

[Cite as *State v. Dickerson*, 2012-Ohio-3268.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 11AP-789
 : (C.P.C. No. 10CR-09-5617)
 Regis L. Dickerson, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on July 19, 2012

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*,
for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Regis L. Dickerson, appeals his murder conviction following a jury trial in the Franklin County Court of Common Pleas. For the following reasons, we affirm.

I. Background

{¶ 2} In September 2010, appellant was indicted for two counts of murder with firearm specifications for the killing of Corey Hart. The indictment also contained two counts of felonious assault with specifications based on incidents occurring on separate dates and involving different victims; however, the trial court granted appellant's motion to sever those counts, and the case proceeded to trial on the murder counts. The following evidence was presented at the murder trial.

{¶ 3} Officer Matthew Hauser testified that, during the early morning hours of August 17, 2010, he was dispatched to the Woods Bar in Columbus in response to a reported shooting. Upon arrival, he observed several females in the parking lot screaming and pointing to a man, later identified as Hart, leaning up against a car going in and out of consciousness. Officer Hauser saw what appeared to be a ring of blood surrounding a bullet hole in Hart's t-shirt. Hart was transported to Grant Hospital, where he was declared dead shortly thereafter. A deputy coroner with the Franklin County Coroner's Office testified that the cause of death was a single gunshot wound to the abdomen; the manner of death was homicide.

{¶ 4} The state presented two eyewitnesses who testified that they observed appellant fire a single gunshot into Hart's abdomen at close range. The first was Roshonna Perry (a.k.a. "Diamond"), appellant's close friend since childhood. Perry testified that she arrived at the Woods Bar earlier that night and met with appellant, his girlfriend, his cousin, and two of his friends. Later in the evening, Perry began arguing with one of appellant's friends, Mike Myers, whom she had fought with in the past. The argument became physical, and appellant attempted to hold Perry back while others pushed Myers out of the bar. As Myers was being moved outside, Perry hit him in the head with brass knuckles. Myers was "bleeding everywhere" after Perry punched him, and he got in the nearby SUV owned by appellant's girlfriend. (Tr. 236.)

{¶ 5} Perry continued yelling at Myers when she was approached by Hart, the father of her best friend's sister. Hart, who was also at the bar that night, asked Perry, "You good?," which apparently offended appellant. (Tr. 247.) Appellant told Hart, "This don't got nothing to do with you, this is family shit." (Tr. 249.) According to Perry, the two men began to argue when, without warning, appellant pulled out a gun and shot Hart once in the middle of the chest. Perry had not seen Hart threaten appellant or display any weapons.

{¶ 6} Perry initially fled the scene, but she quickly changed her mind and returned to care for Hart. She saw the SUV drive away and did not hear from appellant until a telephone conversation 45 minutes later. During the conversation, appellant told Perry, "That nigger ain't family, don't go up to the hospital to see him." (Tr. 257-58.) The next morning, Perry lied to police about the identity of the shooter in order to protect

appellant. After speaking with her mother, however, Perry decided to contact police to tell them the truth. Perry later met with detectives and selected appellant out of a photo array.

{¶ 7} The state's second eyewitness was appellant's cousin, Mikaelle Edwards, who went to the bar with appellant the night of the shooting. Edwards witnessed the fight between Perry and Myers and sat with Myers in the SUV while appellant and Hart argued in the parking lot. According to Edwards, she tried to convince appellant to get in the car when appellant suddenly pulled out a silver revolver and fired a single shot into Hart's upper stomach. Like Perry, Edwards did not see Hart threaten appellant or carry any weapons.

{¶ 8} Edwards testified that, after appellant got into the SUV, they drove away from the shooting. According to Edwards, appellant appeared calm after the shooting. While she was "hysterically crying" about what had happened, appellant assured her, "it is going to be all right." (Tr. 326.) Edwards did not speak with police until several weeks later, when she met with detectives and was presented with a photo array. After looking at the array, Edwards positively identified appellant as the shooter.

{¶ 9} After the state's case-in-chief, appellant presented the testimony of several witnesses, including two employees of the bar who denied seeing appellant that night or hearing any gunshots. Additionally, appellant's girlfriend, Mykesha Loney, testified that she was not at the bar or with appellant that evening.

