[Cite as *State v. Cumberbatch*, 2011-Ohio-1584.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0127**
- vs -	:	
EUGENE O. CUMBERBATCH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 319.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Eugene O. Cumberbatch, appeals his conviction of two counts of aggravated murder and related felonies following a jury trial in the Trumbull County Court of Common Pleas. He argues the jury's verdict was against the manifest weight of the evidence. For the reasons that follow, we affirm appellant's conviction.

{¶2} Appellant was indicted for the aggravated murder of Marvin Chaney with a firearm specification, in violation of R.C. 2903.01(A) and (F) and R.C. 2941.145 (count

1); the aggravated murder of Lloyd McCoy with a firearm specification, in violation of the same Revised Code sections (count 2); the murder of Marvin Chaney with a firearm specification, in violation of R.C. 2903.02(B) and (D) and R.C. 2941.145 (count 3); the murder of Lloyd McCoy, in violation of the same Revised Code sections (count 4); improperly discharging a firearm at or into a habitation, a felony of the second degree, with a firearm specification, in violation of R.C. 2923.161(A)(1) and (C) and R.C. 2941.145 (count 5); having a weapon while under disability, a felony of the third degree, in violation of R.C. 2923.13(A)(3) and (B) (count 6); and felonious assault against Joshua McCoy, a felony of the second degree, with a firearm specification, in violation of R.C. 2903.11(A)(2) and (D)(1) and R.C. 2941.145 (count 7).

{¶3} Appellant pled not guilty and the case was tried to a jury. Brittnay McCoy testified that in March 2009, she was living with her boyfriend, Marvin Chaney, and her two children, Shaunice, age six, and Josh, age three, at 2290 Wick Street, Warren, Ohio. Brittnay's parents lived across the street with Brittnay's sister, Chelise, age 17, and their young brother, Lloyd, age 11.

{¶4} On March 22, 2009, while Brittnay was at her parents' house, her cousin, Marquis Franks, came looking for her. He told her that her boyfriend, Marvin Chaney, had stolen $3,000 from him. He then left her parents' house. One-half hour later, Marquis drove back to Brittnay's parents' home. This time he was accompanied by Eugene Henderson, appellant, and Marcus Yager.

{¶5} Appellant asked Brittnay if she knew where Chaney was and who he was with. Henderson then asked her if Chaney carries any guns. Brittnay said that both appellant and Henderson "looked really mad."

{¶6} After they left, Brittnay told Chaney about these visits. He told her he did not steal anything from Marquis. He said that the night before, on March 21, 2009, he had stolen $2,400 and some "dope" from Henderson.

{¶7} Three weeks later, on April 13, 2009, at about 9:50 p.m., Brittnay was at her home at 2290 Wick Street. It is a small one-story, two-bedroom home facing the street. She and Chaney were in the kitchen. Her sister, Chelise, and her 11-year old brother, Lloyd, were visiting. Chelise was in the kitchen with Brittnay and Chaney, and Lloyd was in the front room watching television with Brittnay's children, Shaunice and Josh.

{¶8} Suddenly, Brittnay and Chelise heard a gunshot. Chelise yelled, "Get down." A few seconds later, they heard consecutive gun shots being fired into the house. Brittnay saw one bullet fly past her face. Both she and Chelise got down on the floor.

{¶9} Chelise testified that while she was on the floor, she heard about 30 gunshots. Glass was shattering everywhere. When the gunfire stopped, the children were screaming, but Chelise did not see Lloyd. Chelise crawled down the hall to the back of the house trying to find him. She found him lying face down and unconscious on the floor in Brittnay's bedroom. She turned him over and saw he was shot. Brittnay came into the bedroom; saw Lloyd was unconscious; and started hitting him until he woke up. Chelise found Chaney on the floor in the children's bedroom. He was holding his chest and lying in a pool of blood.

{¶10} Brittnay called 9-1-1 to report the shooting. The recording of the call reveals non-stop screaming and panic.

{¶11} Shaunice and Josh ran to Brittnay and Chelise in the back of the house. Three-year old Josh was shot in his arm. The victims were taken by ambulance to the hospital.

