

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 14AP-976
v.	:	(C.P.C. No. 13CR04-1791)
	:	
Marseant D. Wellman,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 17, 2015

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*,
for appellee.

Brian J. Rigg, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Marseant D. Wellman, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} On April 1, 2013, a Franklin County Grand Jury indicted appellant with two counts of felonious assault in violation of R.C. 2903.11, and single counts of tampering with evidence in violation of R.C. 2921.12, and having a weapon while under disability ("WUD") in violation of R.C. 2923.13. The charges arose from the shooting of two men outside an after-hours club in Columbus, Ohio. Appellant entered not guilty pleas and

proceeded to a jury trial. Appellant elected to have the WUD charge tried to the court instead of to the jury.

{¶ 3} At appellant's trial, both of the shooting victims testified about the night they were shot but neither could identify who shot them. However, Brett Waite, a licensed security guard who was working at the club that night, identified appellant as the shooter. He testified that he was in the club's parking lot when he heard two shots. He ran to the sound of the shots and saw appellant fire a gun. Waite drew his weapon and ordered appellant to drop the gun. Appellant complied. Waite then ordered appellant and two other men to get on the ground and Waite held them until police officers arrived on the scene. Waite found the gun appellant dropped underneath a car and turned it over to the police. Tests on a DNA sample found on the gun indicated that appellant could not be excluded as the major donor. Gunshot residue testing also indicated that particles highly indicative of gunshot primer residue were identified in a sample taken from appellant. Such a result indicates that an individual either fired a gun, was in the area of a gun when it was fired, or handled an item with gunshot primer residue.

{¶ 4} The jury found appellant not guilty of both counts of felonious assault. The trial court, however, found him guilty of the WUD charge and sentenced him accordingly.¹

II. The Appeal

{¶ 5} Appellant appeals his conviction and assigns the following errors:

[1.] The jury's not guilty verdicts of counts 1 through 4 constituted a midtrial acquittal triggering double jeopardy protection against later conviction of the weapons under disability charge.

[2.] The trial court's guilty verdict to having a weapon under disability was against the manifest weight of the evidence because there was insufficient evidence proving this charge.

A. Double Jeopardy

{¶ 6} Appellant argues in his first assignment of error that once the jury found him not guilty of felonious assault, "the issue preclusion component of the double jeopardy clause prevented the trial court [from] engaging in post-verdict fact-finding proceedings which resulted in a different result for the [WUD] charge." This court dealt

¹ After the state's case-in-chief, the trial court granted the state's motion to dismiss the count of tampering with evidence.

with the identical argument in *State v. Smith*, 10th Dist. No. 14AP-33, 2014-Ohio-5443, ¶ 19. In that case, as in appellant's case, a jury acquitted Smith of a number of charges, including a count of felonious assault, but the trial court found him guilty of a WUD charge. On appeal, we affirmed the WUD conviction, rejecting the very argument appellant presents here. In light of this court's opinion in *Smith*, we deny appellant's first assignment of error.

B. The Manifest Weight of the Evidence

{¶ 7} Appellant contends in his second assignment of error that his conviction is against the manifest weight of the evidence. We disagree.

{¶ 8} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). When presented with a challenge to the manifest weight of the evidence, 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. *Id.* An appellate court should reserve reversal of 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); *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶ 12.

{¶ 9} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 6. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, " 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id.*, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Accordingly, we afford great deference to the jury's determination of witness credibility. *State v. Redman*, 10th Dist. No. 10AP-654, 2011-Ohio-1894, ¶ 26, citing *State v. Jennings*, 10th Dist. No. 09AP-70,

2009-Ohio-6840, ¶ 55. *See also State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus (credibility determinations are primarily for the trier of fact).

{¶ 10} In order to find appellant guilty of the WUD charge, the state had to prove that he knowingly acquired, had, carried, or used any firearm or dangerous ordnance after having been convicted of any felony offense of violence. R.C. 2923.13(A)(2). The parties stipulated that appellant had a felony conviction of robbery, which is defined as an offense of violence. R.C. 2901.01(9)(a). Thus, the only question is whether the state proved that appellant had, carried, or used a firearm.

{¶ 11} Appellant's arguments in support of this assignment of error generally attack the reliability and credibility of the DNA and gunshot residue test results. These arguments, however, completely ignore Waite's testimony. Waite testified that he saw appellant fire a gun in the parking lot. Waite ordered appellant to drop the gun. Appellant complied with that order. (Tr. 212-13.) This testimony, which appellant does not dispute or otherwise attempt to discredit, is evidence that appellant had, carried, or used a firearm. Accordingly, even without considering the DNA and gunshot residue test results, we cannot say that the trial court lost its way by finding appellant guilty of the WUD charge. Appellant's conviction is not against the manifest weight of the evidence.²

{¶ 12} We overrule appellant's second assignment of error.

III. Conclusion

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

Judgment affirmed.

SADLER and BRUNNER, JJ., concur.

² To the extent that appellant's second assignment of error can be read to raise a claim of insufficient evidence, our disposition of his manifest weight argument resolves that claim. *State v. Neroni*, 10th Dist. No. 14AP-236, 2014-Ohio-5525, ¶ 15, citing *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, ¶ 46 (10th Dist.).