[Cite as *State v. Sparks*, 2012-Ohio-2653.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-702
v.	:	(C.P.C. No. 11CR-1336)
Wayne A. Sparks,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 14, 2012

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

Richard Cline & Co., LLC, and *Richard A. Cline*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by defendant-appellant, Wayne A. Sparks, from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas following a jury trial in which appellant was found guilty of aggravated burglary, aggravated robbery, robbery, kidnapping, and having a weapon while under disability.

{¶ 2} On March 10, 2011, appellant was indicted on one count of aggravated burglary, in violation of R.C. 2911.11, two counts of aggravated robbery, in violation of R.C. 2911.01, four counts of robbery, in violation of R.C. 2911.02, two counts of kidnapping, in violation of R.C. 2905.01, and one count of having a weapon while under disability, in violation of R.C. 2923.13.

{¶ 3} The matter came for trial before a jury beginning June 27, 2011. The first witness for the state was Valerie Gibson, age 25. On November 21, 2010, Gibson resided with her boyfriend, Carlos Andre Carter in a townhouse located at 4769 Kingshill Drive. Appellant was an acquaintance of Carter and, on several occasions, appellant had been to Gibson and Carter's residence to play video games with Carter. Gibson knew appellant as "Sparks." (Tr. 92.) Appellant would "come to our house occasionally, play Xbox, [and] hang out with Carlos." (Tr. 92.)

{¶ 4} Gibson, who was employed as a nanny, arrived home from work at 10:30 p.m. on the evening of November 21, 2010. At approximately 11:30 p.m., there was a knock at the door. Gibson was in the kitchen at the time, and Carter and a friend, Kevin Persinger, were in the living room playing video games. Carter went to the door, "looked out the peephole and said that it's Sparks." (Tr. 96.) Carter told Gibson to put their dog in his cage, so she took the dog downstairs to the basement. As she began walking back up the steps, Gibson paused because she heard "some people shuffling their way in, and one of the people who had entered the home was saying '[g]et down, get down,' and so I didn't think this was normal." (Tr. 97.) Carter then shut the basement door.

{¶ 5} Gibson became scared, and went back down the steps. She then heard someone say: "Get that bitch." (Tr. 98.) After a few minutes, Gibson heard someone say: "I'm going to kill you, I'm going to F'ing kill you." (Tr. 100.) The noise stopped a short time later, and Carter then brought Gibson back upstairs. Carter and Persinger "were saying it was Sparks, 'It's Sparks * * * and some other guy. We don't know who he is.' " (Tr. 100.) They indicated that one of the men had a shotgun, and that money had been taken. Later that evening, Gibson and Carter learned from a friend, Will Lewis, that Sparks' full name was Wayne Sparks. Gibson and Carter gave that information to police officers at the scene.

{¶ 6} On cross-examination, Gibson stated that it was not appellant's voice that she heard giving orders while she was in the basement. During the incident, Gibson heard the unidentified voice say: "Sparks, get the money." (Tr. 109.)

{¶ 7} Carter, age 32, testified that he was first introduced to appellant through a mutual friend, Lewis. Appellant would come over to Carter's house to play video games, including Xbox. On November 21, 2010, appellant went to Carter's residence at around

4:00 p.m. to play video games; Persinger, a friend of Carter's, was also at the residence. Appellant left the residence after approximately one hour, but he "was supposed to come back and play more games later that night." (Tr. 122.) Carter's girlfriend, Gibson, returned home from work at approximately 10:00 p.m. that evening. At approximately 11:30 p.m., Gibson was preparing food in the kitchen while Carter and Persinger were still playing video games. There was a knock on the door, and Carter got up; upon observing appellant, Carter told Gibson to put their dog in his cage because appellant "never liked dogs." (Tr. 126.) Gibson took the dog downstairs to the basement.