{¶ 10} The jury returned from deliberations to find appellant guilty of both murder counts with the attendant firearm specifications. At sentencing, the trial court merged the murder counts and imposed a total prison sentence of 18 years to life.

II. Assignments of Error

{¶ 11} In a timely appeal, appellant advances the following assignments of error for our consideration:

I. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF MURDER AS THAT VERDICT WAS NOT

SUPPORTED BY SUFFICIENT EVIDENCE AND WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT AND DENIED HIM A FAIR TRIAL AND DUE PROCESS OF LAW PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY NOT ALLOWING HIM TO PRESENT EXCULPATORY EVIDENCE AND TO PRESENT A COMPLETE DEFENSE TO THE CHARGES.

A. First Assignment of Error

{¶ 12} Appellant's first assignment of error claims his conviction is against the manifest weight of the evidence and is not supported by sufficient evidence because no reasonable juror could have found Perry and Edwards credible. As explained below, appellant's credibility challenges fail under a sufficiency and manifest weight review.

{¶ 13} In determining whether a verdict is against the manifest weight of the evidence, an appellate court sits as the "thirteenth juror" and must weigh the evidence to determine whether 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. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). The appellate court must bear in mind the trier of fact's superior, first-hand perspective in judging the demeanor and credibility of witnesses. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances when "the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶ 14} An appellate court does not act as a "thirteenth juror" in determining the sufficiency of the evidence. *State v. New*, 197 Ohio App.3d 718, 2012-Ohio-468, ¶ 8 (10th Dist.). "The issue of sufficiency presents a purely legal question for the court regarding the adequacy of the evidence." *Id.*, citing *Thompkins* at 386. The relevant inquiry is whether, "after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 15} Appellant's credibility challenges necessarily fail under a review for sufficiency of the evidence. In a sufficiency review, 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. Jordan*, 10th Dist. No. 11AP-691, 2012-Ohio-1760, ¶ 15, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80; *see also State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶ 135 (reiterating that credibility challenges are "not proper on review of evidentiary sufficiency"). Therefore, we reject appellant's argument regarding the sufficiency of the evidence and will review his credibility challenges under a manifest weight review.

{¶ 16} Appellant claims Perry lacked credibility because she initially lied to police in order to protect appellant. A reasonable juror, however, could have found that Perry's decision to testify against her close friend actually *heightened* her credibility. Perry began her testimony in tears, saying it was difficult for her to testify against appellant because she "love[d] him like [her] brother." (Tr. 219.) Regardless, Perry became cooperative with police shortly after the shooting when she admitted being untruthful and identified appellant as the shooter. A jury is not prevented from believing a witness " 'simply because the witness may have been, to some degree, uncooperative with the police.' " *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶ 56, quoting *State v. Darthard*, 10th Dist. No. 07AP-897, 2008-Ohio-2425, ¶ 14. "It is the province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness." *State v. Haynes*, 10th Dist. No. 03AP-1134, 2005-Ohio-256, ¶ 24 (quotations omitted).

{¶ 17} Appellant also points to the fact that Perry benefitted from her testimony. In exchange for Perry's truthful testimony, the state agreed to request probation in her unrelated prosecution for possession of cocaine and tampering with evidence. We find nothing about this agreement fatal to Perry's credibility. Perry had already identified appellant as the shooter to detectives by the time she entered into the agreement with the state. Moreover, she pleaded guilty to those offenses before the shooting even occurred and received no reduction in charges from the state. "[T]he jury was free to assess [her] credibility in light of any consideration [she] received from the state." *Jennings* at ¶ 56, citing *State v. Bliss*, 10th Dist. No. 04AP-216, 2005-Ohio-3987, ¶ 26.

{¶ 18} Next, appellant claims Edwards lacked credibility because she admitted to drinking and smoking marijuana the night of the shooting. However, there was no evidence that either substance impaired her memory of the shooting. Edwards' testimony was largely consistent with that of Perry; both denied seeing Hart threaten appellant or display any weapons, and both testified seeing appellant fire a single shot to Hart's abdomen. Their testimony was further corroborated by the deputy coroner, who concluded that Hart was killed by a single gunshot wound to the abdomen. Under these circumstances, the jury could reasonably find the testimony of Perry and Edwards to be credible.