{¶12} Brittnay testified that as a result of the assault on her home, there were bullet holes everywhere—through the front window, through the siding all around the front window, and through the siding around the kitchen window. Inside the house there were bullet holes in the refrigerator, in the kitchen cabinets above the sink, and in a window frame in the kitchen. Brittnay's china cabinet in the kitchen was completely shot up and broken glass was all over the floor. There were bullet holes in the walls, doors, and windows in every room. There was bullet damage to Chelise's car in the driveway.

{¶13} Joe Williams testified that in March and April 2009, he was renting a house at 1170 Pearl Street in Warren. He said that at the time, Eugene Henderson, appellant, and Marcus Yager often stayed at his house.

{¶14} Mr. Williams testified that toward the end of March 2009, Henderson told him that Chaney, who had also lived at Mr. Williams' house for a time, had stolen $3,000 and some drugs from him. He said that Henderson was very upset about it and had told appellant and everyone else in the house about it. Mr. Williams said that several guns were kept in the house, including a shotgun, an AK-47, and a 9 mm handgun.

{¶15} Mr. Williams testified that during the evening of April 13, 2009, a white male, Jeff Selep, came to his house to purchase drugs. At that time, Henderson, appellant, and Yager were at the house.

{¶16} Henderson asked Mr. Williams if Mr. Selep could watch television with him while they used his car. Mr. Williams agreed, and Henderson, appellant, and Yager left in Mr. Selep's car. Shortly thereafter, all three returned. Henderson came in the house, took the AK-47, returned to the car, and then drove away.

{¶17} Sometime later, the three returned. They ran into the house. Henderson was yelling at appellant, saying, "You dropped my phone. You lost my phone. *** You gotta go get my phone." Appellant said, "Man, I'm sorry. I'm sorry." Mr. Williams said that appellant then left "to go back to get the phone."

{¶18} After appellant left, Yager and Henderson stayed at Mr. Williams' house. Mr. Williams did not ask them what had happened because "it was hush-hush. *** They weren't saying. *** It was *** like they didn't want anybody to know *** what had happened." Later that night, they were watching the news on television when they saw a report about a drive-by shooting on Wick Street. Mr. Williams looked at them and said, "you all went over there." He testified that at that point he knew they were involved in the shooting.

{¶19} The next day, Mr. Williams went to the police to report what he knew about the events of April 13, 2009.

{¶20} Marcus Yager testified that in March 2009, he often went to Mr. Williams' house on Pearl Street. He frequently spent the night and stayed there for long periods of time. When he was there, Henderson and appellant would also be there on a daily basis.

{¶21} Yager testified that in March 2009, Henderson accused Chaney of stealing $3,000 and some crack cocaine from him. Yager said that a few days later, he,

Henderson, Marquis Franks, and appellant went to see a girl named Brittnay on Wick Street. He said that Marquis told her that Chaney had stolen money from him and he asked her if Chaney was at her house. Yager testified that, in fact, Chaney had stolen the money from Henderson.

{¶22} Yager testified that on April 13, 2009, he was at the Pearl Street house with appellant, Henderson, and Mr. Williams. He said that a white male showed up and Henderson asked to use his car. Henderson said he "was gonna shoot the house." Yager testified he took a loaded 9 mm handgun that was in the house, and then he, Henderson, and appellant left the house and drove away in the white male's car. Henderson was the driver; appellant was in the front passenger seat; and Yager was in the back seat behind Henderson. Within five minutes of leaving the house, Yager gave the 9 mm handgun to appellant.

{¶23} Yager testified that Henderson drove by Brittnay's house to see if Chaney was there, but they did not see him. Henderson then drove back to the Pearl Street house to get his AK-47. Henderson went in the house and got the gun, while Yager and appellant stayed in the car. Henderson returned to the driver's seat and put the gun on his lap. Henderson then drove the car back to Wick Street and drove past Brittnay's house. He then turned around and came back down the street toward her house. As they were driving down the street, Henderson gave his cell phone and sunglasses to appellant and told him to hold them for him. Henderson stopped the car in front of Brittnay's house, and told appellant to put the car in drive as soon as he got back in the car.

{¶24} Yager also testified that Henderson got out of the car and proceeded to shoot at the house. Appellant then got out of the car and shot at the house. Yager said he heard "a lot" of gunshots for about 30 seconds. When they returned to the car, Henderson put the car in drive and drove off. Appellant threw the 9 mm handgun in the back seat next to Yager, and said that after shooting it one time, it had jammed.