{¶ 8} Carter proceeded to open the door, and "that is when Sparks pushed in" and another individual came inside with a shotgun. (Tr. 126.) Carter did not recognize the other individual, who he described as a black male, heavy set, approximately six-foot tall, in his mid-30's to mid-40's. According to Carter, "they pushed their way back to the kitchen, and that's where I kind of started going down, [in] the kitchen, they grabbed me and pulled me into the living room and threw me down on the ground and told me to get down and proceeded kicking me." (Tr. 130.) The man with the gun "said '[w]here did the B go?' referring to Valerie." (Tr. 130.) Carter had shut the basement door "[t]o make sure that they didn't go down after her." (Tr. 131.) The man with the gun "said to 'get his stuff,' * * * and Sparks just started going through my pockets." (Tr. 133.) Appellant "went through my pockets, took whatever I had in my pockets. Then after the guy with the gun said '[g]et his stuff too,' referring to Kevin, and then [appellant] went over there and got his stuff." (Tr. 134.) As appellant was going through Carter's pockets, "[t]he guy with the shotgun kicked me on the side of my face." (Tr. 139.) Carter testified that there was no hesitation on appellant's part during the incident. Appellant put the money "in his pocket. After that, it was like two seconds later both were gone." (Tr. 137.) After the two men left, Carter called the police, and he also called Lewis, who informed Carter of appellant's full name. Carter testified that he had $740 taken during the incident.

{¶ 9} Approximately one week after the incident, Lewis contacted Carter "saying that Sparks was trying to get hold of me to try to see if we could make amends on stuff." (Tr. 144.) Later, Lewis "calls me back and he is like 'Wayne says he has a little money for you now that he can give to you, and soon, in a couple of days, his girlfriend is supposed to begin * * * getting a paycheck and she will pay you back.' " (Tr. 145.) During one

conversation, appellant spoke on Lewis' cell phone to Carter. Appellant "was saying 'Man, the cops are coming for me, there is a warrant for my arrest. Now I can't even go to work to get that money to pay you back' * * *. I was like 'Man, you kind of put me in a situation.' He is like 'Man, I'm really sorry about that. I never meant to put you in that situation.' " (Tr. 146.) Carter asked appellant who the other individual was, and appellant "was like 'I don't know, man, I don't even know. I can't say anything.' " (Tr. 147.) Appellant eventually left $130 with Lewis, and Carter picked it up.

{¶ 10} Persinger, age 27, is a friend of Carter's. On November 21, 2010, Persinger arrived at Carter's apartment at approximately 5:00 p.m. to play video games. Appellant had been to Carter's residence earlier that day; Persinger had never met appellant prior to that date. Around midnight, Carter answered a knock at the door and indicated it was appellant. Persinger then heard someone say to get down. He heard "a loud bang of the door crashing into the wall. I see Sparks coming in, Carlos stumbling, and another person with a shotgun coming in." (Tr. 184.) According to Persinger, appellant "came rushing in like he was looking for stuff." (Tr. 185.) Appellant started "going through things, and he eventually went through my pockets." (Tr. 186.)

{¶ 11} Carter was knocked to the ground "and then kicked." (Tr. 189.) The man with the shotgun was an African-American, wearing a black hoodie and black pants. The man was "threatening Carlos and asking for the money." (Tr. 191.) The man pointed the shotgun at Carter and Persinger, but never pointed the weapon at appellant. While pointing the weapon at Persinger, the man asked Carter "if he wanted him to shoot me." (Tr. 194.) Appellant then came over to check Persinger's pockets, and he took Persinger's cell phone, identification, and $10. According to Persinger, the men appeared to be working together. Before leaving, the man with the shotgun said: "I'll be back." (Tr. 196.) Appellant and the other man then ran out of the residence.

{¶ 12} Columbus Police Officer William Frease was on duty on November 21, 2010, and responded to a report of an incident at 4769 Kingshill Drive, Apartment C. At the scene, officers were able to obtain appellant's name as a possible suspect. The officers showed Gibson and Carter a photograph on a computer screen, and they both identified appellant's picture. An arrest warrant was subsequently issued for appellant. Columbus Police Detective George Robey interviewed appellant on March 1, 2011. During the

interview, appellant told the detective: "That nigger on Kingshill runs a drug house." (Tr. 233.) Appellant further told the detective: "I went there to buy weed. I don't know what happened." (Tr. 233.)

