[Cite as *In re A.W.*, 2009-Ohio-5093.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re:	:	
		No. 09AP-312
(A.W.,	:	(C.P.C. No. 07 JU-03-4254)
Appellant).	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on September 17, 2009

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

SADLER, J.

{¶1} Defendant-appellant, A.W. ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, in which that court adjudicated him delinquent on two counts of felonious assault. This case arises out of an incident that occurred on May 8, 2006, when appellant was 16 years old. On March 20, 2007, appellant was charged with four delinquency counts of

felonious assault as an aider and abettor to the firing of a handgun at a group of people. Each count carried a weapon specification.

{¶2} A magistrate held a trial on May 8, 2007 and July 16, 2007. Only two of the four alleged victims testified, and the magistrate found appellant delinquent on the two counts pertaining to those witnesses who testified. The magistrate found appellant not delinquent as to the other two charges. Appellant filed objections to the magistrate's decision, which the trial court overruled. Appellant appealed to this court, and we reversed after determining that the trial court had not employed the appropriate standard of review of the magistrate's decision; we determined that this rendered moot appellant's challenge to his adjudication as being against the manifest weight of the evidence. We overruled appellant's challenge to the sufficiency of the evidence. *In re A.W.*, 10th Dist. No. 08AP-442, 2008-Ohio-6312.

{¶3} Upon remand, the trial court issued a new decision and judgment entry overruling appellant's objections to the magistrate's decision. Appellant timely appealed and advances a single assignment of error for our review:

> The finding that appellant is a delinquent child was against the manifest weight of the evidence.

{¶4} We have previously set forth the standard of review when a juvenile delinquency adjudication is challenged on manifest weight grounds:

> A challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. The court of appeals sits as a "thirteenth juror" and after reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The

> discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.
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> A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. The determination of weight and credibility of the evidence is for the trier of fact. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. The trier of fact is free to believe or disbelieve all or any of the testimony. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility.

(Citations omitted.) *In re M.T.*, 10th Dist. No. 05AP-816, 2006-Ohio-3613, ¶8-9.

{¶5} In the present case, the following testimony was adduced at trial. Plaintiff-appellee, state of Ohio, presented two witnesses. First, Jaycheree Anderson ("Jaycheree") testified that at around 5:00 p.m. on May 8, 2006, she went with her sister, Jasmine ("Jasmine"), her brother, David, and David's friend, Benjamin Weaver ("Benjamin"), to the Linden Recreation Center in Columbus. The purpose of the trip was so the boys could play basketball. Jaycheree testified:

> My brother, well we all walked over to the basketball court to play and there was a group of boys already over there and they were walking to the field and some - - they were exchanging words back and forth and they decided to sh - - start shootin' so we all went home.

(May 8, 2007 Tr., 10.)

{¶6} Jaycheree explained that the group of boys that was already at the basketball court, which included appellant and was at least 15 in number, "were askin' us did we say anything. We said, no. 'Somebody said somethin'.' 'No, we didn't.' Then it

went from there." (May 8, 2007 Tr., 11.) According to Jaycheree, this particular exchange of words took place between Benjamin and Reginal Smallwood ("Smallwood"), an adult in appellant's group. Jaycheree testified that at some point, someone in appellant's group produced a gun, which was passed back and forth.

{¶7} She could not say whether appellant ever handled the gun, but she testified that as Smallwood pointed the gun at her group she heard appellant, who was standing next to Smallwood, say "Shoot that nigger, shoot that nigger." (May 8, 2007 Tr., 13.) She testified that at least four shots were fired and she heard the bullets pass close to her. Then both groups ran off. On cross-examination, she testified that the two groups were at least 100 meters apart, but later said that the distance might have been about half of a football field. Jaycheree testified that she arrived home five to ten minutes after the incident, whereupon she immediately told her mother, Tina Anderson, what had happened.

{¶8} The next prosecution witness was Jaycheree's sister, Jasmine. Jasmine gave the following account:

> Well first we went to Ben's house and then we walked to the center. It was time to play basketball. And we walked to the center, my brother and Ben wanted to play basketball, they asked who got next and [appellant] - - I don't know his name, he said, "I guess ya'll got next" whatever. And that's when it started happenin' and then Reggie and them was walkin' away, they got into the field and he - - I guess they thought somebody said somethin'. Reggie's like, "Who said somethin'?" And nobody said anything and that's when they started arguin' back and forth and all of the sudden I seen a gun had got passed and that's when he said, "Well, I'll shoot 'em, I'll shoot 'em." And that's when Reggie started shootin'.

(May 8, 2007 Tr., 37-38.) Jasmine testified that, though she did not know appellant's last name, she knew him and recognized his voice because he lived across the street from her. (May 8, 2007 Tr., 52.) Jasmine testified that she heard a bullet strike a pole close to where she was standing.

{¶9} Jasmine estimated that the shooting incident took place at 6:00 p.m. and she arrived home at 6:15 p.m. She testified that the children told their mother about the incident, whereupon their mother went across the street to speak to appellant's mother about it. While the three Anderson children were sitting on their front porch, appellant's mother came over to speak with them. Jasmine did not have an explanation as to why her mother's 911 call was logged at 8:30 p.m., more than two hours after her mother was informed about the incident.

