[Cite as *State v. Hunley*, 2013-Ohio-628.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-11-1067

Appellee — Trial Court No. CR0201001145

v.

Kijuan L. Hunley — **DECISION AND JUDGMENT**

Appellant — Decided: February 22, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that found appellant guilty of one count of murder with a firearm specification in violation of R.C. 2903.02(A), 2929.02 and 2941.145. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} On January 25, 2010, appellant was indicted on one count of murder with a firearm specification. Appellant entered a plea of not guilty and a jury trial was ultimately set for February 22, 2011. On February 23, 2011, appellant was found guilty and sentenced to 15 years to life in prison for the murder charge and three years for the accompanying firearm specification, with the sentences to be served consecutively.

{¶ 3} Appellant sets forth the following assignments of error:

> First Assignment of Error
>
> Appellant was denied his right to due process under the law in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 16 of the Ohio Constitution.
>
> Second Assignment of Error
>
> Appellant's conviction was against the manifest weight of the evidence in violation of the due process clause of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 1, 2, 10, 16 & 19 of Article I of the Ohio Constitution.

{¶ 4} In support of his first assignment of error, appellant asserts that the trial court abused its discretion and denied appellant's right to due process when it "forced" him to be tried in handcuffs. Appellant argues that there is nothing in the record to indicate that he ever disrupted court proceedings or acted in a manner that would pose a security risk during trial. Appellant also claims that the trial court failed to consider "alternative security measures" that would have provided a similar level of protection to

the courtroom. Appellant does not, however, specify what alternative security measures the trial court should have considered.

{¶ 5} "Generally, a criminal defendant should not appear before the jury in prison clothes or restraints because it may impair the due process presumption of innocence." *State v. Lewis*, 6th Dist. No. S-10-029, 2011-Ohio-4137, ¶ 12. This court has held that while a criminal defendant may waive his right to wear civilian clothing and elect to remain in his jail uniform as a matter of trial strategy, such waiver must be of the defendant's own free will, knowingly and intelligently done, and must be fully supported by the record. *State v. Collins*, 6th Dist. No. L-05-1399, 2007-Ohio-3578, ¶ 55. Further, a defendant is entitled to attend his trial free of shackling. *State v. Moore*, 6th Dist. No. WD-96-022, 1996 WL 715461 (Dec. 6, 1996).

{¶ 6} The colloquy which transpired at appellant's February 7, 2012 pretrial reveals quite clearly that the trial court did not force appellant to appear before the jury in a jumpsuit and handcuffs. To the contrary, the trial court spoke directly to appellant and articulated its obligation to make sure appellant received a fair trial, specifically mentioning defense counsel's efforts to obtain clothing so that the jury would not see that appellant was in custody. Appellant responded that he would like to wear the jumpsuit. When the trial court asked appellant if he realized that, by wearing the prison jumpsuit, the jury would know that he was in custody, appellant responded affirmatively, again insisting that he wanted to wear the jumpsuit.

{¶ 7} As to the issue of restraints, if a trial court finds it necessary for a defendant to appear at trial shackled, the record should then disclose the court's reasoning for the restraints. *State v. Carter*, 53 Ohio App.2d 125, 132, 372 N.E.2d 622 (4th Dist.1977). In this case, the trial court explained its concern due to appellant's recent conviction on two counts of assaulting a peace officer. The court discussed the issue at length with appellant as follows:

> THE COURT: Okay. The other thing is, is because of your potential assaultive behavior, I am going to keep you handcuffed during the trial.
>
> THE DEFENDANT: Right, right. That's cool.
>
> THE COURT: We are going to have you – your hands will be available but you'll have a belly chain around your waist, and your arms will be restricted so that you cannot harm yourself, harm your attorney, or harm any of the officers that may be guarding you.
>
> I have a lot of different options as it relates to that. One of them is I could keep you just the way you are right now with your hands behind your back.
>
> THE DEFENDANT: I request it to be like this, just like this.
>
> THE COURT: You want to have them behind your back?
>
> THE DEFENDANT: Yeah.

THE COURT: Okay. And again, the reason that we do that is so that the jury doesn't see that you're being restrained.

THE DEFENDANT: Okay.

THE COURT: But if you want to be like that, we will have your hands behind your back. I don't think there will be anything that you'll be required to sign during the proceedings. But we will have you dressed just the way you are dressed right now if that's your desire.

THE DEFENDANT: That's just fine. * * *

{¶ 8} Clearly, appellant chose to appear before the jury in a jumpsuit, handcuffed behind his back. Although it was ultimately the trial court's decision to keep appellant in handcuffs, it was appellant's choice specifically to remain handcuffed behind his back. This matter was addressed during two hearings. The dialog quoted above took place on February 7, 2011. Appellant was scheduled to be tried on the murder charge the following day. The murder trial date was continued to February 22, 2011, however, due to the unavailability of a material witness. In the meantime, appellant was tried on several assault charges and convicted. Therefore, at the time of his murder trial, appellant was no longer a defendant known for his "*potential* assaultive behavior," as the trial court described him on February 7, 2011—he was a defendant recently convicted of several counts of assaulting a peace officer. Despite having discussed the matter with appellant at length at the February 7, 2011 pretrial, the trial court raised the issue again immediately before the murder trial as follows:

THE COURT: * * * It was my understanding the last trial that you would not try the clothes on, you would not allow us to hide the chains. Is it still your position that you want to be handcuffed during the course of the trial?

