[Cite as *State v. Friece*, 2015-Ohio-2871.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 14AP-984
v.	:	(C.P.C. No. 13CR-1163)
Jeffrey A. Friece,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 16, 2015

Ron O'Brien, Prosecuting Attorney, and *Sheryl Prichard*, for appellee.

Stephen Dehnart, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Defendant-appellant, Jeffrey A. Friece, appeals from a criminal conviction and judgment of the Franklin County Court of Common Pleas that was rendered following a jury trial. On November 3, 2014, Friece was sentenced to serve seven years imprisonment for the offenses of receiving stolen property, a felony of the fourth degree, and discharging a firearm into an occupied structure, a felony of the second degree, for which a consecutive, mandatory three-year prison term was imposed for the jury's finding that he had committed the second-degree felony using a gun. Friece argues that the jury's findings and the court's convictions thereon are supported by insufficient evidence and are against the manifest weight of the evidence. Because we find his convictions were supported by adequate evidence and that the weight of that evidence was also in favor of conviction, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On November 11, 2012, someone fired four or five shots through a house located at 1823 Steckel Road in the city of Reynoldsburg. This house was home to a family of four. The two children, ages one and five, along with their father, Eric Schott, were in the house at the time of the incident, while their mother was at work.

{¶ 3} When the shooting occurred, Schott threw his son behind some furniture and called the police. One neighbor, Renee Horn, heard the shots, drew back her curtains, and a saw a dark blue or black car driving in the lawn in front of 1823 Steckel Road. She was unable to identify the car with certainty and did not see the driver. Another neighbor, Robert Clary, heard the shots and looked out his door. He saw a dark car that he described as likely blue and that he believed to be a Chrysler 300. He testified that the car started to go through his front yard, but he could not identify the car with certainty and did not see the driver.

{¶ 4} The house at 1823 Steckel Road is a one-story ranch dwelling with no basement. Some of the shots passed completely through the house. None of the three occupants of the house were injured by the gunshots.

{¶ 5} The officer who responded to the scene listed 6:55 p.m. as the time the shooting took place. The record does not definitively reflect whether this time is the time of the call to the police or whether witnesses recollected that the shooting occurred at that time.

{¶ 6} Meanwhile, another officer was responding to a call about a stolen car. According to the testimony of the responding officer, Malcolm Russell had made a complaint that his sister's car was stolen. Although Russell failed to respond to subpoenas for trial, the state called other witnesses to testify about the circumstances surrounding the stolen car. According to the investigating officer and Russell's sister, Russell had borrowed his sister's car, a blue Chrysler 300, earlier in the day on November 11, 2012. Around the time of the car theft, he had parked it at a house relatively near where the shooting took place. He went inside the house to wash his hands and estimated he took approximately 20-30 seconds to do so. When he looked outside after washing his hands the car was gone. The incident report for the car theft was clocked as 7:01 p.m. The

investigating officer testified that 7:01 p.m. could have been the time at which Russell called the police, or it could have been the time Russell estimated that the car was stolen.

{¶ 7} The next morning, at around 6:00 a.m., a Columbus police officer followed Friece in a blue Chrysler 300 (Russell's sister's car) and performed a computerized check of the car's license plates. Upon doing so, the officer discovered that the car was stolen. He followed the car for a brief time until it pulled into a car wash and the driver exited the car. At that point, the patrol officer exited his patrol car and arrested Friece for receiving stolen property. According to the patrol officer, even though it was 6:00 a.m., Friece appeared intoxicated and smelled of alcohol.

{¶ 8} Friece was wearing blue latex gloves when he was arrested, and a "pat down" the officer conducted resulted in the finding of an empty shell casing in Friece's pocket. (Sept. 8-9, 2014 Tr. 95.) When the officer searched the car, he located a Ruger 9 mm handgun under the driver's seat, and a mask, bottle of bleach, and pair of vice grips in the passenger area.

{¶ 9} A Reynoldsburg police detective assigned to the case testified that he interviewed Friece at the police station. Friece stated that he drinks heavily and tends to black out. As part of the investigation, Ohio Bureau of Criminal Investigation forensics personnel recovered DNA from the handgun, but they were not able to determine that it belonged to Friece. However, they were able to determine that the shell casing found in Friece's pocket had been fired by the Ruger 9 mm found under the stolen car's driver's seat and that the same gun had fired the bullets for which three empty shell casings were found in the roadway in front of 1823 Steckel Road.