{¶ 19} For the reasons stated above, appellant has failed to establish that his conviction was unsupported by sufficient evidence or against the manifest weight of the evidence. Accordingly, appellant's first assignment of error is overruled.

B. Second Assignment of Error

{¶ 20} In his second assignment of error, appellant argues that the trial court prohibited him from presenting exculpatory evidence and violated his right to present a complete defense. Appellant sought to prove that a man named Titus Turner identified someone else as the shooter in a photo array prepared by detectives. Because Turner's whereabouts were unknown, appellant attempted to introduce Turner's out-of-court identification through Detective Robert Wachalek, who showed Turner the array. Sustaining the state's objection, the trial court excluded the evidence as inadmissible hearsay.

{¶ 21} Generally, a trial court has broad discretion in deciding the admissibility of evidence, and a reviewing court should not disturb such decisions in the absence of an abuse of discretion that created material prejudice. *State v. Sage*, 31 Ohio St.3d 173, 182 (1987). "Abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Under this deferential standard, "[i]t is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments." *State v. Morris*, ___ Ohio St.3d ___, 2012-Ohio-2407, ¶ 14.

{¶ 22} Appellant conceded that Turner's out-of-court statement constituted hearsay under the definition in Evid.R. 803(C), but argued that the statement fell within the hearsay exception for public records and reports contained in Evid.R. 803(8). However, even if Turner's identification was contained in a report subject to the exception in Evid.R. 803(8), the statement would nonetheless remain inadmissible hearsay. "[H]earsay statements contained within a public record are not admissible unless the statements themselves are subject to a hearsay exception." *State v. Silverman*, 10th Dist. No. 05AP-837, 2006-Ohio-3826, ¶ 83, citing *State v. Walker*, 9th Dist. No. 14012 (Nov. 8, 1989).

{¶ 23} Nor was the statement admissible under Evid.R. 801(D)(1)(c), governing prior statements of identification. That rule provides that a statement is not hearsay if "[t]he declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification." Evid.R. 801(D)(1)(c). Here, Turner did not testify at trial, and he was not subject to cross-examination. Thus, his testimony could not be considered admissible under Evid.R. 801(D)(1)(c). *See State v. Nevins*, 171 Ohio App.3d 97, 2007-Ohio-1511, ¶ 30 (2d Dist.) (quotations omitted) ("[i]dentification testimony is not admissible per Evid.R. 801(D)(1)(c) unless the person who made the out-of-court identification testifies at trial and is subject to cross-examination").

{¶ 24} Appellant maintains that the exclusion of Detective Wachalek's testimony violated his right to present a complete defense under *Chambers v. Miss.*, 410 U.S. 284 (1973). We disagree. In *Chambers*, the United States Supreme Court found a due process violation based on the combined application of Mississippi's "voucher rule," which prohibited the defendant from impeaching his own witness (who had confessed to the crime but repudiated his confession on the stand) and Mississippi's hearsay rule, which prohibited the defendant from introducing evidence that the witness made incriminating statements to three people. *Id.* at 302. The court emphasized its holding was narrowly confined to the "facts and circumstances" of the case and did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.*

{¶ 25} Nothing in *Chambers* abolishes the hearsay rule or renders the out-of-court statements in this case admissible. To the contrary, *Chambers* actually recognizes the unreliability of out-of-court statements where, as here, the declarant does not testify and is not subject to cross-examination. The court found the availability of the declarant in that case to be an assurance of reliability that "significantly distinguishes" the case from those where the declarant was unavailable. *Id.* at 301. Therefore, we find *Chambers* to be materially distinguishable from the facts herein.

{¶ 26} Contrary to appellant's view, *Chambers* "does not stand for the proposition that the accused is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). Because Turner's out-of-court identification was inadmissible hearsay, the exclusion of Detective Wachalek's testimony was neither an abuse of discretion nor a violation of appellant's right to present a complete defense.

{¶ 27} Accordingly, appellant's second assignment of error is overruled.

III. Conclusion

{¶ 28} Having overruled appellant's first and second assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.
