[Cite as *In re L.J.*, 2012-Ohio-1414.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
		No. 11AP-495
L.J.,	:	(C.P.C. No. 10JU-13874)
(Appellant).	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 30, 2012

John T. Ryerson, for appellant.

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*, for appellee.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

DORRIAN, J.

{¶ 1} Defendant-appellant, L.J. ("appellant"), appeals from the May 17, 2011 judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, wherein the trial court adopted the magistrate's decision adjudicating appellant a delinquent minor as a result of having committed the offenses of aggravated robbery with a gun specification, in violation of R.C. 2911.01(A) and 2941.145, and robbery, in violation of R.C. 2911.02(A)(2). For the following reasons, we affirm.

{¶ 2} On October 7, 2010, at approximately 8 p.m., Joshua Stover ("Stover") left his Canal Winchester residence to go to the grocery store and pick up a few things. As Stover got ready to unlock his car, four individuals approached him from behind. Stover unlocked his car and turned around, at which time one individual grabbed the keys out of his hand and another went through his pockets and got his wallet and phone. Two individuals pointed guns at Stover's head and told him to "shut up" and get on his knees. Stover got down on his knees facing the driver's side door of the car. At that time, one of

the individuals entered the vehicle through the driver's side door, started the car, put it in reverse, fiddled around with it a little bit, and revved the engine. Then the individual in the driver's seat waived to another individual to get into the car. Both individuals in the car had weapons. After they were both in the car, the individuals sped toward the entrance of the complex and left the complex. After making sure everybody was gone, Stover went inside and called 911. The Columbus Police Department contacted Stover to identify two suspects they had pulled over. At approximately 8:15-8:20 p.m., Stover identified appellant as being one of the individuals that robbed him.

{¶ 3} On October 8, 2010, the state filed a complaint charging appellant with aggravated robbery, in violation of R.C. 2911.01(A)(1), and robbery, in violation of R.C. 2911.02(A)(2), felonies of the first and second degree, respectively. Because appellant was age 14 at the time the offenses were committed, the complaint was filed in the Division of Domestic Relations, Juvenile Branch. The case was referred to a magistrate and, upon the state's request, the complaint was amended to add a gun specification to both offenses.

{¶ 4} This matter came on for hearing before the magistrate on November 30 and December 14, 2010. At the hearing, Stover, Officer Zachary Weekley ("Officer Weekley"), Officer Daryl Wiedmann ("Officer Wiedmann"), and Officer Gregory Sanderson ("Officer Sanderson"), testified on behalf of the state. Further, appellant called Brian Edward Meyers ("Meyers") as a witness, and appellant also testified on his own behalf.

{¶ 5} At the conclusion of testimony, the magistrate found, beyond a reasonable doubt, that appellant was a delinquent minor committing the offenses of: (1) aggravated robbery with a gun specification and (2) robbery. She journalized her decision along with findings of fact and conclusions of law on December 22, 2010.

{¶ 6} On January 5, 2011, appellant filed objections to the magistrate's decision stating that it was against the manifest weight of the evidence and that the state did not prove every element of the offense beyond a reasonable doubt. (*See* Objections, 1.) Also, appellant objected to the finding of the gun specification and argued that no physical evidence linked him to an operable weapon. (*See* Objections, 1.)

{¶ 7} On January 27, 2011, at the dispositional hearing, the magistrate recommended that appellant be committed to the Department of Youth Services for one year on each of the charges of aggravated robbery and robbery to run concurrently, and

one year on the gun specification to run consecutively. The magistrate journalized her recommendation in a judgment entry dated February 8, 2011.

{¶ 8} On February 18, 2011, appellant also filed objections to the magistrate's February 8, 2011 judgment entry. In his objections, appellant alleged that his commitment to the Department of Youth Services for a minimum period of one year on the underlying charges of aggravated robbery and robbery, and one year on the gun specification, was against the manifest weight of the evidence. (*See* Objections to Magistrate's Order entered February 7, 2011, 1.) Further, on April 11, 2011, appellant filed a supplemental memorandum in support of his objections. On April 28, 2011, the state filed its memorandum contra. On May 17, 2011, the trial court journalized a decision and judgment entry approving and adopting the magistrate's decisions made December 22, 2010 and January 27, 2011. (*See* Decision and Judgment Entry, 4.) In its decision and judgment entry of May 17, 2011, the trial court denied the objections and found that the magistrate "properly made a decision based on the testimony and evidence presented and did not err as a matter of law." (*See* Decision and Judgment Entry, 3-4.)