{¶ 10} Friece had gunshot residue ("GSR") on his hands. Expert testimony allowed that GSR would potentially be present on Friece's person if Friece had touched anything with GSR on it (like the interior of a car in which a gun had been fired or an expended shell casing). It would also be present if he had fired a gun or had been nearby when a gun was fired. Russell, who reported the car stolen, was not tested for GSR, even though he had reported to Reynoldsburg police that he had stopped the car at near the same time in order to wash his hands.

{¶ 11} On March 1, 2013, Friece was indicted for discharging a firearm into an occupied house and receiving and retaining stolen property. The case went before a jury

September 8 through 11, 2014, and, on September 12, 2014, the jury found Friece guilty of both charges. Following a hearing on October 30, 2014, the trial court filed an entry of conviction and sentence in which Friece was required to serve seven years in prison for these crimes. Friece now appeals.

II. ASSIGNMENT OF ERROR

{¶ 12} Friece asserts a single assignment of error for our review:

> Appellant's convictions were not supported by sufficient evidence and were against the manifest weight of the evidence.

III. DISCUSSION

{¶ 13} Friece asserts both concepts, sufficiency and weight of the evidence, in a single assignment of error. The Supreme Court of Ohio has "carefully distinguished the terms 'sufficiency' and 'weight' * * *, declaring that 'manifest weight' and 'legal sufficiency' are 'both quantitatively and qualitatively different.' " *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 10, quoting *State v. Thompkins*, 78 Ohio St.3d 380 (1997), paragraph two of the syllabus.

{¶ 14} Sufficiency of the evidence is:

> "[A] term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." * * * In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law.

Id. at ¶ 11, quoting *Thompkins* at 387, quoting *Black's Law Dictionary* 1433 (6th Ed.1990). "In reviewing a record for sufficiency, '[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. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 47, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 15} By contrast, weight of the evidence:

> [C]oncerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue

> rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*."

(Emphasis sic.) *Eastley* at ¶ 12, quoting *Thompkins* at 387, quoting *Black's* at 1594. In a manifest weight analysis, "the appellate court sits as a 'thirteenth juror' and disagrees with the jury's resolution of the conflicting testimony." *Thompkins* at 388, quoting *Tibbs v. Florida*, 457 U.S. 31, 41-43 (1982).

{¶ 16} There are also significant procedural differences in how the two evidentiary review concepts are applied. While a mere majority of a reviewing court may find that evidence was insufficient, "[n]o judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause." Ohio Constitution, Article IV, Section 3(B)(3); *see also Thompkins* at paragraphs three and four of the syllabus.

{¶ 17} Moreover, appellate findings on manifest weight versus sufficiency have different effects on retrial. "[T]he Double Jeopardy Clause does not preclude retrial of a defendant if the reversal was grounded upon a finding that the conviction was against the weight of the evidence. However, retrial is barred if the reversal was based upon a finding that the evidence was legally insufficient to support the conviction." *Thompkins* at 387, citing *Tibbs* at 47. Thus, we address the concepts of sufficiency and weight separately.

A. Whether the Conviction was Supported by Sufficient Evidence

{¶ 18} In order for the evidence to be sufficient to support Friece's convictions, at least some evidence had to be presented at trial for each of the elements of the offenses such that we could conclude "after viewing the evidence in a light most favorable to the prosecution, [that] a[] rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Monroe* at ¶ 47.

{¶ 19} As relevant to this case, with respect to improperly discharging a firearm into a habitation, R.C. 2923.161 provides:

> (A) No person, without privilege to do so, shall knowingly do any of the following:

> (1) Discharge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual[.]

