

[Cite as *State v. Monroe*, 2009-Ohio-4994.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92291

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

DARREN MONROE

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505319

BEFORE: McMonagle, J., Cooney, A.J., and Boyle, J.

RELEASED: September 24, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

William D. Mason
Cuyahoga County Prosecutor
BY: Thorin Freeman
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

Robert Tobik
Chief Public Defender
BY: John T. Martin
Assistant Public Defender
1200 West 3rd Street
Cleveland, OH 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} The state of Ohio (the “State”) appeals from the judgment of the trial court granting defendant-appellee Darren Monroe’s motion for a new trial. We affirm.

I. Background

{¶ 2} Monroe was indicted on one count of aggravated murder with a firearm specification and mass murder specifications, and two counts of attempted murder, both with firearm specifications. He pleaded not guilty and the case proceeded to trial. The trial court granted Monroe’s Crim.R. 29(A) motion for acquittal in part and dismissed the mass murder specifications, thus reducing the aggravated murder charge to murder. The jury subsequently returned a verdict of guilty as to count one, murder with a firearm specification, but acquitted Monroe of both counts of attempted murder.

{¶ 3} Monroe subsequently filed motions for acquittal and for a new trial. After a hearing, the trial court denied the motion for acquittal but granted the motion for a new trial. In its written findings of fact and conclusions of law, the court concluded that the verdict was against the manifest weight of the evidence. Specifically, the trial court held that the jury lost its way in relying upon the testimony of State’s witnesses Crystal

Demopoulos and Daniel Smith, because they were biased against Monroe and inherently not credible. The State now appeals from this judgment.

II. Trial Testimony

{¶ 4} In the early morning hours of December 22, 2007, the victim, David Bober, was shot in the back as he was running from the shooter. His half-brother, Raymond Bober, Jr., and his friend, Milton Caraballo, Jr., testified at trial about the events that led to the shooting.

{¶ 5} According to Ray Bober, on the evening of December 21, 2007, he and David went to Caraballo's house to drink and shoot pool. They left around 3:30 a.m. to return to David's house. Ray rode with David. As they turned off West 48th Street onto Koch Court (which runs west off West 48th Street), David yelled back at someone on the street who had said something to him. David turned south into the alley off Koch Court behind his house, parked the car in his driveway, and then ran back down the alley and up Koch Court to the intersection of Koch Court and West 48th Street. Ray followed five seconds behind.

{¶ 6} Ray admitted that he has trouble with his right peripheral vision, but stated that "straight ahead I got excellent eyesight." He testified that as he turned the corner from the alley onto Koch Court, he saw David standing in the street near the southwest corner of Koch Court and West 48th Street. As Ray ran up Koch Court, he saw an African-American male, about six feet

one inch tall, weighing approximately 200 pounds, standing in the middle of the street and “pointing something.” Ray heard a shot and then saw Caraballo (who had driven separately and parked his car on the street), followed by David, start running toward David’s house, which was one house south of the corner. Ray testified that he said “we’re cool, we’re cool,” to the shooter, who was ten to 15 feet away from him, but the shooter started shooting at him, so he turned and ran to David’s house. As he reached David’s house, he tripped over David, who was shot in the leg and back and had fallen.

{¶ 7} Ray testified that he did not see anyone other than his brother David and the shooter in the street that morning. Specifically, he testified that he did not see six to eight African-American males walking south on West 48th Street as he was running up Koch Court, and that he never saw the shooter in anyone’s driveway or on the other side of the street. He also testified that he never saw David walk north on West 48th Street during the incident. Ray subsequently told the police that the shooter was wearing a black hood or hat.

{¶ 8} Caraballo testified that he followed David and Ray home that morning in his car. He parked in front of David’s house, got out of his car, walked to the side of David’s house, and waited for David and Ray to come from the alley through the backyard. When they did not arrive, he walked

back to the front of the house. He then heard arguing coming from Koch Court and walked toward the voices. Caraballo testified that as he walked toward the voices he heard someone say, "Let's box," and then heard Ray say, "We're cool; we're cool." Caraballo testified that by then he was three or four feet away from David, who had his arms up like he was ready to box, and Caraballo told him they should go back to the house.

