

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

LEVANDER R. DAVIS,

Defendant-Appellant.

13-1285

Case No.

Appeal taken from the:
Tenth Judicial District
Franklin County, Ohio

COA Case No. 12AP-156

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT LEVANDER DAVIS

Levander R. Davis #A656768
Allen Correctional Institution
Attention C-Unit
2338 North West St.
Lima, Ohio 45801
Phone: (419) 224-8000
DEFENDANT-APPELLANT, PRO SE

Ron O'Brien (0017245)
Franklin County Prosecuting Attorney
373 South High St., 13th Floor
Columbus, Ohio 43215
Phone: (614) 525-3555
COUNSEL FOR PLAINTIFF-APPELLEE

RECEIVED
AUG 09 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
AUG 09 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Explanation of why this is a case of public or great general ... 3
interest and involves a substantial constitutional question

Statement of the Case 6

Statement of the Facts 7

Proposition of law number one 11
The trial court erred by overruling Appellant's Crim. R.
29 motion for judgment of acquittal, and thereby deprived
Appellant of Due Process of Law as guaranteed by the Fifth
and Fourteenth Amendment to the United States Constitution
and comparable provisions of the Ohio Constitution.

Proposition of law number two 15
The trial court erred by finding Appellant guilty and
thereby deprived Appellant of Due Process of Law as
guaranteed by provisions of the Ohio Constitution because
the verdict of guilty was against the manifest weight of
the evidence.

Conclusion 17

Certificate of Service 18

Appendix: (1) Judgment Entry filed July 1, 2013 (2 pages) A-1
(2) Decision rendered June 28, 2013 (7 pages) A-3
Tenth Judicial District Court of Appeals
Franklin County, Ohio

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Appellant Levander R. Davis proposes a question that commonly affects pro se prisoners appealing their criminal conviction and/or sentence. Because the matter is one of judicial economy, it is of public and great general interest, and is thus ripe for this Court's resolution. The Appellant, like countless others whose case is so postured, is seeking to reopen his appeal pursuant to Rules 26(B) of the Ohio Rules of Appellate Procedure. He will propose several assignments of error not raised on his appeal due to the ineffective assistance of appellate counsel. However, the Appellant also seeks to reopen his appeal for the two assignments of error that were raised by appellate counsel - and on the same grounds - that being ineffective assistance of appellate counsel. This is so because the Appellant is convinced that said errors that were raised do have merit, but that appellate counsel failed to include pertinent facts and supporting law that would have driven the appellate court to sustain the two assignments of error, instead of overruling them.

Stated another way, had appellate counsel effectively argued the two assignments of error before the appellate court, "there is ... the possibility that, but for ... [the omissions and] unprofessional errors the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, at 694 (1984); see also App. R. 26(B)(5). An application for reopening must be filed "within ninety days from journalization of the appellate judgment" pursuant to App. R. 26(B)(1). Given the possibility that the appellate court may deny the application, and the certainty that the appellate courts

decision will not be rendered before the forty-five day deadline to seek review by this Honorable Court, the Appellant must present the (ineffectively argued) claims to this Court or risk forfeiting the claims for federal habeas and/or certiorari review.

Alternatively, if the appellate court grants the application, but later overrules the assignments of error, then the result is that the Appellant will twice be seeking review of essentially the same claims with this Court. The conundrum becomes increasingly more complicated on federal habeas and certiorari review. Regardless, even if an appellant is not trying to reopen the same claims in his appeal, and only asserts assignments of error not previously raised, he nonetheless must come before this Honorable Court twice in order to preserve the right to federal review. Thus, the collateral effects to judicial economy become clear and convincing.

Further, given the relatively high number of appeals that do result in an application for reopening pursuant to App. R. 26(B), this is indeed an issue of public and great general interest, and does pose underlying constitutional questions. Only App. R. 26(A) addresses the conundrum directly, as it is specifically stated in Rule 26(A) that "[t]he filing of an application for reconsideration shall not extend the time for filing a notice of appeal in the Supreme Court." No such mandate by legislature exists under Rule 26(B), therefore this Court, under the separation of powers, has authority to mandate that a properly filed application for reopening an appeal pursuant to App. R. 26(B) will toll the limitations period for the filing of a notice of appeal with the Supreme Court of Ohio.

As such, this Honorable Court should accept jurisdiction over

the case sub judice, and resolve this issue, as well as the many issues in the assignments of error that represent violations of the Appellant's Fourth, Fifth, Sixth, and Fourteenth Amendment rights as protected by the Constitution of the United States.

STATEMENT OF THE CASE

Appellant was indicted on one count of Murder in violation of R.C. 2903.02, one count of Attempted Murder in violation of R.C. 2903.02, one count of Felonious Assault in violation of R.C. 2903.11, and one count of Weapons Under Disability in violation of R.C. 2923.13. On December 12, 2011, a trial was held on these allegations. At the conclusion, Appellant was convicted on all counts.