{¶10} The defense began its case by calling Tina Anderson, the victims' mother. She testified that she could not remember exactly when her children arrived home on the date of the incident, but said that they were supposed to arrive home between 6:00 and 6:30 p.m. She testified that after she was told about the shots being fired, she spoke individually to each child to ascertain whether their accounts of the incident were consistent with one another, which they were. She testified that her children were upset and scared, and she was shocked and wanted to confirm the events before speaking with her neighbor, appellant's mother. She then went across the street to talk to appellant's mother about the incident prior to calling 911.

{¶11} She testified that she called 911 on the evening of May 8, 2006, to report the shooting. Originally, she testified that she called 911 between 6:00 and 8:00 p.m., but when the defense showed her the 911 records indicating her call came in at 8:30 p.m.,

she conceded that that was the time she called. Later, the defense again pressed her as to the reason for the two-hour delay in contacting the authorities. She testified that after she spoke to appellant's mother, his mother had gone to find appellant. She confirmed that she indeed may have waited two and one-half hours before calling 911.

{¶12} Next, the defense called Smallwood. He testified that on May 8, 2006, he had played basketball at the recreation center with a group, including appellant. When they were finished, they began to leave, whereupon the Anderson group arrived. Smallwood denied having had a gun or firing any shots. He stated that he did not hear appellant tell him to shoot anyone. When asked whether he saw anyone else open fire, he testified, "No. I wasn't paying attention." (July 16, 2007 Tr., 42.) He testified that he did hear shots in the distance. When the police came to his home to interview him two days later, he told them he had heard shots, and he was not arrested at that time. Later, he was charged with aggravated menacing, to which he pleaded guilty.

{¶13} Appellant testified next. He stated that he and his group had arrived at the recreation center at 4:30 p.m. and played basketball. When the Anderson group arrived they asked who was next in line for use of the basketball court. Appellant said he told them he guessed it was them. An argument ensued between Benjamin and someone in appellant's group, but, according to appellant, no one pulled out a gun or fired a gun. He stated that all members of his group were wearing gym shorts and, thus, had no place to put a gun. Appellant stated that he did hear gunfire, though, and he ran. He heard someone else say "shoot the nigger" but he denied he was the one who said that. He stated that this happened at about 6:00 p.m.

{¶14} Finally, the defense called appellant's mother Sonji Carthan. She testified that after she arrived home from work between 5:30 and 6:00 p.m. on May 8, 2006, Tina Anderson came over to report the shooting to her. She talked to the Anderson children on their front porch, then went to pick up her son at a house on a nearby street. She believed that "friction" had developed between Smallwood and Benjamin. (July 16, 2007 Tr., 70-71.)

{¶15} The parties agreed that Tina Anderson called 911 at 8:34 p.m., and that no bullets or gun were recovered from the scene or elsewhere.

{¶16} In support of his argument that the trial court's judgment is against the manifest weight of the evidence, appellant focuses primarily upon the amount of delay between when Tina Anderson's children told her about the incident and when she called 911, arguing "[i]t is highly suspicious that a parent would wait two to three hours before notifying the authorities after hearing shots had been fired at her children." (Brief of appellant, 7.) We disagree.

{¶17} Tina Anderson testified that she spoke to each of her children individually to ensure she received the full story. She then went across the street to speak to her neighbor, the mother of the person her children were accusing of encouraging the shooting. Though not all mothers would be as careful to verify their children's information, or as courteous in advising their neighbor that her son is a suspect, these facts do not raise questions about Tina Anderson's credibility so as to call the judgment into question.

{¶18} Appellant also points out that there was no physical evidence, such as spent ammunition, shells or photographs of bullet strikes, and the State presented no "neutral" witnesses. (Brief of appellant, 9.) But the court did have before it the testimony

of the two victim witnesses, who testified that appellant told the shooter to shoot at the victims' group, and that the shooter followed appellant's instruction. The victims' versions of events were entirely consistent with one another, and provided the elements of the crime of felonious assault. Appellant and Smallwood denied that appellant told Smallwood to shoot, but resolution of the competing testimony on this point was particularly within the province of the trier of fact. A conviction is not to be reversed merely because the defendant's version of events is contrary to that offered by the victims or other witnesses. *State v. Jackson*, 10th Dist. No. 06AP-1267, 2008-Ohio-1277, ¶11. The trier of fact was free to believe or disbelieve all or any of the testimony. Id.

{¶19} Finally, appellant argues that the judgment was against the manifest weight of the evidence because Jaycheree's estimate that a distance of 50 yards separated the shooter and her group is not enough evidence of appellant's or Smallwood's intention to harm the victims. Without any citation to authority for the proposition, he argues that "half the length of a football field is beyond the effective range of a handgun. If the incident happened, at all, whether at short or long range, the intent appears to have been to scare, not harm." (Brief of appellant, 10.) There is no evidence in the record regarding the "effective range of a handgun." Moreover, there is evidence that appellant actively encouraged Smallwood to shoot at the victims, Smallwood pointed the gun at the victims and fired, and bullets passed near enough to the victims that they both heard bullets pass by and one of them heard a bullet strike a nearby object.

{¶20} Upon our review of all of the evidence in the record and the parties' arguments, we cannot say that the evidence weighs heavily against conviction or that 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. Accordingly, appellant's single assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed.

Judgment affirmed.

FRENCH, P.J., and KLATT, J., concur.

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