{¶ 9} On June 2, 2011, appellant filed a timely notice of appeal. Appellant set forth a single assignment of error for our consideration:

> The trial court erred in overruling the objections filed to the decision of the Magistrate, as that decision was against the manifest weight of the evidence.

{¶ 10} In his assignment of error, appellant challenges the manifest weight of the evidence supporting the trial court's delinquency findings. Our review of the manifest weight of the evidence in a juvenile delinquency adjudication is the same as for criminal defendants. *In re B.O.J.*, 10th Dist. No. 09AP-600, 2010-Ohio-791, ¶ 6, citing *In re Watson*, 47 Ohio St.3d 86 (1989); *In re Wood*, 10th Dist. No. 06AP-1032, 2007-Ohio-3224, ¶ 15-16; *In re M.C.*, 10th Dist. No. 10AP-491, 2011-Ohio-2541, ¶ 5; and *In re Fortney*, 162 Ohio App.3d 170, 2005-Ohio-3618 (4th Dist.), ¶ 19.

{¶ 11} A challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. *State v. Thompkins*, 78 Ohio St.3d 380 (1997). The court of appeals sits as a "thirteenth juror" and after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and

determines whether in resolving conflicts in the evidence, the jury 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, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1stDist.1983). " 'The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387.

{¶ 12} A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967). The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶ 58; *State v. Clarke*, 10th Dist. No. 01AP-194, 2001 WL 1117575 (Sept. 25, 2001). The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard*, 1st Dist. No. C-000553, 2001 WL 1219765 (Oct. 12, 2001). Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶ 22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶ 17.

{¶ 13} In the present matter, the trial court found appellant to be a delinquent minor due to committing the offenses of aggravated robbery, pursuant to R.C. 2911.01(A), with a gun specification, and robbery, pursuant to R.C. 2911.02(A)(2).

{¶ 14} R.C. 2911.01 states, in relevant part, that:

> (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;

> (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
>
> (3) Inflict, or attempt to inflict, serious physical harm on another.

Further, R.C. 2911.02(A)(2) states, in relevant part, that:

> No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> * * *
>
> (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another[.]

{¶ 15} The basis for appellant's manifest-weight challenge is the conflicting testimony of Stover, the victim, and Meyers, the only eyewitness to the robbery. (*See* appellant's brief, 8.) Specifically, appellant points to the following alleged discrepancies in testimony between Stover and Meyers: (1) Stover testified that there were two individuals over him who got into the car and drove away, while Meyers testified that only one individual got into the car and drove away, and that that individual was not pointing a gun at Stover; (2) Stover testified that all of the individuals were African-American, while Meyers testified that one of the individuals was white; and (3) Stover testified that all four individuals wore dark hoodies and that the one individual wearing a red-colored hoodie was not pointing a gun at him, while Meyers testified that the two individuals standing over Stover wore distinctive red and yellow jackets. (*See* appellant's brief, 10-11.) In response, the state asserts that the evidence from Stover and Meyers is not inconsistent and argued it was appropriate for the magistrate to consider the dark lighting conditions, distance, and the fact that Meyers only witnessed the conclusion of the crime. (*See* appellee's brief, 7.)

{¶ 16} Stover testified that the robbery took place on October 7, 2010, at approximately 8 p.m. and that is was dark outside. Stover also testified that the individuals robbing him wore "[b]aggy clothes, hooded sweatshirts." (Tr. 15.) Further,

when questioned about identifying the individuals who committed the robbery, Stover testified as follows:

> Q. All right. So, you're on your knees—let's take a step back. You're on your knees and you see these two individuals get into your car, were you able to get a look at their faces?
>
> A. Yes.
>
> Q. Okay. And how were you able to do so?
>
> A. I was facing the car when it pulled out, driver's side, I mean, it was–it was pretty clear.
>
> * * *
>
> A. Yeah. I mean, I was [staring] directly at the car for—for a good minute or so.
>
> * * *
>
> Q. Did you see anybody else get into the car?
>
> A. No.
>
> Q. So you just saw those two people get in the car and leave, to your knowledge?
>
> A. Yes.
>
> * * *
>
> Q. Were—were you ever contacted by the police to go identify any of the suspects?
>
> A. Yes.
>
> Q. Okay. * * * were you able to identify the two suspects that the police had?
>
> A. Yes.
>
> Q. Okay. Do you remember what you told the police when you identified them, what percentage of certainty you were?
>
> A. * * * [A]fter they were shown to me I was 100% positive.