On January 18, 2012, the Court sentenced Appellant to serve fifteen years to life related to the Murder (plus three years on the gun specification), ten years related to Attempted Murder (plus three years on the gun specification), eight years related to Felonious Assault (plus three years on the gun specification), and three years related to Weapons Under Disability (plus three years on the gun specification). The Court merged the firearm specifications related to Attempted Murder and Felonious Assault. The Court also ordered the sentences related to Attempted Murder, Felonious Assault, and Weapons Under Disability to run concurrent with the Murder sentence. At the time of sentencing, Appellant was also sentenced to ten years on case number 11CR-2202.

Appellant is currently serving a sentence of forty-four years to life in the Ohio Department of Rehabilitation and Correction. On February 24, 2012, Appellant timely appealed to the Tenth Judicial District Court of Appeals, who rendered their decision on June 28, 2013. (See Appendix). Because the appellate court affirmed the convictions, the Appellant seeks discretionary appeal from this Court pursuant to S. Ct. Prac. 2.1(A)(3).

STATEMENT OF THE FACTS

The Appellant takes issue with the statement of the facts that were presented by appellate counsel on appeal, which are being properly addressed in an application to reopen the appeal pursuant to App. R. 26(B). However, it is Appellant's understanding and belief that the instant appeal may not be utilized to raise issues not presented to the Tenth Judicial District Court of Appeals. Thus, the statement of the facts as presented by appellate counsel to the Tenth District are as follows:

In the early morning hours of March 8, 2012, Appellant was a patron at Mike's Bar near the West Broad Street area in Columbus, Ohio. (Tr. p. 50). This area is a high-crime area known to have gang related activity. Id. at 48. Several other patrons were inside the bar near Appellant, including Brandon Houston, DeAndre Fagain, and Demetri Evans, all who testified at the trial in this matter.

Brandon Houston testified that he was inside the bar with his friends Tumarcus Steele, Donatello Taliaferro, DeAndre Fagain, and Al, last name unknown. Id. at 96. Around 40 individuals were inside the bar watching television or playing pool. Id. at 97. Within minutes of Houston's arrival, he noticed Appellant lifting his shirt to expose what he believed to be a handgun in his waistband. Tracy Ferguson, another bar patron, was on the dance floor "throwing up gang signs in the mirror." Demetri Evans, a bar patron near Appellant, confronted Ferguson on the dance floor and attempted to get him to stop flashing gang signs. Id. at 98-101. Ferguson became "hostile" and started arguing with Evans and Appellant. Id. at 101. According to Houston, Appellant reached for his waistband. Houston immediately

ran for the bathroom. While taking cover, he heard several gun shots. He never saw Appellant with a gun in his hand, actually firing the weapon. Id. at 108.

DeAndre Fagain testified that he witnessed Appellant draw his weapon and fire at Ferguson. Id. at 257. Fagain and Tumarcus Steele sustained injuries during the shooting. Id. at 107. In fact, Fagain suffered eight gunshot wounds while attempting to run from the bar. Id. at 269. After medics attended to Fagain, Houston left the scene, noticing a gun clip or magazine lying in the foyer area of the bar as he left. Id. at 109. And, despite what both Houston and Fagain described as an unobstructed view of the incident, both witnesses had trouble identifying Appellant in a photo array. Id. at 138-40 and 785. Demetri Evans testified that he was with the Appellant that night in the bar. He was also related to the deceased, Tracy Ferguson. Evans accepted a plea agreement from the State for his testimony against Appellant. He avoided jail and, during trial, he claimed that Appellant often carried multiple guns and weapons. Id. at 616-17.

Officer John Thiel of the Columbus Police Department testified about what he saw in the bar when he arrived. He noticed four to five shell casings near the doorway of the bar. After the scene was secure, detectives began processing the scene. Tables and chairs were found knocked over, with ammunition lying throughout the bar. Id. at 60. The Crime Scene Unit located projectiles on the floor, casings on the floor, and projectiles in the wall near the main bar area. Days after the shooting, officers returned to the scene based on an anonymous tip. The tip stated that weapons and narcotics were hidden in the basement where several individuals fled when the shooting began. Id. at 689. The basement was never analyzed before this point. But

once the basement was processed, officers discovered more projectiles, three handguns, and narcotics. Id. at 690.

After medics transported Ferguson, he was officially pronounced dead at Mount Carmel Medical Center as the result of multiple gunshot wounds. Id. at 313. A total of eleven .9 mm casings and thirty-three .40 caliber casings were recovered from the scene. Ten days later, Appellant was arrested by Sergeant Mathias as a suspect for murder, and he had a .9mm handgun on him at the time of arrest. Id. at 357. A ballistics expert determined that the .9 mm casings were fired from Appellant's handgun found on his person at the time of arrest. The .40 caliber handgun was never recovered. Id. at 447-48 and 693.

