[Cite as *State v. McEwen*, 2013-Ohio-672.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-419
v.	:	(C.P.C. No. 11CR-05-2757)
Denzel J. McEwen,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 26, 2013

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

Brian J. Rigg, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Denzel J. McEwen ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of murder with a firearm specification. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} On May 24, 2011, appellant was indicted on two counts of murder, each being an unclassified felony, with a firearm specification attached to both counts. The indictment alleged that appellant killed William Kohler during an altercation on December 22, 2010. Count 1 of the indictment alleged appellant purposely caused Kohler's death, and Count 2 alleged Kohler died as a proximate result of appellant

committing a felony offense of violence. Appellant pleaded not guilty to the charges, and a jury trial ensued.

{¶ 3} At trial, Brittany Meeks testified as follows. In December 2010, Meeks shared an apartment with her boyfriend, Nicholas Nye. Appellant also lived there "[i]ntermittently." (Tr. Vol. I, 39.) On the evening of December 21, 2010, Meeks was at the apartment with Nye and appellant. Kohler and his girlfriend, Shelby Patzer, were also at the apartment. Appellant left the apartment around 12 midnight, and everyone else fell asleep in the bedroom by 1:00 a.m. Nye and Meeks slept on the bed, and Kohler and Patzer slept nearby on a floor mattress. Later that morning, appellant returned and started fighting with Nye in the bedroom. Meeks testified she saw Kohler try to stop the fight and saw him get shot by appellant. Afterward, appellant fled, and the police arrived. Although Meeks spoke with the police about the shooting at the scene, she testified she had not discussed the incident with anyone prior to that time. Meeks admitted that she and her friends used heroin on the night before the shooting, but testified that heroin generally only impacts her for an hour, and that her ability to recall the shooting was not affected.

{¶ 4} Patzer also testified that appellant shot Kohler during the December 22, 2010 altercation. Patzer confirmed that she and Kohler were visiting Nye and Meeks on the night before the incident. She claimed that appellant was not with them that night, and she indicated that everyone went to bed around 2:30 a.m. She said that nobody was using drugs before going to bed. She admitted to previously using heroin but said that it had no impact on her memory. Lastly, she testified that the police spoke with her, Meeks, and Nye on the morning of the shooting. She said that she had not spoken with Nye or Meeks about the incident prior to the time the police had talked with her.

{¶ 5} Nye confirmed at trial that appellant and Meeks lived with him in an apartment, but said that only his name was on the lease. According to Nye, he was at his apartment with appellant, Kohler, Meeks, and Patzer on the evening of December 21, 2010, and everyone was using drugs except for Kohler. Nye admitted he was high on heroin, but claimed the drug did not affect his memory. Nye, Meeks, Kohler, and Patzer

went to bed around 3:00 a.m., and appellant left. Appellant returned later that morning and started fighting with Nye. They were in Nye's bedroom, and, at one point, Nye walked away from the fight and sat on his bed. He put his head down and heard gunshots. He looked up and saw Kohler bleeding and appellant running away.

{¶ 6} Theresa Rudell lived next to Nye, and testified that she heard shots fired in Nye's apartment at approximately 9:00 a.m. on December 22, 2010. She looked out the peephole of her door and saw appellant fleeing the apartment. She called the police immediately.

{¶ 7} Franklin County Coroner Jan Gorniak testified that Kohler was pronounced dead at 9:49 a.m. on December 22, 2010. According to Gorniak, Kohler died from a gunshot wound to the chest.

{¶ 8} Columbus Police Officer James Marsh was dispatched to the shooting scene and testified as follows. Marsh went to the scene around 9:15 a.m. and other police officers arrived soon afterward. Marsh saw Kohler lying on the sidewalk, bleeding, and unable to talk. He also saw Nye, Patzer, and Meeks. Marsh apprehended them for questioning and placed them in separate police cruisers. He claimed that those individuals did not have time to discuss the shooting between themselves because they were apprehended and separated shortly after the incident.

{¶ 9} Detective Pat Dorn arrived at the shooting scene after Marsh and testified as follows. Nye, Patzer, and Meeks spoke with Dorn about the shooting, and they independently identified appellant as the shooter. Dorn subsequently searched the apartment where the shooting occurred and took blood samples from the apartment. Dorn explained to the jury that the blood samples were not tested because only Kohler had been injured, and, thus, he believed the blood could only have come from Kohler. Dorn did not collect DNA or fingerprints because, according to Dorn, since appellant lived in the apartment, there would have been traces of those elements expected to be in the apartment. Dorn further testified that he did not test anyone's hands for gunshot residue because the room where the murder occurred was small and residue would have been on all persons present in the room during the incident.

{¶ 10} Appellant testified on his own behalf. He claimed that he was not at Nye's apartment on the date of the shooting and denied shooting Kohler.

{¶ 11} After deliberations, the jury found appellant guilty on both murder counts and firearm specifications. The trial court merged the counts and specifications and sentenced appellant to prison for a total of 18 years to life.

II. ASSIGNMENTS OF ERROR

{¶ 12} Appellant has filed a timely notice of appeal and assigns the following as error:

> 1. The verdict is against the sufficiency and manifest weight of the evidence.
>
> 2. There was insufficient evidence to convict the defendant.