{¶25} Yager then testified that Henderson asked appellant for his cell phone, and appellant said he did not have it because he had dropped it while he was outside. This apparently made Henderson very angry.

{¶26} Officer John Yuricek testified he saw many shell casings in the road in front of the residence. He also saw a pair of sunglasses and a cell phone in the street in front of the house. He remained on the scene to make sure none of the evidence was disturbed.

{¶27} Michael Stabile, evidence technician with the Warren Police Department, testified that in the early morning hours of April 14, 2009, he was called to the scene. He collected 25 shell casings from the scene. One was from a 9 mm handgun and the other 24 were from an AK-47. He sent three of the shell casings to the Bureau of Criminal Identification and Investigation (BCI) for analysis. Mr. Stabile swabbed the cell phone and sent the swabs and sunglasses to BCI for DNA analysis. He also sent known DNA standards for appellant and Henderson to BCI for comparison.

{¶28} Jonathon Gardner, forensic technician with BCI, determined that the three fired shell casings submitted by Mr. Stabile were 7.62 by 39 mm, and that each was fired from the same gun. The AK-47 is a fully-automatic firearm that fires continuously

until you take your finger off the trigger or run out of ammunition. The magazine for this rifle holds 30 cartridges.

{¶29} Brenda Gerardi, forensic scientist in the forensic biology DNA section of BCI, testified that she compared known DNA from Henderson and appellant to DNA profiles from a pair of sunglasses and two swabs collected from a cell phone submitted by Warren police. She determined that the DNA profile from the sunglasses is a mixture consistent with contributions from Henderson and appellant. Henderson's DNA profile was one in 1,579 unrelated individuals. Appellant's DNA profile on the sunglasses was one in 541.

{¶30} Ms. Gerardi also found that the DNA from the swabbings of the cell phone is a mixture consistent with contributions from Henderson and appellant. Henderson's DNA is consistent with him being a major contributor to the DNA on the cell phone swabs. His DNA profile was one in 426 quadrillion, 300 trillion. Also, appellant's DNA is consistent with him being a minor contributor to the DNA. His DNA profile was one in 423.

{¶31} While appellant's DNA profiles on these objects were relatively low, he could not be excluded as a contributor to the DNA mixture found on both objects. Ms. Gerardi testified that it would be more likely that Henderson, who owned the cell phone, would leave more DNA on it than appellant, who only touched the phone for a short period of time.

{¶32} Dr. Humphrey Germaniuk, Trumbull County Medical Examiner and Coroner, performed an autopsy on Marvin Chaney. Dr. Germaniuk determined that a

bullet had entered his chest, perforated his lung, bruised his heart, perforated his diaphragm, and exited through his back, resulting in his death.

{¶33} Dr. Joseph Ohr, Mahoning County Forensic Pathologist, performed an autopsy on 11-year-old Lloyd McCoy. He found that Lloyd had sustained an entrance gunshot wound to his back, which injured his lung, diaphragm, and liver, and exited through his chest, resulting in his death one week later. He had also sustained a gunshot wound to his right hand.

{¶34} Dr. Peter Sarkos, reconstructive surgeon, performed surgery on three-year-old Josh McCoy for a through-and-through gunshot wound to his left forearm. He repaired the child's muscles and tendon and he now has use of his hand.

{¶35} Warren Detective Wayne Mackey testified that after receiving information regarding Marcus Yager's involvement in these crimes, he questioned him. At first, Yager denied any involvement and was arrested. He subsequently provided a written statement to the detective, implicating himself, Henderson, and appellant.

{¶36} Detective Mackey determined that the available evidence corroborated Yager's statement. Joe Williams' statements about the three men being at his house on April 13, 2009; leaving and returning together; and Henderson yelling about appellant losing his cell phone corroborated Yager's statement. Jeff Selep's statement that he allowed Henderson, Yager, and appellant to use his car and that they left and returned together provided further corroboration. The single 9 mm shell casing found at the scene corroborated Yager's statement that appellant fired a 9 mm handgun one time before it jammed. Further, the cell phone found at the scene corroborated Yager's statement that Henderson was upset with appellant because he ignored his order to

hold his phone for him. The DNA evidence also corroborated Yager's statement about appellant briefly handling Henderson's sunglasses and cell phone.

