

STATE OF OHIO                    )  
  )ss:  
COUNTY OF LORAIN            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

BRIAN D. KING

Appellant

C.A. Nos.     09CA009686  
                  09CA009696

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE Nos.     09CR077532  
                  09CA077569

DECISION AND JOURNAL ENTRY

Dated: December 6, 2010

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DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Brian King and Jermaine Hughes got in a fight. Following the fight, Mr. Hughes and Mr. King retreated in opposite directions, with Mr. Hughes returning to a house owned by Rosa Hughes, his grandmother. A short time later, Mr. King appeared at Ms. Hughes's house and, after confronting Mr. Hughes with a gun, fired at him multiple times. While Mr. Hughes escaped unharmed, Mr. King's stray rounds struck Ms. Hughes's house, as well as the nearby house of Patty Jo James. Two months later, while both Mr. Hughes and Mr. King were being held at the Lorain City Jail, Officer Jacob Morris heard Mr. King threaten Mr. Hughes, as well as other members of Mr. Hughes's family. Mr. King waived his right to a jury trial, and, following a bench trial, the trial judge found him guilty of two counts of improper discharge of a firearm

into a habitation, along with gun specifications on each of those counts, and one count of having a weapon while under disability stemming from the night of the fight. Additionally, the trial judge found Mr. King guilty of one count of intimidation and one count of retaliation stemming from the statements he made in the city jail. The trial judge sentenced Mr. King to eight years in prison. This Court affirms because his convictions are not against the manifest weight of the evidence.

### BACKGROUND

{¶2} At trial, Mr. Hughes testified that Mr. King and he got into a fistfight on November 19, 2008. The fight broke up, and Mr. Hughes retreated to his grandmother's house while Mr. King retreated in another direction. At his grandmother's house, Mr. Hughes stood in the driveway, speaking to his daughter's mother on the phone. While on the phone, he saw three men approaching and recognized one of them as Mr. King. Mr. Hughes, thinking Mr. King wanted to continue their earlier fight, confronted him. Mr. King responded by producing a handgun, pointing it at Mr. Hughes, and pulling the trigger.

{¶3} According to Mr. Hughes, the gun misfired. Mr. King then proceeded to chamber a round while Mr. Hughes ran for cover behind a car in the driveway. Mr. Hughes testified that Mr. King fired off five or six shots while backing away then fled down the street. Believing the gun was empty, Mr. Hughes pursued him. Mr. King turned and fired twice more at Mr. Hughes, who took cover behind a house before retreating to his grandmother's house.

{¶4} Patty Jo James testified that, on November 19, she heard shots from down the street and a car driving away. She then heard people running outside her house followed by two more shots. One of the bullets from those two shots penetrated her living room and the other struck her house. Detective Douglas Smith, the police officer who investigated the events of

November 19, testified that he had found evidence that at least five rounds had been fired. His department recovered two bullets, one from Ms. Hughes's house and one from Ms. James's house. Additionally, outside Ms. Hughes's house, the police found a live round, which Detective Smith described as indicative of a misfire, and a spent casing.

{¶5} The trial court held a preliminary hearing on January 8, 2009, regarding the shootings. Mr. Hughes, who was being held at the Lorain Correctional Institution for walking away from a halfway house, testified against Mr. King. Afterwards, both men were held in the Lorain City Jail. According to Mr. Hughes, when officers came to transport Mr. King to Lorain County Jail, Mr. King pointed at him and said "snitches die slow." Officer Morris corroborated Mr. Hughes's account. He testified that Mr. King sang, "Snitches die slow. I'll shoot your grandma's house up, fuck your girl and kidnap your kid or daughter." Mr. Hughes has a daughter who was two-months-old at the time. Officer Morris also testified that Mr. King pointed at Mr. Hughes while singing his threat. According to Officer Morris, after Mr. King was aboard the transport back to Lorain County Jail, Mr. Hughes asked the officer if he had heard what Mr. King had said. Officer Morris testified that Mr. Hughes said that Mr. King's words had intimidated him.