{¶ 9} Caraballo testified that he then saw the shooter, who was standing in the street near the corner of Koch Court, raise his hand. At that point, Caraballo told everyone to run and he, David, and Ray all ran toward David's house. Caraballo testified that he heard two to four gunshots as he was running away. He testified that the shots were coming "from the alleyway from where the guy had his hand raised, right by that alley [i.e., Koch Court]." A bullet grazed his leg as he was running away.

{¶ 10} Later that morning, Monroe was placed in a cold stand across the street from Caraballo for possible identification as the shooter. Caraballo testified that he told the police, "I really couldn't tell you, but I don't think so." Later that morning, Caraballo gave a written statement to the police in which he stated that he did not believe the individual in the cold stand was the shooter because he was "too heavy-set." Caraballo told the police that he thought the shooter had been wearing a black knitted hat. He estimated the shooter to be between five feet ten inches and six feet one inch tall and 250

pounds. Like Ray, Caraballo testified there was no one else on the street during the incident.

{¶ 11} Daniel Smith and Crystal Demopoulos also testified at trial. Smith and Demopoulos lived downstairs in the front house at 3289 West 48th Street, two houses north of the intersection of Koch Court and West 48th Street, on the east side of the street. Monroe and an unidentified woman lived in the rear house.

{¶ 12} Demopoulos testified that at approximately 4 a.m. on December 22, 2007, she was sitting on the couch in the living room with Smith, watching him play a video game. She heard people talking outside and looked out a window that faced the driveway. She testified that she saw Monroe and a white male in her driveway, close to her house, walking towards the rear house, but she could not make out what they were saying. She testified that she sat back down for two to five minutes but went to the window again when she heard yelling outside. She testified that this time she saw Monroe standing in the driveway yelling, while a group of six to eight African-American males walked across West 48th Street and Koch Court. Demopoulos assumed that Monroe was yelling at these individuals.

{¶ 13} Demopoulos testified that she then saw Monroe, who had a cell phone at his ear, put the cell phone down at his side, raise his left hand, and

shoot. According to Demopoulos, when he fired, Monroe was standing “in the middle of [her] driveway right behind the apron in the sidewalk.”

{¶ 14} Demopoulos testified that at the first shot, Smith told her to get down, so she got on the floor and grabbed the mouths of her two pit bulls to keep them from barking. She testified that she heard another shot as she went down. According to Demopoulos, she stayed down “for a couple of seconds,” then got up, went to the window again, and saw Monroe, who was standing in the same spot she had seen him earlier, put the gun down, raise the cell phone to his ear, and say, “I just had to shoot this m----- f-----,” as he turned around and walked away. Demopoulos testified that Monroe was wearing blue pants and a black, patterned hoodie, but did not have the hood or a hat on.

{¶ 15} Demopoulos testified further that Monroe was a large individual who “shifted all his weight from side to side when he walked” and had a distinctive voice. She stated that she recognized Monroe from his walk and his voice because, although he had moved into the rear house only a few weeks prior to the shooting, she had already had several unpleasant encounters with him. According to Demopoulos, twice when she let her pit bulls out in the back yard, Monroe said he would “kill those things” and told her to put the dogs back in the house.

{¶ 16} Smith testified that Monroe had only recently moved into the rear house, but said he had spoken with him twice prior to the shooting. On one occasion he asked Monroe to turn down the music coming from his car and on another occasion, he asked Monroe to remove a clothes basket Monroe had placed on Smith's car. Smith testified that Monroe weighed between 250 and 300 pounds and "waddled" when he walked.

{¶ 17} Smith testified that on the morning of December 22, 2007, he heard two people outside arguing as they came from the rear of the house and walked up the driveway toward the street. Smith testified that he looked out one of the three side windows of his house and saw Monroe talking on the phone but also arguing with a white male who was in the street and looking back at Monroe as he was walking away. According to Smith, as Monroe was standing in the driveway by the house, he said, "Hold on a second," and then put the phone down by his side, raised his left hand, aimed a gun towards the street, and fired.