{¶ 20} The state presented evidence that 1823 Steckel Road was the home of a family of four and that three of them were home at the time of the shooting. The state's evidence showed that several bullets hit the front of the house and that some passed through the entire house. Witnesses testified that three to five shots apparently came from the driver of a car. The prosecution also presented evidence that Friece was driving a car that matched the description of the car from which shots were reported fired. In that car, Reynoldsburg police found under the driver's seat the firearm that ejected three shell casings found in the roadway in front of 1823 Steckel Road. Reynoldsburg police found a shell casing in Friece's pocket that was forensically determined to have been shot from the gun found in the car. Friece admitted to police that he drinks a lot and blacks out. A neighbor of the victim who saw the car, testified that it drove through his yard, and the arresting officer reported that Friece appeared intoxicated at the time he arrested him. This evidence provides a sufficient basis for a "rational trier of fact" to find "the essential elements of the crime proven beyond a reasonable doubt." *Monroe* at ¶ 47.

{¶ 21} As relevant to this case, with respect to the offense of receiving stolen property, R.C. 2913.51 provides:

> (A) No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.

The state presented evidence that Friece was found driving a car that was not his, which the owner had not given him permission to drive. The owner also specifically testified that she had never met Friece before and had no idea who he was before encountering him in the trial. Drawing inferences in favor of the state, this evidence is sufficient for a "rational trier of fact" to find "the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶ 22} The evidence was sufficient to support both of Friece's convictions.

B. Whether Friece's Convictions were Against the Manifest Weight of the Evidence

{¶ 23} The evidence in this case contained considerable facts indicative of guilt. Friece was found driving a car that was not his and which he had not been given permission to drive. Under the driver's seat was the firearm that was used in a drive-by shooting the night before, and in Friece's pocket was an empty shell casing that expert testimony supported had been ejected from that firearm. Friece admitted to police that he drinks a lot and blacks out. A neighbor of the victim who saw the car, testified that it drove through his yard, and the arresting officer reported that Friece appeared intoxicated at the time he arrested him.

{¶ 24} Further, Friece's hands tested positive for GSR, and he appeared intoxicated. In addition, the police discovered a mask in the passenger compartment of the car. Finally, at the time of his arrest, Friece was wearing latex gloves, had a bottle of bleach with him, and was in a car wash bay.

{¶ 25} There were also some facts that favored Friece. The car showed no evidence of a hotwiring-style theft; the keys were in it. In addition, the report on the shooting indicated an incident time of 6:55 p.m. and the stolen car report indicated an incident time of 7:01 p.m. At trial, Friece argued that the discrepancy in the incident times showing the car theft was reported after the report of drive-by shooting meant that even though Friece came into possession of the car at some point, he did not do so until after the shooting took place. Friece argued that he had GSR on his hands simply because he was in the car and picked up a shell casing he found there. The defense urged the jury to consider the incredible coincidence the prosecution's theory required them to accept—that Friece, intending to commit a drive-by on a family he never met before, had just happened on a nearby car with the keys in it to use in the drive-by. Friece's attorney theorized that Russell, whose hands were not analyzed for GSR (he had just washed them at his sister's home), and who disobeyed a subpoena and failed to appear and testify at Friece's trial, had done the drive-by shooting before reporting the car stolen and arranging for it to end up in Friece's possession.

{¶ 26} Sitting as the "thirteenth juror" upon a manifest weight review of the evidence adduced at trial, we cannot say that the jury " ' "clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered." ' " (Alteration made in *Tewarson*.) *Eastley* at ¶ 20, quoting *Tewarson v.*

Simon, 114 Ohio App.3d 103, 115 (9th Dist.2001), quoting *Thompkins* at 387. There was considerable circumstantial evidence against Friece, and the investigating officer testified that it is not uncommon for persons to wrongly estimate the time when an offense took place or, as in the reporting of a stolen car, to fail to call the police immediately. A jury was certainly able to find, based on the testimony it heard, that the timing discrepancy in the reports does not definitively indicate that the shooting actually took place before the car theft. Despite the fact that the DNA evidence was not definitive; the GSR evidence allowed for multiple inferences; law enforcement did not test the hands of Russell (whether or not GSR could be detected after washing his hands) and the state lacked Russell's testimony, we find under a manifest weight review that a jury could make the inferences it did from the evidence and convict Friece of both counts against him.

IV. CONCLUSION

{¶ 27} We overrule Friece's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and HORTON, J., concur.