

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-188
 : (M.C. No. 2011 CRB 021093)
 [G.G., Sr.], : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on December 13, 2012

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, Chief Prosecutor, *Melanie R. Tobias*, and *Orly Ahroni*, for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Municipal Court.

BROWN, P.J.

{¶ 1} G.G., Sr., defendant-appellant, appeals the judgment of the Franklin County Municipal Court, in which the court found him guilty, pursuant to a jury trial, of endangering children, which is a violation of R.C. 2919.22(A) and a first-degree misdemeanor.

{¶ 2} Appellant has a son, G.G., who was 11 years old at the time of the incident in question. On June 10, 2011, appellant and G.G. were standing near each other in the kitchen of appellant's home. Appellant was handling a handgun, and the gun discharged. The bullet struck the kitchen table and exited the house through a wall.

{¶ 3} On August 30, 2011, Columbus Police Sergeant J. Glen Branam, along with two other officers, went to appellant's home and investigated the incident, after receiving information from the county children's services department. Appellant initially denied that he owned a gun or that the incident happened. Appellant eventually admitted what happened and showed Sergeant Branam the bullet holes. Appellant claimed that the handgun accidentally discharged while he was handling it.

{¶ 4} On September 14, 2011, appellant was charged with endangering children. On January 23, 2012, a jury trial was held. On January 30, 2012, the jury found appellant guilty. A sentencing hearing was held on March 1, 2012. In its March 2, 2012 journal entry, the court sentenced appellant to 180 days of incarceration with 149 days suspended. The court also imposed a three-year period of community control and a \$500 fine. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

[I.] The trial court erred by admitting improper opinion testimony by the investigating police detective.

[II.] Appellant's conviction is against the manifest weight of the evidence.

{¶ 5} We begin by addressing appellant's second assignment of error keeping in mind appellant's argument in his first assignment of error that the trial court erred when it admitted improper opinion testimony of Sergeant Branam. Specifically, appellant contends the trial court erred when it permitted Sergeant Branam to testify, without being qualified as an expert, that the gun fired within "literally millimeters" of G.G. and that the gun could not fire accidentally based upon its various features.

{¶ 6} With these arguments under appellant's first assignment of error in mind, we address appellant's second assignment of error. Appellant argues that the trial court's judgment was against the manifest weight of the evidence. This court's function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and

created a manifest miscarriage of justice. *Id.*, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). If we find that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. *Id.* On the other hand, we will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-94 (1998).

{¶ 7} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *See Martin* at 175. However, in conducting our review, we are guided by the presumption that the jury 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. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Thus, a reviewing court must defer to the factual findings of the jury regarding the credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Concerning the issue of assessing witness credibility, the general rule of law is that "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). The fact finder is free to believe all, part or none of the testimony of each witness appearing before it. *Hill v. Briggs*, 111 Ohio App.3d 405, 412 (10th Dist.1996). If evidence is susceptible to more than one construction, reviewing courts must give it the interpretation that is consistent with the verdict and judgment. *White v. Euclid Square Mall*, 107 Ohio App.3d 536, 539 (8th Dist.1995). Mere disagreement over the credibility of witnesses is not sufficient reason to reverse a judgment. *State v. Wilson*, 113 Ohio St.3d 382, 387, 2007-Ohio-2202.

{¶ 8} R.C. 2919.22(A) provides, in pertinent part:

No person, who is the parent * * * of a child under eighteen years of age * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support.

A "substantial risk" is defined in R.C. 2901.01(A)(8) as "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."

{¶ 9} An essential element of the crime of endangering children under R.C. 2919.22(A) is the existence of the culpable mental state of recklessness. *State v. McGee*, 79 Ohio St.3d 193 (1997), syllabus. R.C. 2901.22(C) provides:

A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

{¶ 10} Accordingly, the state of Ohio, plaintiff-appellee, had the burden to prove beyond a reasonable doubt that appellant (1) was the parent of a child under 18 years of age, (2) violated a duty toward that child, (3) created a substantial risk to the safety of that child, and (4) acted with recklessness. *See State v. Allen*, 140 Ohio App.3d 322, 323 (1st Dist.2000), citing *State v. Caton*, 137 Ohio App.3d 742 (1st Dist.2000).