THE DEFENDANT: Yeah.

{¶ 9} We further note that the trial court instructed the jury, at the beginning of the trial and again before deliberation, that nothing was to be inferred from the fact that the defendant was dressed in jail clothing and obviously in custody.

{¶ 10} Based on all of the foregoing, including appellant's assault convictions and his own expressed desire to be handcuffed behind his back, we find that appellant's due process rights were not violated. The trial court did not abuse its discretion by complying with appellant's wishes and, accordingly, appellant's first assignment of error is not well-taken.

{¶ 11} In support of his second assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence because the state presented the testimony of only one witness pointing to him as the gunman. Appellant further asserts that the witness's testimony was not credible because at the time of trial the witness was a convicted felon who received a negotiated plea and sentence for his testimony at trial.

{¶ 12} In determining whether a verdict is against the manifest weight of the evidence, the appellate court "weighs the evidence and all reasonable inferences, and

considers the credibility of witnesses." *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). The court then makes a determination as to whether, in resolving conflicts in the evidence, the factfinder "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id*. Accordingly, this court must determine whether a rational trier of fact could have found the disputed elements of the crime—in this case, murder with a gun specification—established beyond a reasonable doubt. *State v. Wilson*, 8th Dist. No. 84593, 2005-Ohio-511.

{¶ 13} The jury heard the testimony of two police officers who responded to the scene, a detective, an officer assigned to the scientific investigations unit, an officer assigned to firearms investigations, the assistant Lucas County coroner, and four individuals who know appellant and were at the scene or nearby at the time of the shooting.

{¶ 14} Several of the officers testified as to their investigation of the scene where the body of Victor Johnson was found and as to various pieces of evidence, including two 9 millimeter shell casings found near the body and some pieces of a projectile removed from the victim's body during the autopsy. The murder weapon was not located. Deputy Coroner Cynthia Beisser testified that Johnson's body had five separate gunshot wounds: an entrance wound to the back of his head, an entrance wound on the back of his left shoulder, and in-and-out wounds on his left side, the back of his right arm, and his right hand. Beisser was unable to determine the range of fire in this case

other than to say there were no contact wounds. Beisser determined that the cause of death was multiple gunshot wounds and the manner of death was homicide.

{¶ 15} Terrell Mitchell testified that he was a friend of both appellant and Johnson. On the night of the shooting, he was standing on the sidewalk along Hollywood Avenue in Toledo talking to appellant, Johnson, and Alonzo Anderson, another friend. Mitchell stated that after they talked for approximately 20 minutes, "somebody started shooting." Mitchell did not see who was shooting because by that time he was talking to Anderson with his back turned to appellant and Johnson. He knew that appellant and Johnson were standing behind him at that time. To Mitchell's knowledge, no one else was behind him. As soon as Mitchell heard the gunshots, he "ran for his life" without looking around. Alonzo Anderson confirmed Mitchell's testimony, stating that he was standing with Mitchell when he heard gunshots coming from behind him and immediately ran away. Andre Autman testified that he was friends with appellant, Johnson, Anderson and Mitchell. On the evening of the shooting, while Autman was standing on the street, he saw appellant and Mitchell drive past. About 15 minutes later, he saw Johnson and Anderson walk by. Shortly after that, he heard gunshots. Like the others, he immediately ran in the opposite direction.

{¶ 16} Benjamin Mathis testified he was friends with Johnson, Anderson, Autman and Mitchell and that they would "hang out together" on Hollywood Avenue. Mathis had known appellant since Mathis was a child. Mathis explained that he was currently serving a four-year sentence for convictions of felonious assault with a firearm

specification and grand theft. Mathis was originally charged with two counts of felonious assault, one count of attempted murder, one count of robbery and one count of aggravated robbery in one case, and grand theft in another. Mathis entered a plea in his case as a result of a plea agreement offered by the state for his testimony in appellant's case. Mathis was with appellant and a few other friends early in the day of the shooting until appellant broke away from the group. Later that night, Mathis was on his grandmother's porch on Lawrence Avenue, one block over from Hollywood Avenue, when he heard gunshots. Mathis was curious and headed in the direction of the shots. As he did, he saw Mitchell and Anderson running away from Hollywood and toward him through an opening in the trees. Mathis ran through the trees and saw Johnson running from appellant, who was chasing him and shooting at him. At that point, Mathis turned around and went back to his grandmother's house.

{¶ 17} This court has carefully reviewed and considered the record of evidence. Appellant characterizes the witnesses, Mathis in particular, as having no credibility. Although we may review credibility when considering the manifest weight of the evidence, the credibility of witnesses is still primarily an initial determination for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact 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." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d

77, 80-81, 461 N.E.2d 1273 (1984). A jury may believe all, part, or none of a witness's testimony. *State v. Eisenman*, 10th Dist. No. 10AP-809, 2011-Ohio-2810, ¶ 16. The jury in this case found the testimony of appellee's witnesses to be credible and sufficient for conviction. We find no evidence that the factfinder lost its way or created a manifest miscarriage of justice. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 18} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE