

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 12AP-156
v.	:	(C.P.C. No. 11CR-05-2313)
Levander R. Davis,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 28, 2013

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

R. William Meeks Co., L.P.A., and *David H. Thomas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Levander R. Davis ("defendant"), appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a jury verdict, of one count of murder, in violation of R.C. 2903.02, one count of attempted murder, in violation of R.C. 2903.02, and one count of felonious assault, in violation of R.C. 2903.11. Defendant waived his right to a trial by jury and the trial judge found defendant guilty of having a weapon while under disability, in violation of R.C. 2923.13. Because sufficient evidence and the manifest weight of the evidence support defendant's convictions, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On May 2, 2011, defendant was indicted on one count each of murder, attempted murder, felonious assault, having a weapon while under disability, and illegal

possession of a firearm in a liquor permit premises. Each charge also carried a firearm specification. Upon application of the assistant prosecuting attorney, and for good cause shown, the trial court ordered that a nolle prosequi be entered as to the illegal possession of a firearm in a liquor permit premises charge. Following trial, defendant was found guilty of the remaining charges in the indictment. The events giving rise to the indictment occurred during the early morning hours of March 8, 2012.

{¶ 3} On March 8, 2012, defendant was a patron at Mike's Bar in Columbus, Ohio. The area where Mike's Bar is located is a high-crime area known to have gang related activity. That night, there were several patrons inside the bar near defendant, including Brandon Houston, DeAndre Fagain, and Dimetri Evans, all of whom testified at defendant's trial.

{¶ 4} Houston testified that he was at the bar with his friends, Tumarcus Steele, Donatello Taliaferro, Fagain, and a man named Al, whose last name Houston did not know. According to Houston, there were approximately 40 patrons inside Mike's Bar that evening. Houston testified that he observed defendant at the bar with two other men, neither of whom Houston knew: Tracy Ferguson, Jr., and a man with tattoos on his face who was later identified as Evans. Shortly after Houston arrived, he saw defendant lift his shirt and expose a gun. At the same time, Houston observed Ferguson "throwing up gang signs in the mirror." (Tr. 101.) At that time, Evans approached Ferguson and tried to get him to stop. Instead, Ferguson became more hostile and began arguing with Evans and defendant. At that time, Houston observed defendant reach for his hip and extend his arm. Houston heard the first gun shot at which time he turned and ran into the bathroom. According to Houston, he heard three gun shots, followed by silence and then additional gunfire and screaming. Houston stayed in the bathroom until the bar was quiet. Houston did not see defendant actually fire the gun and did not see anyone get shot. As he left the bar, Houston stumbled on a magazine clip from a gun which he pointed out to police.

{¶ 5} Fagain testified that he observed three people in the bar having an argument, and described one of those men as trying to calm down one of the other two men. Fagain observed defendant first hit Ferguson and then pull out a gun and shoot Ferguson. Fagain testified further that, after defendant shot Ferguson, defendant "just started shooting up the club." (Tr. 260.) Fagain testified that defendant was the only one

shooting at the time. When the shooting began, Fagain turned to run and was shot several times.

{¶ 6} Evans was at the bar that night with defendant and Ferguson. Evans' testimony corroborated Houston's testimony that Ferguson was throwing up gang signs. Evans testified that he knew defendant had several different guns, he knew defendant frequently carried a gun, and sometimes carried more than one gun. Evans testified that he saw defendant with a gun on the night in question, and saw defendant shoot Ferguson.

{¶ 7} Columbus Police Officer Jim Thiel was the first officer to arrive at the scene. Officer Thiel saw four to five shell casings lying in the entrance to the bar. Columbus Police Officer Timothy Mounts testified that eleven 9mm spent shell casings were recovered from the north end of the bar and that, in that same area, thirty-three 40 caliber spent shell casings were also recovered. It was determined that the 9mm shell casings had been fired from a 9mm gun which was later recovered from defendant. Columbus Police Officer Kevin Jackson testified and identified photographs he took at the scene. Columbus Police Detective Jacqueline Mitchell identified evidence which she collected and logged, including a black ammunition magazine clip found near the entrance to the bar.

{¶ 8} Columbus Police Sergeant Jeff Matthias testified concerning the circumstances surrounding defendant's arrest. At the time of his arrest, defendant admitted that he had a gun in his waistband. Sergeant Matthias identified the gun recovered from defendant as a loaded 9mm Smith & Wesson. A ballistics expert determined that the 9mm casings found at the scene were fired from defendant's handgun. The 40 caliber handgun was never recovered.

{¶ 9} The magazine clip Houston saw in the doorway was recovered and was determined to be a 40 caliber handgun magazine clip. DNA obtained from the magazine clip was compared to a sample of defendant's DNA and it was determined that defendant was a major contributor to the DNA on the magazine clip. During cross-examination, the forensic scientist who processed the DNA sample explained that a major contributor "relates to the quantity of that DNA being left on that item." (Tr. 597.) The analyst also testified that DNA can be transferred from one object to another.

{¶ 10} Defendant's counsel called Columbus Police Detective Robert Wachalec to testify. Detective Wachalec was the blind administrator for a photo array presented to

Fagain. In his report regarding the photo array, Detective Wachalec indicated that Fagain identified Evans as the shooter. Detective Wachalec testified at trial that his summary of the identification was not accurate, because Fagain had actually identified defendant as the shooter.

