

[Cite as *State v. Berry*, 2011-Ohio-6452.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1187
Joseph L. Berry,	:	(C.P.C. No. 10CR-02-1114)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 15, 2011

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*,
for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Joseph L. Berry, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. Because appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence, we affirm that judgment.

{¶2} On October 9, 2008, police were called to an apartment at 1988 Fairmont Avenue in Columbus, Ohio. The police found three dead people inside the apartment: Franklin Walker, Markell Peaks, and Carol Welch. All three died from gunshot wounds: Walker and Peaks each had three gunshot wounds to the head and back and Welch had at least 20 gunshot wounds.

{¶3} As a result of these murders, a Franklin County Grand Jury indicted appellant with three counts of aggravated murder in violation of R.C. 2903.01, three counts of aggravated robbery in violation of R.C. 2911.01, one count of aggravated burglary in violation of R.C. 2911.11, three counts of kidnapping in violation of R.C. 2905.01,¹ and one count of tampering with evidence in violation of R.C. 2921.12. Appellant entered a not guilty plea and proceeded to a jury trial.

{¶4} At trial, James Moore testified that he and another man, Mandrell Kendricks, sold drugs in the area of 1988 Fairmont Avenue back in 2008. Moore and Kendricks spent a lot of time in that area because Kendrick's mother lived in a nearby apartment complex at 2003 West Broad Street. Around that time, Kendricks and Moore discussed robbing the apartment at 1988 Fairmont Avenue because they believed the occupants were drug dealers and would have money. Moore and Kendricks discussed robbing the apartment again on the night of October 8, 2008. Appellant and another man, Robert Smith, were involved in this second discussion. Moore testified that Kendricks and appellant planned the robbery. Kendricks had two 9mm Glocks and Moore had his own gun. Moore went to a neighbor's apartment to get rubber gloves so the men would not leave fingerprints at the scene. All four men went into the apartment armed with guns and wearing gloves. Moore was the last of the four to enter the apartment. When he got inside, Moore saw three people laying face down on the ground. Kendricks demanded money and drugs from the victims. After Peaks told him that they did not have any money or drugs, Moore saw Kendricks shoot Peaks and then Walker. He then saw appellant shoot Peaks and Walker. Moore testified that he ran outside of the apartment

¹ All ten of these counts also contained firearm specifications pursuant to R.C. 2941.145.

to vomit and then he heard additional shots fired. Moore testified that in exchange for his truthful testimony against appellant, Kendricks and Smith, he received an 18-year prison sentence for his involvement in these murders.²

{¶5} Amber Rae Cody, who lived in the apartment complex at 2003 West Broad Street, also testified that she overheard Moore, Kendricks, and appellant talking about robbing the apartment at 1988 Fairmont Avenue the night before the murders. In fact, she testified that appellant asked her boyfriend if he wanted to be involved in the robbery but that her boyfriend declined. She saw Kendricks that night with two 9mm guns and another gun in his pants. Cody and another witness, Micah Biggers, also testified that they saw appellant and Kendricks the day after the murders wearing items that were owned by the murder victims.

{¶6} The jury found appellant guilty of all charges and the trial court sentenced him accordingly.

{¶7} Appellant appeals and assigns the following errors:

I. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION.

II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIMINAL RULE 29.

III. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE CONVICTION AND (SIC) WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

² Eventually, Kendricks, Smith, and Moore were also charged with offenses arising from these murders.

Appellant's First and Second Assignments of Error- Sufficiency of the Evidence

{¶8} In these assignments of error, appellant contends that his convictions are not supported by sufficient evidence and that the trial court erred in denying defendant's Crim.R. 29 motion for acquittal. Because the same standard of review applies to sufficiency of the evidence and Crim.R. 29(A) motions for acquittal, we consider defendant's first two assignments of error together. *State v. Rankin*, 10th Dist. No. 10AP-1118, 2011-Ohio-5131, ¶11 (citing *State v. Messer–Tomak*, 10th Dist. No. 07AP-720, 2008-Ohio-2285, ¶7-8).

{¶9} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally adequate to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. Whether the evidence is legally sufficient to support a verdict is a question of law. *Id.*

{¶10} In determining whether the evidence is legally sufficient to support a conviction, " ' the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶34 (quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus). A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484.

{¶11} In this inquiry, appellate courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence admitted at trial supports the

conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶¶79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence); *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶4 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime.").