{¶37} Detective Mackey also learned that appellant was under indictment in Mahoning County for three felonies—receiving stolen property, trafficking in cocaine, and trafficking in marijuana—the latter two of which prohibited him from having a firearm.

{¶38} After the state rested, the defense presented no evidence or testimony. The state's evidence was therefore undisputed.

{¶39} The jury returned its verdict against appellant finding him guilty of each crime and specification charged in the indictment. At his sentencing, appellant told the court, in Brittnay's presence, that "in her heart and soul, she knows that she played a part, too, in her brother's death by associating with" Chaney. Subsequently, the court sentenced appellant on counts 1 and 2, aggravated murder, to life with parole eligibility after 30 years; on counts 3 and 4, murder, to 15 years to life in prison; on count 5, improperly discharging a firearm at or into a habitation, 8 years; on count 6, having a weapon while under disability, 5 years; and on count 7, felonious assault, 8 years. The court ordered the sentences imposed on counts 1, 2, 3, 4, 5, and 7 to be served concurrently to each other, but consecutively to count 6. The court merged all firearm specifications and sentenced appellant on them to a total of three years in prison, to be served prior to and consecutively with the other sentences. Appellant's total sentence was life with parole eligibility after 38 years.

{¶40} Appellant appeals his conviction, asserting the following for his sole assignment of error:

{¶41} "The appellant's convictions are against the manifest weight of the evidence."

{¶42} Appellant does not challenge the sufficiency of the evidence. Instead, he argues the jury's verdict finding him guilty of all counts and specifications in the indictment was against the manifest weight of the evidence. We do not agree.

{¶43} In determining whether the judgment is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, and considers the credibility of the witnesses. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 1997-Ohio-52. The court determines whether, in resolving conflicts in the evidence and deciding witness credibility, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. Id. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment. Id.

{¶44} Witness credibility rests solely with the finder of fact, and an appellate court is not permitted to substitute its judgment for that of the jury. *State v. Awan* (1986), 22 Ohio St.3d 120, 123. (Citations omitted.)

{¶45} "The jury is entitled to believe all, part, or none of the testimony of any witness." *State v. Archibald*, 11th Dist. Nos. 2006-L-047 and 2006-L-207, 2007-Ohio-4966, at ¶61, discretionary appeal not allowed at 116 Ohio St.3d 1508, 2008-Ohio-381. (Citation omitted.)

{¶46} The role of the reviewing court is to engage in a limited weighing of the evidence in determining whether the state properly carried its burden of persuasion.

Thompkins, supra, at 390. If the evidence is susceptible to more than one interpretation, an appellate court must interpret it in a manner consistent with the verdict. *State v. Banks*, 11th Dist. No. 2003-A-0118, 2005-Ohio-5286, at ¶33. (Citation omitted.)

{¶47} First, appellant argues the jury's verdict was against the manifest weight of the evidence because there was no physical evidence, such as weapons or fingerprints, placing him at the scene. However, appellant has failed to cite any authority in support of this argument, in violation of App.R. 16(A)(7). For this reason alone, this argument lacks merit. In any event, our independent research has not disclosed any authority for the proposition that the lack of such evidence mandates the reversal of a conviction as against the manifest weight of the evidence.

{¶48} Moreover, we do not agree with appellant's contention that there was no physical evidence of his guilt. Officer Yuricek located Henderson's sunglasses and cell phone in front of Brittnay's house just after the shooting. Further, appellant concedes on appeal that he "associated with and was regularly around Eugene Henderson." Moreover, Yager testified that appellant agreed to hold Henderson's sunglasses and cell phone for him while Henderson was out of the car. Further, Ms. Gerardi testified that the DNA profiles obtained from the sunglasses and cell phone were mixtures consistent with contributions from Henderson and appellant. While the pool of potential contributors is relatively large, Ms. Gerardi testified that there was a greater concentration of Henderson's DNA on the cell phone than that of appellant, which was consistent with the state's evidence that it belonged to Henderson and was only briefly handled by appellant.