{¶ 13} Appellant testified on his own behalf. Appellant, age 37, has been previously convicted of aggravated assault and robbery. Appellant testified that he met Carter through Lewis, and that he had been to Carter's residence on prior occasions to purchase marijuana. On November 21, 2010, appellant went to Carter's residence at approximately 6:00 p.m. and "got a bag of weed from him." (Tr. 246.) Appellant testified that he later received a call from someone asking about purchasing some marijuana. Appellant told this individual: "I know a place if you want it." (Tr. 247.) Appellant then drove to Carter's residence.

{¶ 14} Appellant gave the following account of the events:

> I get out of my car, goes up, knock on the door, looking at my phone.
>
> Instantly a guy comes with a shotgun from this way, boom. Instantly knock on the door. [Carter] comes to the door, opens the door, pushes us in. I go straight to the floor. I never said nothing. I go straight to the floor. Dude had the gun like this, points the gun at me, said "Get up. Go in his pockets." Then he starts running around. This all happened in two minutes.

(Tr. 247.)

{¶ 15} According to appellant, the man with the shotgun ordered appellant to go through Carter's pockets. The man then said: "I'm going to come back and kill everybody." (Tr. 248.) Appellant testified that "[e]verybody took off. I took off." (Tr. 248.) Appellant further testified that the man took his (appellant's) cell phone.

{¶ 16} Appellant later spoke on the phone with Carter, telling Carter he could "probably help [him] out, but I didn't have nothing to do with that, period." (Tr. 249.) According to appellant, he gave Carter money on two occasions after the incident. Appellant denied ever seeing the man with the shotgun prior to that evening. Appellant did not call 911 because he thought Carter "is going after the dude. I didn't know nothing. I don't want to call the police to his drug house." (Tr. 256.) On cross-examination,

appellant acknowledged he did not tell the detective that the man with the shotgun ordered him to go through the pockets of Carter or Persinger.

{¶ 17} Lewis testified that he is an acquaintance of Carter, and that he had previously purchased marijuana from him. Lewis introduced appellant to Carter so that appellant could purchase drugs. On November 21, 2010, Lewis received a call from Carter in which Carter related that appellant "and another big guy with a shotgun just robbed him." (Tr. 296.) Lewis told Carter that appellant's name was Sparks, but Lewis did not know appellant's first name. Lewis called appellant's girlfriend, and he eventually spoke with appellant. Lewis testified that appellant "explained to me how he had nothing to do with it, and I was like: Well, whatever. They're calling the cops, they're mad, and you need to get them their money back." (Tr. 296.) On two occasions, Lewis received money from appellant to give to Carter.

{¶ 18} On cross-examination, Lewis testified that Carter phoned him shortly after the incident, relating that appellant "and some other big black dude just robbed him with a shotgun." (Tr. 301.) Appellant never mentioned to Lewis that his (appellant's) cell phone had been taken.

{¶ 19} Following deliberations, the jury returned verdicts finding appellant guilty on all counts. The trial court sentenced appellant by judgment entry filed August 3, 2011.

{¶ 20} On appeal, appellant sets forth the following two assignments of error for this court's review:

> FIRST ASSIGNMENT OF ERROR
>
> Jury exposure to extrinsic evidence was plain error that so tainted the trial process that it deprived Mr. Sparks of his constitutional right to due process of law, to be present at all phases of trial, to confront witnesses, and to a fair trial, in violation of the Fifth, Sixth and Fourteenth Amendment to the United States Constitution and Article I, §§ 10 & 16 of the Ohio Constitution.
>
> SECOND ASSIGNMENT OF ERROR
>
> The jury's verdicts were not supported by sufficient evidence; in the alternative, the verdicts were against the manifest weight of the evidence.