{¶ 18} Smith testified that he "hit the floor" after the first or second shot and then heard two more shots. Smith testified that he stayed on the floor "a few seconds," then got up, looked out the window, and saw Monroe "standing in his original location" and then start walking back up the driveway. According to Smith, Monroe raised the phone to his ear and said, "I just had to shoot somebody." Smith testified that he then called 911 and, without

identifying himself, reported the shooting. Later that morning, he went to the police station and gave a written statement about the incident. The police showed him a photo array, but he did not identify Monroe from the array.

{¶ 19} Smith's father, Dennis Smith, testified that Smith called him at approximately 5:30 a.m. that morning and asked him to call the police to tell them that they should be looking for clues in his driveway, instead of in the intersection of West 48th Street and Koch Court.

{¶ 20} Cleveland police officer Raymond O'Connor and his partner responded to the scene. After speaking to people on the scene, including Ray and Caraballo, Officer O'Connor strung the crime scene tape around the intersection of West 48th Street and Koch Court. Subsequently, other officers arrived on the scene and, in response to Dennis Smith's call, expanded the crime scene 50 yards in each direction. The expanded scene included Demopoulos and Smith's driveway.

{¶ 21} Cleveland police officer Joseph Gulas testified that two shell casings were found in the middle of the street in the intersection of West 48th Street and Koch Court, where Ray Bober and Caraballo testified the shooting occurred. Cleveland police officer Robert Wagner testified that he walked on the east side of West 48th Street looking for shell casings but did not find any.

III. Law and Analysis

A. Inconsistent Verdicts

{¶ 22} In its first assignment of error, the State contends that the trial court granted the motion for a new trial because the verdicts were inconsistent, i.e., guilty of David Bober's murder but not guilty of attempted murder of Ray Bober and Milton Caraballo. The State argues that inconsistent verdicts on different counts of a multi-count indictment do not justify overturning a guilty verdict and, therefore, the trial court erred in granting the motion for new trial. See, e.g., *State v. Parker*, 8th Dist. No. 90298, 2008-Ohio-3538, ¶24.

{¶ 23} Although the State's proposition of law is correct, its argument fails because the trial court did not grant the motion for a new trial on this basis. The judgment entry of findings of fact and conclusions of law is clear: the trial court granted the motion because the verdict was contrary to the manifest weight of the evidence, not because the verdicts were inconsistent. In its judgment entry granting the motion for a new trial, the trial court very carefully explained why the verdict was against the manifest weight of the evidence:

{¶ 24} "The jury relied on the testimony of Dan Smith and Crystal Demopoulos in coming to their verdict. Smith and Demopoulos are biased against Mr. Monroe based on their previous relationship with [him].

Furthermore, the testimony of Demopoulos contradicted the testimony of Smith, even though they viewed the incident from the same position. Their testimony was also contrary to the testimony of the other eyewitnesses to the incident, Milton Caraballo and Ray Bober. Finally, Smith and Demopoulos'[s] testimony was not in line with the location of the shell casings, the only relevant physical evidence presented at trial.

{¶ 25} “* * * [T]he jury’s determination to believe Demopoulos and Smith over Caraballo and Bober is against the manifest weight of the evidence. The jury chose to believe two witnesses who could not keep their story straight from the date of the incident to trial, two witnesses that disliked the defendant, two witnesses that presented entirely different testimony at trial as to the people present on the street, and two witnesses that testified in contradiction to the physical evidence. This court finds that Demopoulos and Smith were not credible witnesses and their testimony presented little if any value to the case against the defendant. The jury clearly lost its way in relying on Demopoulos and Smith’s testimony to convict the defendant.”

{¶ 26} The court then explained that the verdict was “further evidence” of the underlying reason for granting a new trial: that the jury lost its way when it rendered a guilty verdict that was contrary to the weight of the evidence.

{¶ 27} Appellant's first assignment of error is overruled.

B. Manifest Weight of the Evidence

{¶ 28} In its second assignment of error, the State argues that the trial court erred in granting a new trial on the basis of the manifest weight of the evidence. Specifically, the State contends that the trial court's factual determinations about Smith and Demopoulos's testimony were incorrect, which led the court to erroneously conclude that a new trial was warranted.

{¶ 29} Under Crim.R. 33(A)(4), a new trial may be granted when the verdict is not sustained by sufficient evidence or is contrary to law. The parties conceded at oral argument that a verdict against the manifest weight of the evidence is contrary to law.