III. DISCUSSION

A. First and Second Assignments of Error: Sufficiency and Manifest Weight of the Evidence

{¶ 13} We address appellant's first and second assignments of error together. Appellant first contends that the jury's verdict is based on insufficient evidence. We disagree.

{¶ 14} Sufficiency of the evidence is a legal standard that tests whether the evidence is legally adequate to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Whether the evidence is legally sufficient to support a verdict is a question of law, not fact. *Id.* In determining whether the evidence is legally sufficient to support a verdict, " '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. A verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

{¶ 15} In a sufficiency of the evidence inquiry, appellate courts do not assess whether the prosecution's evidence is to be believed, but whether, if believed, does the evidence support the verdict. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80 (concluding that the evaluation of witness credibility is not proper on a review for the sufficiency of evidence); *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4, citing *State v. Woodward*, 10th Dist. No. 03AP-398, 2004-Ohio-4418, ¶ 16 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime").

{¶ 16} The prosecution alleged that appellant committed murder by fatally shooting Kohler, and the jury found appellant guilty of that crime. Appellant argues that the jury's verdict cannot stand because the evidence failed to establish that he shot Kohler. In particular, appellant contends that there is no physical evidence linking him to the murder. However, the prosecution need not rely on physical evidence to prove a crime. *State v. Jordan*, 10th Dist. No. 05AP-1330, 2006-Ohio-5208, ¶ 27. Instead, a crime may be proven solely by testimony from witnesses who were present when the crime occurred. *Id.*

{¶ 17} Here, the jury's finding of appellant's guilt was supported by the testimony of four witnesses. Meeks and Patzer testified that they saw appellant shoot Kohler. While this direct evidence alone would have been sufficient to support the jury's guilty findings, there was additional evidence presented from Nye and Rudell. Nye testified that he heard gunshots while sitting on his bed with his head down and when he looked up, Kohler had been shot, and he saw appellant running out of the room. Rudell testified that she saw appellant fleeing from Nye's apartment after hearing gunshots from inside the apartment. Both Nye and Rudell's testimony, if believed, constituted evidence from which the jury could infer appellant was guilty of murdering Kohler.

{¶ 18} Accordingly, after a review of the evidence, we conclude that there is sufficient evidence to support the jury's verdict finding appellant guilty of murder.

{¶ 19} Next, appellant contends that the jury's verdict is against the manifest weight of the evidence. We disagree.

{¶ 20} When presented with a manifest weight challenge, an appellate court may not merely substitute its view for that of the trier of fact, but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387. An appellate court should reserve a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 21} 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.

{¶ 22} Appellant argues that the weight of the evidence failed to establish that he murdered Kohler. He again asserts that no physical evidence linked him to the murder. As explained above, physical evidence is not required to support a conviction.

{¶ 23} Appellant also contends that Nye, Meeks, and Patzer were not credible. Appellant first asserts that the three witnesses lacked credibility because they used heroin on the night before the incident. Although the evidence established that only Nye and Meeks used heroin that night, all three witnesses testified as to whether any heroin ingested that evening would have affected their ability to recall the murder and concluded that it would not. It was in the jury's province to determine whether Nye, Meeks, and Patzer were under the influence of heroin when the murder occurred such that it would affect their ability to perceive or recall the evidence that evening.

{¶ 24} Appellant additionally claims that those witnesses lacked credibility because they were inconsistent on matters such as when they went to bed and who had

used drugs before the murder. "A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. The trier of fact is free to believe or disbelieve all or any of the testimony." *State v. Williams*, 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶ 16 (citations omitted). *See also State v. Banks*, 10th Dist. No. 09AP-13, 2009-Ohio-4383, ¶ 15 (stating that the fact finder is free to resolve or discount alleged inconsistencies). "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." *Williams* at ¶ 16 (citations omitted).

{¶ 25} Here, we need not disturb the jury's verdict on grounds that Nye, Meeks, and Patzer provided inconsistent testimony on matters occurring before the murder. The witnesses provided corroborating testimony to implicate appellant in the murder, and Rudell bolstered their testimony when she said that she saw appellant fleeing from Nye's apartment after she heard gunshots originating there.

{¶ 26} Next, appellant asserts that the jury lost its way by believing Nye, Meeks, and Patzer because they could have conspired to fabricate an accusation against him before they spoke with the police. It was reasonable for the jury to conclude that the witnesses did not engage in that type of collaboration. Marsh said that the witnesses were placed in separate police cruisers before they would have had an opportunity to discuss the incident between themselves, and Meeks and Patzer confirmed that they did not discuss the incident with anyone before being interviewed by the police.

{¶ 27} Lastly, appellant notes that he denied being at Nye's apartment when the murder occurred. But it was within the province of the jury to reject appellant's testimony and accept the corroborating evidence establishing that he was guilty of murdering Kohler.

{¶ 28} Because the jury could reasonably have believed that appellant committed the offenses of which he was convicted, we find the jury's verdict was not against the manifest weight of the evidence. Having also concluded that sufficient evidence supports the verdict, we overrule appellant's first and second assignments of error.

IV. CONCLUSION

{¶ 29} Because appellant's two assignments of error are overruled, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