{¶ 21} Under the first assignment of error, appellant asserts that the jury was exposed to extrinsic evidence prior to the case being submitted to the jury. Specifically, appellant notes that, after the testimony was presented on June 28, 2011, the trial court discharged the jurors for the evening after instructing them that they must not discuss the case with anyone and must not undertake any independent investigations. Appellant maintains that, despite these admonitions, one of the jurors, "C.K.," went home that evening and accessed online information from the Franklin County Municipal Court's public information website regarding appellant's prior criminal record. Appellant argues that, when C.K. took it upon himself to visit the website and review appellant's criminal record, this juror ceased being a fair and impartial juror. Appellant also contends he was denied the opportunity to confront, cross-examine, and rebut negative information that was provided by C.K. to at least one other juror, and that it is impossible to know how many other jurors were exposed to this improper information.

{¶ 22} In response, the state argues that appellant's arguments assume the jury was exposed to extrinsic evidence, i.e., appellant's arrest record from the municipal court. The state contends, however, that the juror who obtained the information (C.K.) was excused from the jury and did not take part in deliberations, and that the juror who reported C.K.'s indiscretion was left on the jury at the request of appellant. The state further maintains that the record does not indicate any other jury members were exposed to outside information. Upon review, the record supports the state's contentions.

{¶ 23} Specifically, the record shows that, prior to jury deliberations, the trial court, out of the presence of the jury, held a discussion with the parties regarding a claim that one of the jurors had obtained outside information about appellant's past criminal record. The court informed the parties that a juror had approached the bailiff "and indicated that one of the other jurors had shared information" with him that had been obtained by "some sort of a smart phone or something that has connection with the Internet and that the name of Wayne Sparks was on the phone and there was some reference about how many times he has been charged with criminal activity." (Tr. 307.) The court noted it had "communicated this to both counsel * * * because I think it's important to identify who this juror is and to get that juror and their phone out of that room." (Tr. 307.)

{¶ 24} At that point, the trial court questioned, outside the presence of the other jury members, the juror who had reported the incident to the bailiff. That juror (hereafter "the reporting juror") stated that he was standing in the deliberation room when another juror, C.K., approached him with a phone, and "he says: 'Check this out' and he handed me the phone, and it said 'Sparks has been in trouble with the law 37 times,' and I went and I handed it back and I go: 'How did you know that?' He goes: 'Well, you can look anything up about these people,' and I went: 'You can't do that.' " (Tr. 309.)

{¶ 25} The reporting juror related that he immediately went to the bailiff "and told her" about the incident. (Tr. 309.) When asked whether the conversation took place in the presence of other jurors, the reporting juror responded: "They did not know it. I mean we were right behind them in the corner." (Tr. 309.) When asked whether C.K. communicated this information with anyone else, the reporting juror stated: "I don't believe so." (Tr. 310.) The reporting juror represented that the incident occurred "[t]en minutes ago," and that he had not discussed the matter with any other jurors. (Tr. 310.)

{¶ 26} The trial court then asked the reporting juror whether he would be able to deliberate solely on the basis of the evidence presented "as opposed to whatever [C.K.] may have said or shown you on his phone?" (Tr. 312.) The reporting juror responded: "Yes." (Tr. 312.) The court then afforded counsel for both sides the opportunity to question the reporting juror. After briefly questioning this juror, defense counsel indicated: "We are satisfied." (Tr. 313.)

{¶ 27} The trial court then questioned juror C.K. outside the presence of the other jury members. C.K. stated that the previous evening he had used his home computer to look up information on the "Franklin County Municipal Court site." (Tr. 316.) C.K. then typed on his phone that "he [appellant] has been in trouble with the law 37 times since 1991." (Tr. 317.) When asked whether he had shared that information with anyone other than the reporting juror, C.K. responded: "No, not at all." (Tr. 318.)