{¶12} In essence, appellant contends that the state did not present sufficient evidence to prove his involvement with these murders. We disagree. On the night of the murders, Moore overheard Kendricks and appellant planning to rob the apartment at 1988 Fairmont Avenue. Cody overheard a similar discussion. After that discussion, Moore, Kendricks, Smith, and appellant entered the victims' apartment at 1988 Fairmont Avenue. Moore testified that all of them, including appellant, had a gun in their hand when they went into the apartment. Moore went into the apartment last and saw three people lying on the floor face down. He then saw Kendricks and appellant shoot two of the victims. After he left the apartment, he heard more shots. This testimony is sufficient to prove that appellant entered the victims' apartment with a gun and participated in the murder of three people. Appellant's convictions are supported by sufficient evidence. Accordingly, we overrule appellant's first and second assignments of error.

Appellant's Third Assignment of Error- Manifest Weight of the Evidence

{¶13} Appellant also contends that his convictions were against the manifest weight of the evidence. We disagree.

{¶14} 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.

Thompkins at 387. Although there may be sufficient evidence to support a judgment, a court may nevertheless conclude that a judgment is against the manifest weight of the evidence. *Id.*

{¶15} 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.* at 387. 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.*; *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶12.

{¶16} 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. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. 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* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus (credibility determinations are primarily for the trier of fact).

{¶17} Appellant contends that his convictions are against the manifest weight of the evidence because Moore was not a reliable witness and because the state failed to present physical evidence linking him to the crime scene. We disagree.

{¶18} Appellant's convictions were based largely on Moore's testimony. The jury was aware of Moore's involvement in these murders, his willingness to testify against appellant, Kendricks, and Smith, his receipt of a reduced prison sentence, and his attempt to minimize his role in these murders. The jury was in the best position to assess Moore's credibility. The jury chose to believe his testimony, and that is a decision within the province of the jury. *State v. Woodward*, 10th Dist. No. 03AP-398, 2004-Ohio-4418, ¶20. His testimony was not so incredible as to render appellant's convictions against the manifest weight of the evidence. *State v. Thompson*, 10th Dist. No. 07AP-491, 2008-Ohio-2017, ¶34.

{¶19} Furthermore, many portions of Moore's testimony were bolstered by testimony from other witnesses. Moore testified that on the night of the murders, he went to a neighbor's apartment to get gloves to wear during the robbery so that they would not leave fingerprints inside the apartment. That neighbor testified that Moore asked her for rubber gloves that night and that she gave him the gloves. (Tr. 439-40.) Moore also testified that during the murders, he ran outside the apartment to vomit. Anne Pennington, a Columbus Police Detective, testified that she saw vomit in the backyard of the apartment when she responded to the crime scene. (Tr. 426.) Lastly, Moore testified that Kendricks had two 9mm Glocks on the night of the murders. Mark Hardy, a forensic

scientist with the Columbus Police crime laboratory, examined the shell casings and projectiles found in the apartment and in the nearby area and concluded that there were at least three guns involved in these murders and that two of them were 9mm Glocks. (Tr. 349-50.) Cody testified that she saw Kendricks on the night of the murders with two 9mm guns while the men were discussing robbing the apartment. (Tr. 380.) Cody and Biggers also saw appellant wearing items owned by the murder victims the day after the murders.

{¶20} Lastly, the lack of physical evidence linking appellant to these crimes does not render his convictions against the manifest weight of the evidence. *State v. Nix*, 1st Dist. No. C-030696, 2004-Ohio-5502, ¶¶65-71 (rejecting argument that convictions were against the manifest weight of the evidence where testimony overwhelmingly supported convictions). While physical evidence could have been helpful, Moore and Cody's testimony strongly linked appellant to these crimes. Given this testimony, we cannot say the jury lost its way and created a manifest miscarriage of justice. *State v. Jackson*, 7th Dist. No. 09 JE 13, 2009-Ohio-6407, ¶¶13-16 (lack of physical evidence does not make convictions against manifest weight of the evidence where victim's testimony linked defendant to crimes); *State v. Reine*, 4th Dist. No. 06CA3102, 2007-Ohio-7221, ¶25 (same). Appellant's convictions are not against the manifest weight of the evidence. Accordingly, we overrule appellant's third assignment of error.

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

Judgment affirmed.

BRYANT, P.J., and SADLER, J., concur.