{¶ 11} Following a sentencing hearing on January 18, 2012, defendant was sentenced to serve 15 years to life for the murder conviction, ten years for the attempted murder conviction, eight years for the felonious assault conviction, three years for having a weapon while under disability conviction, and three years for each firearm specification. The trial court ordered that defendant serve the attempted murder, felonious assault, and having a weapon while under disability sentences concurrently to each other, but consecutive to the murder sentence and consecutive to the firearm specifications. The court merged two of the sentences for the firearm specifications. The court further ordered that defendant serve the sentence herein consecutive to a ten years prison sentence from common pleas case No. 11CR-2202, for a total prison term of 44 years to life.

II. ASSIGNMENTS OF ERROR

{¶ 12} Defendant appeals and presents the following two assignments of error:

[I.] THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S CRIM. R. 29 MOTION FOR JUDGMENT OF ACQUITTAL, AND THEREBY DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.

[II.] THE TRIAL COURT ERRED BY FINDING APPELLANT GUILTY AND THEREBY DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY PROVISIONS OF THE OHIO CONSTITUTION BECAUSE THE VERDICT OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 13} Defendant's first assignment of error asserts the court erred in failing to grant his Crim.R. 29 motion. Defendant moved for acquittal pursuant to Crim.R. 29 at the close of the State of Ohio's, plaintiff-appellee, ("State"), case-in-chief.

{¶ 14} Pursuant to Crim.R. 29(A), a court "shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction

of such offense or offenses." Because a Crim.R. 29 motion questions the sufficiency of the evidence, "[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence." *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶ 6; *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37.

{¶ 15} Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Conley*, 10th Dist. No. 93AP-387 (Dec. 16, 1993). When reviewing the sufficiency of the evidence, the court does not weigh the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79.

{¶ 16} Defendant argues that the State did not demonstrate that he: (1) purposely caused the death of Ferguson, (2) attempted to purposely cause the death of Fagain, (3) knowingly caused serious physical harm to others, or (4) that he had a prior felony conviction and possessed a weapon. According to defendant, the State failed to prove beyond a reasonable doubt that he fired a 40 caliber handgun that night.

{¶ 17} The State presented two eyewitnesses who saw defendant shoot Ferguson, and a third eyewitness who saw defendant with a gun that night. Further, although defendant claimed that there were multiple shooters in the bar that night, all three eyewitnesses who testified saw only one person with a gun in the bar before the shooting, and that person was the defendant.

{¶ 18} Although a 40 caliber handgun was not recovered that night, a 40 caliber magazine clip was recovered. Forensic evidence established that defendant was a major contributor of DNA on the magazine clip. Further, the 9mm and 40 caliber spent shell casings which were recovered from the bar were all found in the same general area, the north end of the bar.

{¶ 19} Here, both eyewitness testimony and circumstantial evidence indicated that defendant was the shooter at Mike's Bar that night and that he was the one who killed Ferguson and wounded Fagain. Accordingly, sufficient evidence supported the jury's conclusion that defendant purposely caused Ferguson's death, attempted to cause

Fagain's death, knowingly caused serious physical harm to others, and had a weapon while under disability.

{¶ 20} Because the evidence, when viewed in a light most favorable to the State was legally sufficient to support defendant's conviction, the trial court properly overruled defendant's Crim.R. 29 motion. Defendant's first assignment of error is therefore overruled.

{¶ 21} Defendant's second assignment of error asserts that his convictions are against the manifest weight of evidence presented at trial. Sufficiency of the evidence and manifest weight of the evidence are distinct concepts; they are "quantitatively and qualitatively different." *Thompkins* at 386. When presented with a manifest weight argument, we engage in a limited weighing of evidence to determine whether sufficient, competent, credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *Conley*. *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). In the manifest weight analysis, the appellate court considers the credibility of the witnesses and determines whether 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.*, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1983). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 22} In support of his argument, defendant asserts: (1) he was only seen with a 9mm handgun, (2) all the witnesses ran when the shooting began, (3) the victim and Fagain were shot several times with a 40 caliber handgun, and (4) to the extent that his DNA was found on the 40 caliber magazine clip, the State's expert admitted that DNA can be transferred to an object even if the object is never touched by the person.

{¶ 23} The State presented physical and scientific evidence establishing that defendant possessed a 40 caliber handgun on the night of the shooting. First, the State presented two eyewitnesses who saw defendant shoot Ferguson, and one of those

eyewitnesses was a friend of defendant. Second, Fagain specifically testified that defendant shot him. The evidence established that Fagain was shot twice in the stomach, indicating that he was facing defendant at the time the shots were fired. Second, there were thirty-three 40 caliber shell casings found inside the bar in the same general area as the 9mm shell casings which were fired from the gun recovered from defendant. This indicates that both guns were fired from the same general area. Third, DNA testing revealed that defendant was a major contributor to the DNA recovered from the 40 caliber magazine clip. As the State's expert noted, there are major contributors and minor contributors and here defendant was a major contributor to the DNA present on the 40 caliber magazine clip. Fourth, there was testimony that defendant owned several handguns and was known to carry more than one gun on occasion.

{¶ 24} Engaging in the limited weighing of the evidence, which we are permitted, the record does not indicate that the jury clearly lost its way. The direct and circumstantial evidence indicating that defendant shot and killed Ferguson and wounded Fagain, including eyewitness testimony and other physical evidence recovered from the scene, provided the jury with credible, competent evidence on which to find defendant guilty on all counts beyond a reasonable doubt.

{¶ 25} Defendant's second assignment of error is overruled.

III. CONCLUSION

{¶ 26} Having overruled defendant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT, P.J., and DORRIAN, J., concur.