{¶ 28} The trial court then permitted counsel for both sides to question C.K. During questioning by the state, C.K. indicated that the information on his phone was typed in the form of a text, but that "there was no text sent to anybody. * * * Just wrote in there what it was." (Tr. 323.) C.K. stated that he deleted the text message "[r]ight after I showed [the reporting juror]." (Tr. 328.) C.K. further stated that he had not heard any of

the other jurors discussing "anything about this case at all." (Tr. 333.) Following the questioning of C.K., the trial court excused him from further service, and warned that he might "end up back here in this room in a contempt hearing." (Tr. 331.)

{¶ 29} The trial court informed counsel that it would be necessary to conduct further voir dire of the remaining jurors to ascertain whether they had "received any information whatsoever about anything having to do with this case from any source other than inside this courtroom." (Tr. 336.) After conferring with appellant, defense counsel stated that appellant "is okay with bringing them all out at once and asking them that general question and then going from there." (Tr. 336.) Defense counsel further stated: "Maybe it will help, for the record I have also had a discussion with Mr. Sparks about [the reporting juror], and he is agreeable to keep him on the jury once he heard his answers to the questions." (Tr. 337.)

{¶ 30} The trial court then addressed the remaining jurors, asking them to indicate by a show of hands whether "anybody here received any information concerning the facts of this case * * * from any source whatsoever outside of this courtroom?" (Tr. 339.) The record reflects that no hands were raised in response. The court also asked the jurors whether anyone had received any information from juror C.K.; again, no hands were raised in response.

{¶ 31} Here, the record on appeal does not support appellant's claim of uncertainty as to how many jurors may have been exposed to this information. Rather, there is no evidence suggesting that any jurors, other than the reporting juror and C.K. (who was excused from the panel), became aware of appellant's past criminal record. As reflected above, when the jury as a whole was asked whether anyone had obtained outside information, none of the jurors responded. As also noted, C.K. informed the trial court that he did not share the information with any juror except the reporting juror. The reporting juror also indicated he did not believe any other jurors were exposed to this information. As also noted, the trial court permitted both sides to question the reporting juror about whether he could be impartial and, after hearing the reporting juror's responses, defense counsel stated on the record that: "We are satisfied." Defense counsel further stated on the record that he had conferred with appellant about the reporting juror and that appellant was "agreeable to keep him on the jury once he heard his answers

to the questions." Upon review, appellant has failed to demonstrate that the trial court's handling of the matter deprived him of the right to an impartial jury or a fair trial.

{¶ 32} Moreover, as argued by the state, inasmuch as defense counsel did not request that the reporting juror be removed but, instead, expressed satisfaction with the trial court's handling of the matter, any error was invited by defense counsel. Under Ohio law, "a party will not be permitted to take advantage of an error which she herself invited or induced the trial court to make." *State ex rel. Smith v. O'Connor*, 71 Ohio St.3d 660, 663 (1995). *See also Lester v. Leuck*, 142 Ohio St. 91, 93 (1943), quoting *State v. Kollar*, 93 Ohio St. 89, 91 (1915) (" 'a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible' ").

{¶ 33} Appellant also contends that the trial court erred in engaging in ex parte communication with the jury. More specifically, during the parties' discussion of the matter concerning juror C.K., the trial court had instructed the jurors to return to the deliberation room while the attorneys worked on jury instructions. The attorneys subsequently left the courtroom for lunch, and the trial court realized that the jurors were still in the deliberation room. The court then gave the jurors an admonition and excused them for lunch.

{¶ 34} Following the noon recess, the trial court met with the parties outside the presence of the jury, at which time the court indicated on the record what had transpired. Specifically, the trial court noted the following on the record:

> Another matter that we need to put on the record, if any appellate court reviews this, I'm certain they're going to get to see the record concerning it, misconduct of the juror this morning. We spent a bunch of time this morning trying to deal with that. We brought the jury out and spoke to them individually and then sent them back into the jury deliberation room.
>
> And then, quite frankly, with everything else that happened thereafter involving not just this case but my morning docket, I forgot they were in there.
>
> Both counsel worked on jury instructions and then left. It was not until about 12:15 that I remembered they were still locked

> up in that little room. You guys were parts unknown, so I gave them an admonition, sent them to lunch and told them to be back at 1:30. And it's now 2:00. I think we're ready for closing argument.