#### MANIFEST WEIGHT

{¶6} Mr. King's sole assignment of error is that his convictions are against the manifest weight of the evidence. When a defendant argues that his convictions are against the manifest weight of the evidence, this Court "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.” *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶7} The trial court convicted Mr. King of two counts of improperly discharging a firearm at or into a habitation, and one count of having weapons while under disability, as well as two gun specifications. Under Section 2923.16.1(A)(1) of the Ohio Revised Code, “[n]o person, without privilege to do so, shall knowingly . . . [d]ischarge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual.” Under Section 2923.13(A)(3) of the Ohio Revised Code, “[u]nless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if . . . [t]he person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse . . . .” Mr. King was previously convicted of possession of marijuana.

{¶8} Mr. King has argued that Mr. Hughes’s testimony about the incident at his grandmother’s house was not credible. He notes Mr. Hughes’s past convictions, his delay in speaking to the police, and his vagueness regarding the fight earlier in the day. Mr. King’s lawyer, however, cross-examined Mr. Hughes about all these matters, allowing the trial judge to weigh them in considering Mr. Hughes’s credibility.

{¶9} Mr. King also has argued that Mr. Hughes’s testimony was inconsistent with the forensic evidence found at the scene because only one bullet and one casing were found at Ms. Hughes’s house. He has argued that Mr. Hughes himself could have been the shooter and could have picked up the casings. Additionally, he has suggested that the shooter could have been in a car since Ms. James testified that she heard a vehicle drive off after the initial shots. If this

occurred, Mr. King has argued, the casings could have been ejected in the car. Detective Smith, however, testified that finding only one casing was not unusual and it was most likely that the police merely had failed to locate the other casings at the scene. The trial judge was entitled to believe Detective Smith's explanation concerning the forensic evidence.

{¶10} Additionally, Detective Smith testified that the police found a live round and that a live round is often indicative of a misfire, which matched Mr. Hughes's account that Mr. King initially pulled the trigger and the gun misfired. Also, Ms. James testified that she heard the car drive in a direction that is inconsistent with Detective Smith's testimony about the trajectory of the bullets that struck her house. Mr. King's convictions for improperly discharging a firearm at or into a habitation and having a weapon while under disability are not against the manifest weight of the evidence.

{¶11} Additionally, the trial judge found Mr. King guilty of intimidation and retaliation. Under Section 2921.03(A) of the Ohio Revised Code, "[n]o person, knowingly and by force, by unlawful threat of harm to any person or property . . . shall attempt to influence, intimidate, or hinder a . . . witness in the discharge of the person's duty." Under Section 2921.05(B) of the Ohio Revised Code, "[n]o person, purposely and by force or by unlawful threat of harm to any person or property, shall retaliate against the victim of a crime because the victim filed or prosecuted criminal charges."

{¶12} Mr. King has argued that his statements to Mr. Hughes at the jail were nothing more than the lyrics of a rap song and that he did not intend them for Mr. Hughes. Even assuming the words were taken from a song, Mr. King has acknowledged that they were "violent and offensive," and both Officer Morris and Mr. Hughes testified that the statements were directed at Mr. Hughes. Further, the evidence indicates that Mr. King altered the lyrics to

address Mr. Hughes directly. Such threats, regardless of whether they came from a well-known song, could have the effect of intimidating a witness. Officer Morris testified to this fact, saying that Mr. Hughes said he felt intimidated following Mr. King's threats. Accordingly, we cannot say that the trial court lost its way when it believed the testimony of Officer Morris and Mr. Hughes that Mr. King threatened Mr. Hughes, who had just testified against Mr. King at a preliminary hearing. Therefore, this Court concludes that Mr. King's convictions for intimidation and retaliation are not against the manifest weight of the evidence.

### CONCLUSION

{¶13} Mr. King's convictions are not against the manifest weight of the evidence. The judgment of the Lorain County Common Pleas Court is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

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CLAIR E. DICKINSON  
FOR THE COURT

CARR, J.  
BELFANCE, J.  
CONCUR

APPEARANCES:

PAUL GRIFFIN, attorney at law, for appellant.

DENNIS P. WILL, prosecuting attorney, and AMY IOANNIDIS BARNES, assistant prosecuting attorney, for appellee.