{¶ 30} A ruling on a motion for a new trial when based upon factual findings is within the trial court's discretion, and a reviewing court may not reverse the trial court's decision absent a finding that the trial court abused its discretion. *State v. Sims*, 8th Dist. No. 85341, 2005-Ohio-4299, ¶35, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, *State v. Williams* (1975), 43 Ohio St.2d 88, and *Toledo v. Stuart* (1983), 11 Ohio App.3d 292. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 31} The State first takes issue with the trial court's finding that Smith and Demopoulos testified that the shooter was in the driveway throughout the incident. We find no error, because the record reflects that Demopoulos testified that the shooter was in the driveway when he started shooting and remained "in the same spot" in the driveway during the shooting. Likewise, Smith testified that the shooter was in the driveway when the shooting started and he was "pretty much standing in his original location" when Smith looked out the window immediately after the shooting stopped. Although the State argues that Smith and Demopoulos did not see where the shooter went while they were on the floor during the shooting, both testified they were down for only "a few seconds" and then immediately returned to the window. Thus, the trial court's conclusion that they both testified that the shooter was in the driveway during the shooting was reasonable.

{¶ 32} The trial court's finding that Smith and Demopoulos's testimony directly contradicted the only physical evidence in the case was also correct. Shell casings were found in the street in the intersection of West 48th Street and Koch Court—exactly where Ray Bober and Caraballo testified the shooting occurred. While the State goes to great lengths to explain how shell casings could have been kicked or moved to different locations, the State cannot rebut the fact that shell casings were not found in the driveway, where

Smith and Demopoulos testified the shooting occurred, and, therefore, their testimony was not, as the trial court found, “in line” with “the only relevant physical evidence presented at trial.”

{¶ 33} The State also takes issue with the trial court’s conclusion that Demopoulos’s testimony contradicted Smith’s, even though they allegedly viewed the shooting from the same position, and its conclusion that they gave differing accounts of the number of people on the street during the incident. The record supports the trial court’s conclusions.

{¶ 34} Smith testified at trial that when he looked out the window, he saw Monroe arguing with a “skinnier, white male” who was in the street (although in his police statement, Smith stated “I did not see anyone in the street”). He testified that he also saw two or three people who appeared to be with the male but were ahead of him and “a street further away.” Smith also testified that there were six to eight African-American males walking across the street, but stated that they were not involved in the events leading to the shooting. (Smith made no mention of these males in his police statement, however.) Demopoulos testified that when she looked out the window, she saw Monroe arguing with someone, and then saw a group of six to eight males crossing West 48th Street and Koch Court. She testified that these individuals were involved in the altercation and “were the only males [she] saw.” In light of this testimony, the trial court’s conclusion that Smith

and Demopoulos “presented entirely different testimony at trial as to the people on the street,” despite the fact that they both allegedly observed the shooting from their living room window, was correct.

{¶ 35} We likewise find no merit to the State’s assertion that the trial court erred in finding that Smith and Demopoulos’s testimony was contrary to that of the other eyewitnesses to the shooting. Smith and Demopoulos both testified the shooter was in the driveway, but Ray Bober and Caraballo testified that the shooter was standing in the street near the corner of Koch Court and West 48th Street when he shot David Bober. Smith and Demopoulos testified regarding varying numbers of persons in the area during the shooting; however, both Ray Bober and Caraballo testified that there was no one other than them, David Bober, and the shooter in the vicinity during the shooting, and Ray Bober specifically testified that he never saw six to eight males in the area that morning. Ray Bober described the shooter as approximately six feet one inch tall and approximately 200 pounds; Smith and Demopoulos identified Monroe, who is five feet nine inches and 370 pounds, as the shooter. In light of this testimony, the trial court’s finding that Smith and Demopoulos’s testimony contradicted that of Bober and Caraballo merely recognized the obvious.

{¶ 36} We hold that the trial court’s findings of fact and conclusions of law were supported by the record and, hence, the trial court did not abuse its

discretion in granting the motion for a new trial, as the verdict was against the manifest weight of the evidence. Appellant's assignments of error are therefore overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for new trial.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
MARY J. BOYLE, J., CONCUR