, that two wounds were consistent with gunshot wounds that she had seen in the past, based upon 22 years of experience on the police force, experience with victims of gunshot wounds, and familiarity with different types of gunshot wounds. Therefore, we find appellant's counsel was not deficient for failing to object to Bair's testimony on this issue.

{¶18} Even if we were to find that appellant's counsel was deficient for failing to object to Bair's testimony, appellant has failed to demonstrate prejudice. Appellant's counsel emphasized on cross-examination that Bair was not a ballistics expert and

questioned him on what experience and training he had to allow him to make that conclusion as to the caliber of the gun. Bair also admitted under cross-examination that he could not say for sure what kind of gun the fragments came from, and it was possible that the bullets came from a low-caliber weapon. Thus, any possible prejudice was minimized if not eliminated. For these reasons, appellant's second assignment of error is overruled.

{¶19} Accordingly, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and SADLER, JJ., concur.

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