> Q. So you were 100% positive that the two people pulled over were the two people that robbed you?
>
> A. Yes.
>
> Q. Do you know about what time this was when you went to go ID the suspects?
>
> A. Not specifically what time. If I had to guess I would say it was right around 8:15, 8:20.
>
> Q. So pretty quickly?
>
> A. Yes.
>
> Q. Do you see any of those suspects that you said you identified in the courtroom today?
>
> A. Yes.

(Nov. 30, 2010 Tr. 19-22.) The record reflects that, at the hearing, Stover identified appellant as one of the suspects involved in the robbery.

{¶ 17} Meyers testified that, on the evening of October 7, 2010, he was home watching television, and his wife was in the office with the window open. Meyers lives at 3939 Bogdon Drive, Canal Winchester, Ohio, straight across the parking lot from the scene of the robbery. Additionally, Meyers testified that his wife heard someone say "give me your wallet," and told Meyers "someone's in trouble out there," so Meyers ran outside. (Dec. 14, 2010 Tr. 5.) Meyers also testified that he saw the victim on his knees, holding his head. Further, Meyers testified that:

> I seen two black males over him, one had a red jacket—unique jackets, red color in here and the other one was yellow like they could've [been] brothers. The car was—somebody was in the car, I didn't know how many, they were trying to back out the car, they couldn't get it in gear and they hit the car in front trying to get out. And, then on the other side there was a thin, like, white guy with—young guy with white hair or blonde hair and he ran the opposite direction when they seen me, the other two black gentlemen, young kids in their 20s I'd say, they ran the opposite way[.]

(Dec. 14, 2010 Tr. 8.) Although Meyers estimated the distance from where he was sitting to where Stover was robbed as 30-35 yards, on cross-examination, Meyers admitted that he was far enough away from where the robbery took place that he could not recognize faces, but he recognized the unique jackets. Further, Meyers admitted that, other than the driver, he did not know how many more people were in Stover's car.

{¶ 18} Officer Weekley testified that, on October 7, 2010, at aproximately 8 p.m., a call came in from dispatch about a robbery. According to dispatch, "[a] witness said that four male blacks were robbing an individual outside of a Bogdon address," and that the victim's vehicle "turned left out of the complex and it was a green Toyota Corolla." (Nov. 30, 2010 Tr. 45.) Further, Officer Weekley testified that he spotted the victim's vehicle less than a minute after the description aired and stopped the vehicle at the intersection of Shannon and Brice Roads. On direct examination, Officer Weekley testified as follows:

> Q. * * * When you stopped the vehicle how many people were in it?
>
> A. Two.
>
> Q. Two? Would you be able to recognize either of those people-
>
> A. Yes.
>
> Q. –if you saw them again?
>
> A. Yes, I would.

(Nov. 30, 2010 Tr. 48-49.) Upon identifying appellant as one of the individuals in the vehicle, Officer Weekley further testified:

> Q. Do you remember which seat that this young man was in?
>
> A. Passenger seat.

(Nov. 30, 2010 Tr. 49.)

{¶ 19} Officer Wiedmann also identified appellant as the passenger in the vehicle. Further, Officer Wiedmann testified that, after placing appellant in the back of the cruiser,

he returned to the vehicle and saw what appeared to be a handgun laying in the backseat pointing out towards the passenger side of the vehicle. Officer Wiedmann retrieved the weapon, went back to the cruiser, and placed it on the dashboard of the cruiser. Additionally, Officer Wiedmann testified that, upon seeing this, appellant uttered "that's not the only gun in the vehicle." (Nov. 30, 2010 Tr. 61.)

{¶ 20} Officer Sanderson testified that, on October 7, 2010, when he responded to the scene, the suspects had already been secured. In addition, Officer Sanderson testified that another officer noticed a gun sticking out from underneath the passenger's seat in the vehicle. Officer Sanderson retrieved the gun, checked for ammunition and bagged the gun. He then submitted the weapon to the property room, along with a request for a laboratory examination to test for operability. The gun was determined to be an operable firearm. (Tr. 80; *see also* Crime Laboratory Report, State's Exhibit A.)