{¶49} Next, appellant challenges the testimony placing him at the crime scene as contradictory, inconsistent, and self-serving. First, he suggests that Marquis Franks, rather than he, went with Henderson to shoot up Brittnay's house. He argues that Mr. Williams was trying to protect Marquis when he said that Marquis was not at his house on April 13, 2009. He then argues that Mr. Williams' testimony was not credible because it was contradicted by Yager, who said that Marquis was there that day. However, Yager testified that the only time Marquis was at Mr. Williams' house was long after the shooting when he came to pick up Yager. Thus, any inconsistency between Mr. Willams' and Yager's testimony on this point was trivial and inconsequential. In any event, there is no evidence that Marquis, rather than appellant, went with Henderson that night. As a result, appellant's suggestion that Mr. Williams was attempting to protect Marquis is nothing more than conjecture and speculation.

{¶50} Next, appellant argues that Marquis had more reason to be at the crime scene than appellant. However, contrary to appellant's argument, the state's witnesses did not portray Marquis as the person most angry about Chaney's theft. It was Henderson, the alleged victim of the theft, who was incensed at Chaney for stealing from him. In telling Brittnay that Chaney had stolen from him, Marquis was merely attempting to locate Chaney for Henderson. Further, the evidence demonstrated that appellant was Henderson's associate and willing accomplice. Considering the evidence in context, it made sense that appellant would accompany Henderson to Brittnay's home on April 13, 2009.

{¶51} Appellant next argues that, because Mr. Williams said he did not know who owned the guns in the house, he was trying to protect himself. While not

admirable, it is understandable that Mr. Williams may not have wanted to make this admission. However, even if Mr. Williams knew who owned one or more of the guns, that does not necessarily discredit the remainder of his testimony.

{¶52} In any event, it was for the jury to resolve any perceived conflicts in the witnesses' testimony. It obviously chose to believe the state's witnesses, who placed appellant at the scene of the crime. We cannot say that in doing so, the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse appellant's conviction.

{¶53} Next, appellant challenges Yager's credibility. First, he suggests that Yager was not credible because he denied knowing there might be a shooting even after Henderson returned to the car with his AK-47. While Yager may have had reason to believe that a shooting was about to take place, it was for the jury to decide whether his testimony as a whole was credible. We note that, even if Yager believed a shooting was likely to occur, such belief did not necessarily discredit his testimony regarding Henderson's and appellant's involvement in these crimes.

{¶54} Appellant next argues that because Yager was charged with "nearly the same" offenses as appellant, but will only be sentenced to from one to five years in prison, he was not credible. The charges against Yager are not in the record. He testified, however, that he pled guilty to obstruction of justice and complicity to involuntary manslaughter. The undisputed evidence reflects that his level of involvement was minimal compared to that of Henderson and appellant, and that his plea deal was dependent on his truthful testimony. We cannot say that because Yager was offered a plea bargain in exchange for his testimony, the jury was not entitled to

consider his testimony credible. Obviously, if such were the case, the state could never rely on the testimony of accomplices and many criminals would escape prosecution. It was for the jury to determine whether Yager's testimony was sufficiently corroborated by the other evidence presented by the state.

{¶55} Next, appellant argues that because Yager said in his written police statement that Henderson wore his sunglasses, Yager's testimony was not credible. We note that appellant has failed to put Yager's statement in evidence. We are therefore not in a position to determine whether there was any inconsistency on this point. *State v. Dudas*, 11th Dist. No. 2007-L-074, 2007-Ohio-6731, at ¶15. It is unclear what Yager said in his police statement about Henderson wearing his sunglasses, e.g., when and for how long Henderson wore them. Appellant's cross-examination of Yager regarding his statement is far from clear, and cannot serve as a substitute for Yager's written statement. In any event, even if Henderson wore the sunglasses at some point, that does not mean he did not ask appellant to hold them before he left his car. He obviously would not be wearing them outside in the dark. We note *the record does not support* appellant's contention that Yager told the police Henderson was wearing the glasses and dropped them while firing his AK-47.

{¶56} While there may be some minor inconsistencies in Yager's testimony, considering it as a whole, it is remarkably logical, internally consistent, detailed, heavily corroborated, with virtually no hint of bias against appellant. The jury as the trier of fact was entitled to resolve any inconsistencies in Yager's testimony in his favor. They obviously found his testimony credible. In doing so, we cannot say the jury clearly lost its way.

{¶57} Based on our thorough and complete review of the record, the state presented ample, credible evidence that, if believed by the jury, established appellant's guilt beyond a reasonable doubt.

{¶58} For the reasons stated in the opinion of this court, appellant's assignment of error is overruled. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.