(Tr. 344.)

{¶ 35} When asked whether there was any record the parties wished to make, the prosecutor responded: "No objections in any way." (Tr. 344.) Defense counsel stated: "Yeah. That's perfectly fine." (Tr. 345.)

{¶ 36} Upon review, we find no error, plain or otherwise, from the record. Appellant argues that any private communication with a juror during a trial is presumptively prejudicial. This court has previously noted the general rule that, "any communication with the jury by either the judge or court personnel, outside the presence of the defendant or parties to the case, is error and may warrant a new trial." *State v. Cook*, 10th Dist. No. 05AP-515, 2006-Ohio-3443, ¶ 35. However, such private communication outside the presence of the defendant " 'does not * * * create a conclusive presumption of prejudice.' " *Id*., quoting *State v. Schiebel*, 55 Ohio St.3d 71, 84 (1990). Rather, " '[t]he communication must have been of a substantive nature and in some way prejudicial to the party complaining.' " *Id*., quoting *Schiebel* at 84. Further, "[i]f the communication is not substantive, the error is harmless." *Id*. In *Cook* at ¶ 36, this court noted that "[s]ubstantive matters may include discussions between a judge and juror of legal issues involved in the case, applicable law, the charge to the jury, or a fact in controversy," but that, "even where the communication involves a substantive issue, the defendant still must demonstrate that he was prejudiced by the communication."

{¶ 37} Here, the record does not establish that the trial court's communication involved a substantive matter, nor has appellant demonstrated prejudice. As noted, the prosecution and defense counsel were made aware of the court's admonition, and neither raised any objection or sought further clarification. Defense counsel indicated on the record that the court's action was "perfectly fine." In the absence of any showing of prejudice, any error with respect to the communication was harmless.

{¶ 38} Based upon the foregoing, appellant's first assignment of error is without merit and is overruled.

{¶ 39} Under his second assignment of error, appellant argues that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. With respect to his sufficiency challenge, appellant asserts there was no evidence of aiding and abetting to support the convictions.

{¶ 40} At the outset, we note the applicable standards of review in considering sufficiency and manifest weight challenges. In *State v. Sexton*, 10th Dist. No. 01AP-398, 2002-Ohio-3617, ¶ 30-31, this court discussed the distinction between those two standards as follows:

> To reverse a conviction because of insufficient evidence, we must determine as a matter of law, after viewing the evidence in a light most favorable to the prosecution, that a rational trier of fact could not have found the essential elements of the crime proved beyond a reasonable doubt. * * * Sufficiency is a test of adequacy, a question of law. * * * We will not disturb a jury's verdict unless we find that reasonable minds could not reach the conclusion the jury reached as the trier of fact. * * * We will neither resolve evidentiary conflicts in the defendant's favor nor substitute our assessment of the credibility of the witnesses for the assessment made by the jury. * * * A conviction based upon legally insufficient evidence amounts to a denial of due process, * * * and if we sustain appellant's insufficient evidence claim, the state will be barred from retrying appellant.
>
> A manifest weight argument, by contrast, requires us to engage in a limited weighing of the evidence to determine whether there is enough competent, credible evidence so as to permit reasonable minds to find guilt beyond a reasonable doubt * * * to support the judgment of conviction. * * * Issues of witness credibility and concerning the weight to attach to specific testimony remain primarily within the province of the trier of fact, whose opportunity to make those determinations is superior to that of a reviewing court. * * * Nonetheless, we must review the entire record. With caution and deference to the role of the trier of fact, this court weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury, as the trier of facts, clearly lost its way, thereby creating such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised

> only in the exceptional case in which the evidence weighs heavily against a conviction.

(Citations omitted.)

{¶ 41} R.C. 2923.03(A) sets forth the essential elements of complicity, and states in part: "No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: (1) Solicit or procure another to commit the offense; (2) Aid or abet another in committing the offense." In order to support a conviction for complicity by aiding and abetting, pursuant to R.C. 2923.03(A)(2), "the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime." *State v. Johnson*, 93 Ohio St.3d 240 (2001), syllabus.