{¶ 21} "This court has consistently held that the weight given to inconsistencies in any witnesses' testimony is a determination within the province of the trier of fact, and such inconsistencies generally do not render a conviction against the manifest weight of the evidence." *In re B.O.J.* at ¶ 18. Moreover, "where a factual issue depends solely upon a determination of which witnesses to believe, that is the credibility of witnesses, a reviewing court will not, except upon extremely extraordinary circumstances, reverse a factual finding either as being against the manifest weight of the evidence or contrary to law." *In re Johnson*, 10th Dist. No. 04AP-1136, 2005-Ohio-4389, ¶ 26 (citations omitted).

{¶ 22} Here, the magistrate heard testimony from both Stover and Meyers regarding the details of the robbery. While there may be some inconsistencies between Stover and Meyers's testimonies, it is important to also consider that their testimonies are similar in many respects. Both Stover and Meyers testified that, on the evening of October 7, 2010, four individuals robbed Stover and stole his vehicle. Further, both Stover and Meyers testified that, during the robbery, Stover was on his knees and that some of the individuals carried guns. Additionally, the magistrate heard the testimony of Officers Weekley, Wiedmann, and Sanderson regarding the stop of the vehicle, the detention of appellant, and the retrieval of two weapons from Stover's vehicle.

{¶ 23} Taking into consideration the testimonies of Officers Weekley, Wiedmann, and Sanderson, in conjunction with Stover's description of the robbery, the magistrate could reasonably believe Stover's accounting of the facts over Meyers's accounting of the facts. In doing so, the magistrate could reasonably believe that appellant robbed Stover at gunpoint and left the complex in the passenger's seat of Stover's vehicle, only to be stopped by Officer Weekley less than a minute later. The trier of fact was free to believe, or disbelieve, any part of the witnesses' testimony, and a conviction is not against the manifest weight of the evidence merely because the trier of fact believed the victim's testimony. *See State v. Smith*, 10th Dist. No. 04AP-726, 2005-Ohio-1765. Therefore, for the foregoing reasons, any inconsistencies in the witnesses' testimonies do not render the verdict against the manifest weight of the evidence.

{¶ 24} We decline to substitute our judgment for the trier of fact regarding the credibility of the witnesses or the weight to be given to their testimony. After reviewing the record in its entirety, we conclude there is nothing to indicate that the trier of fact clearly lost its way or that any miscarriage of justice resulted. Consequently, we do not find that the trial court's decision to adopt the magistrate's decision finding appellant delinquent on the aggravated robbery, with gun specification, and robbery charges is against the manifest weight of the evidence.

{¶ 25} Appellant also argues that the gun specification, pursuant to R.C. 2941.145, should be set aside because there is no physical evidence linking appellant to any weapon. (*See* appellant's brief, 12.) R.C. 2941.145 states, in relevant part, that:

> (A) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. * * *

It is well-settled that "[a] firearm enhancement specification can be proven beyond a reasonable doubt by circumstantial evidence." *Thompkins*, 78 Ohio St.3d 380, paragraph one of the syllabus. Further, "[i]n determining whether an individual was in possession of

a firearm and whether the firearm was operable or capable of being readily rendered operable at the time of the offense, the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm." *Id*.

{¶ 26} In the present matter, the state amended its complaint on October 15, 2010, to add the following gun specification, stating: "[f]urther the child had a firearm, as defined in section 2923.11 of the Ohio Revised Code on or about the child's person or under the child's control while committing the act charged and to have displayed the firearm, brandished the firearm, indicate possession of the firearm or used the firearm to facilitate the commission of the act charged." (*See* Oct. 26, 2010 Magistrate's Decision.) Stover testified that, during the commission of the robbery, appellant pointed a gun at his head. Stover also admitted that he was threatened and worried about getting shot. Further, Stover testified that appellant got into the vehicle, and that, as far as he could see, the vehicle left the complex. In addition, Officer Wiedmann testified that, after placing appellant in his cruiser, appellant informed him that there was more than one gun in the vehicle. Finally, Officer Sanderson testified that he retrieved an operable gun from underneath appellant's seat. In addition, the state submitted as evidence a copy of a crime laboratory report stating that the gun was examined and determined to be an operable firearm. (*See* State's Exhibit A.)

{¶ 27} In light of the evidence in the record, and for the above-stated reasons, we believe that the trial court could find beyond a reasonable doubt that appellant had a firearm on or about his person or under his control while committing the robbery, and that he displayed, brandished, indicated possession of, or used the firearm to facilitate the commission of the robbery.

{¶ 28} Appellant's sole assignment of error is overruled. For the foregoing reasons, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is hereby affirmed.

Judgment affirmed.

BROWN, P.J., and TYACK, J., concur.