{¶ 11} Appellant challenges only one of the elements of the charge under his second assignment of error, claiming the state failed to prove recklessness. Appellant asserts that the state's argument that he intentionally or recklessly discharged the weapon is supported only by the speculative testimony of Sergeant Branam. Appellant also argues that no evidence rebutted G.G.'s testimony that appellant did not point the gun at him and that appellant did not have his finger on the trigger. Appellant contends that the evidence presented by the state that indicated the child was close to the weapon at the time of discharge may well demonstrate negligence, but it falls short of establishing recklessness.

{¶ 12} The state counters that, even disregarding the portion of Sergeant Branam's testimony that appellant criticizes under his first assignment of error, appellant's conduct was reckless. We agree. G.G. testified that appellant was cleaning his gun in the kitchen, and he was standing next to appellant. He said appellant removed the magazine but did not realize there was still a bullet in the chamber. G.G. testified that appellant pushed a button on the side of the gun, and the gun fired. G.G. believed appellant's firing the gun

was accidental. G.G. testified that he and his father were about two feet away from each other when the gun discharged, it hurt his ears a little bit, and he was scared. G.G. said that his father did not have his finger on the trigger when he was cleaning the gun, and his father did not point the gun at him. He also never felt like he was in danger of being shot, and the bullet did not almost hit him. G.G. also denied that his father told him to lie to police. Although G.G. initially testified that his father was pointing the gun away from him, he later admitted that the bullet hole in the kitchen table shows that appellant must have turned the gun toward G.G. before it discharged.

{¶ 13} With regard to the testimony of Sergeant Branam that appellant does not contest under his first assignment of error, Sergeant Branam testified that appellant told him that he was holding the gun and showing it to G.G., and as he was manipulating something on the gun, it discharged. Appellant told him that G.G. was "standing right beside" and "directly beside" him at the time. When Sergeant Branam asked appellant how close G.G. was to him, appellant said he "just missed him. He was right beside me." Appellant indicated to Sergeant Branam that he was standing "almost shoulder to shoulder" with G.G. Sergeant Branam said that appellant also told him that he had instructed G.G. to lie to the police about the incident.

{¶ 14} After reviewing the above testimony, we find the jury verdict was not against the manifest weight of the evidence. In determining whether appellant acted recklessly, the key issue the jury faced was whether Sergeant Branam or G.G. was more credible. Sergeant Branam testified that appellant told him G.G. was standing "right beside" and "directly beside" him, almost shoulder to shoulder, and that the bullet just missed G.G. Sergeant Branam's testimony on these issues was not "speculative," as appellant claims; rather, his testimony was explicit and definite. Although this court is permitted to weigh credibility in a manifest-weight review, appellant provides no basis for us to question the jury's apparent determination that Sergeant Branam's testimony was truthful. Furthermore, although G.G. first testified that appellant was pointing the gun away from G.G. while handling it, G.G. later admitted that appellant must have turned the gun in his direction because the bullet struck the kitchen table where G.G. was standing. A known risk of handling and manipulating a gun while standing in very close proximity to a child and while pointing it in the direction of that child, without checking the chamber

to see if a bullet is still in the firearm, is that the firearm will discharge in the direction of the child, and the bullet will narrowly miss that child. Appellant's dangerous actions under these circumstances demonstrate a perverse disregard of a known risk that his conduct was likely to create a substantial risk to G.G.'s safety.

{¶ 15} Appellant protests that the state presented no evidence to rebut G.G.'s testimony that appellant did not point the gun at G.G. and that appellant did not have his finger on the trigger. However, as explained above, despite his initial denial, G.G. eventually admitted that appellant must have pointed the gun in his direction because the bullet hit the kitchen table near where G.G. stood. Furthermore, Sergeant Branam testified that appellant said he told G.G. to lie to police about the incident. Thus, the jury may have fairly believed G.G. was not testifying truthfully and was still lying to protect his father. Also, although G.G. testified that appellant fired the gun accidentally and that appellant did not have his finger on the trigger when it discharged, there is no evidence in the record to even hint that the gun had a malfunction, which is the necessary inference. For the jury to believe the gun was malfunctioning would have been wholly without basis. For these reasons, we find the jury did not lose its way and create a manifest miscarriage of justice when it concluded that appellant's conduct was reckless. The state presented substantial evidence for the jury to conclude that all of the essential elements of endangering a child were established beyond a reasonable doubt. Therefore, appellant's second assignment of error is overruled. Also, because we have found the trial court's judgment was not against the manifest weight of the evidence even without consideration of the testimony appellant contests under his first assignment of error, we find appellant's first assignment of error is moot.

{¶ 16} Accordingly, appellant's first assignment of error is moot, his second assignment of error is overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

BRYANT and TYACK, JJ., concur.