{¶ 42} R.C. 2911.11 defines aggravated burglary, and states in part:

> (A) No person, by force, stealth, or deception, shall trespass in an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit * * * 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.

{¶ 43} The offense of aggravated robbery is set forth under R.C. 2911.01(A), which states: "No person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave 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."

{¶ 44} R.C. 2911.02 defines the offense of robbery as follows:

> (A) No person, in attempting or committing a theft offense 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;
>
> (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
>
> (3) Use or threaten the immediate use of force against another.

{¶ 45} The offense of kidnapping is defined under R.C. 2905.01(A), which provides: "No person, by force, threat, or deception, * * * by any means, 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; (3) To terrorize, or to inflict serious physical harm on the victim or another."

{¶ 46} We first address appellant's sufficiency argument. Under this analysis, construing the evidence most strongly in favor of the state, as we are required to do, the record shows that the state presented the following testimony regarding the events at issue. On the evening of November 21, 2010, Gibson and her boyfriend, Carter, were at their residence, along with Carter's friend, Persinger. Carter and Gibson were acquainted with appellant prior to the incident. Following a knock on the door, Carter opened the door after observing appellant. When he opened the door, appellant pushed his way in, followed by a man with a shotgun. According to Persinger, appellant "came rushing in like he was looking for stuff." Appellant "started looking through things." (Tr. 186.) Carter testified that the men "pushed their way back to the kitchen," and "they grabbed me and pulled me into the living room and threw me down on the ground."

{¶ 47} The man with the weapon stated: "Get that bitch." Appellant began going through Carter's pockets, and then proceeded to go through Persinger's pockets. The man with the weapon kicked Carter in the side of the head. According to Carter, there was no hesitation on appellant's part during the incident. Carter also testified that appellant put the money in his pocket before leaving the residence. Persinger testified that the man with the shotgun never pointed the weapon at appellant; according to Persinger, the men appeared to be working together. Appellant and the man with the weapon both fled the residence after taking money and other items. Appellant subsequently contacted Carter,

through Lewis, and offered to make amends, eventually leaving money with Lewis to give to Carter. Upon review, the state presented sufficient evidence upon which the jury could have determined that appellant solicited, procured, aided or abetted the gunman in the commission of the offenses.

{¶ 48} With respect to appellant's manifest weight challenge, appellant argues that the testimony of Carter and Persinger was not credible. More specifically, appellant points to his own testimony as refuting Carter's claim that appellant was at his apartment earlier that day playing video games. Appellant maintains that Persinger never testified that appellant played video games that day. Appellant further argues that, despite Carter's denial that he sold drugs, both Lewis and appellant testified that they had purchased marijuana from Carter on past occasions.

{¶ 49} In general, "[a] defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial." *State v. Johnson*, 10th Dist. No. 11AP-717, 2012-Ohio-2325, ¶ 32, citing *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21. Determinations with respect to weight and credibility of the evidence are primarily within the province of the trier of fact, who "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." *Johnson* at ¶ 32, citing *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶ 58. Further, "[t]he trier of fact is free to believe or disbelieve all or any of the testimony." *Id*.

{¶ 50} In the present case, the jury heard differing testimony with respect to whether Carter may have sold drugs to Lewis and appellant in the past. The trier of fact could have found Carter's testimony questionable on this point, but still found credible his account (as well as the account of Persinger and Gibson) as to appellant's role in the events on the evening of November 21, 2010. Upon review of the record, we cannot conclude that the jury lost its way and created such a manifest miscarriage of justice as to warrant reversal of the convictions. Accordingly, appellant's convictions are not against the manifest weight of the evidence.

{¶ 51} Having found that the convictions are supported by sufficient evidence and that they are not against the manifest weight of the evidence, appellant's second assignment of error is overruled.

{¶ 52} Based upon the foregoing, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.

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