The clip seen by DeAndre Fagain in the bar's doorway was also processed and later determined to be a .40 caliber handgun clip. DNA was obtained from the clip, and a sample of Appellant's DNA was compared at the crime lab. Appellant was found to be a major contributor to the DNA on the clip. Id. at 582-83. However, as noted at the trial, this evidence is questionable because DNA may be transferred without even touching an item. Id. at 595.

Projectiles were also removed from Tracy Ferguson and DeAndre Fagain. Those projectiles were determined to be from a .40 caliber handgun, which was never located. The several witnesses who testified against the Appellant were nearby before and after the shooting, and they testified that Appellant was seen with only one handgun that evening, a .9 mm - the same .9 mm found on Appellant and linked to casings found in the bar. No one testified that Appellant was also seen carrying a .40 caliber weapon.

However, despite a different caliber weapon responsible for the crimes, Appellant was convicted on all counts. He was sentenced to a

total of forty-four years to life on this case and 11CR-2202.

Such are the facts of the case as appellate counsel construed to be relevant to the appeal as of right to the Tenth Judicial District Court of Appeals.

PROPOSITION OF LAW NUMBER ONE

The Appellant takes issue with the argument below as presented by appellate counsel on appeal, which is being properly addressed in an application to reopen the appeal pursuant to App. R. 26(B). However, it is Appellant's understanding and belief that the instant appeal may not be utilized to raise issues or include argument not presented to the appellate court. That said, the Appellant does not concede that the claim is without merit, and in fact asserts that the appellate court erred in overruling the claim, even with the deficiencies by appellate counsel. Thus, the following argument is presented for this Honorable Court's consideration, as prepared by appellate counsel on appeal as of right.

THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S CRIM. R. 29 MOTION FOR JUDGMENT OF ACQUITTAL, AND THEREBY DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.

The trial court erred in overruling Appellant's Crim. R. 29 motion for judgment of acquittal, as the State failed to offer sufficient evidence to prove each and every element of the crime charged beyond a reasonable doubt. The Ohio Supreme Court has set forth the following standard with respect to claims of insufficient evidence:

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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.

In order to convict Appellant of one count of Murder, one count of Attempted Murder, one count of Felonious Assault, and one count of Weapons Under Disability. The State is required to prove beyond a reasonable doubt all the elements of each offense. The State failed to satisfy their burden regarding these offenses.

First, the State did not prove beyond a reasonable doubt the offense of Murder. Under R.C. 2903.02, it must be shown that Appellant "purposely cause[d] the death of another." The State's witnesses testified that a chrome .9 mm handgun was in Appellant's waistband. *Id.* at 259. He grabbed and fired the weapon during the fight with Ferguson. Appellant was also arrested ten days later with the same .9 mm handgun. However, bullets removed from Tracy Ferguson and DeAndre Fagain were .40 caliber rounds. Numerous shell casings and projectiles were recovered at the scene. Appellant was never seen in possession of a weapon that even resembled a .40 caliber handgun. Given the number of patrons at the bar and the amount of weapons later retrieved at the scene, the only logical explanation is that there were multiple shooters. The State attempted to prove possession of a second handgun based on DNA retrieved from the .40 caliber clip in the doorway. However, Ms. Pauley of the Columbus Police Crime Laboratory indicated that DNA can be transferred to an item without even touching it, and DNA can be left behind if the item was touched a year earlier. *Id.* at 595 and 600. This was the State's failed attempt to link Appellant to possession of a .40 caliber handgun. Also, the eyewitnesses the State relied so heavily on did not witness Appellant possess or shoot multiple handguns. Therefore, the elements of Murder were not satisfied by the State and the trial court erred in denying the Rule 29 motion.

Second, the State did not prove beyond a reasonable doubt the offense of Attempted Murder. Under R.C. 2903.02, as discussed above, it must be shown that Appellant attempted to "purposely cause the death of another." This allegation related to the testimony of Fagain. As discussed above, Fagain suffered several gunshot wounds that night. However, all projectiles retrieved from Fagain's body were .40 caliber rounds. Again, Appellant was never in possession of a .40 caliber handgun. In fact, the State's witnesses, likely because of their affiliation with gangs, correctly identified the Appellant's weapon as a chrome .9 mm handgun. Ms. Amstutz, a forensic scientist, also testified that she had never seen a chrome .40 caliber handgun. Id. at 492. Additionally, Fagain turned and ran when the shooting began. He never witnessed who actually fired the weapon at him, and he initially did not even know he was shot. For these reasons, it is logical to believe there were multiple shooters inside the bar. Therefore, the State did not meet its burden that Appellant committed the offense of Attempted Murder, and the trial court erred in denying the Rule 29 request for acquittal.

Third, the State did not prove beyond a reasonable doubt the offense of Felonious Assault. Under R.C. 2903.11, no person shall knowingly "cause serious physical harm to another." Again, the State attempted to relate all injuries suffered in the bar that night to the Appellant. All injuries that were suffered were related to a .40 caliber handgun. Appellant was never in possession of this caliber of weapon; rather, the State's witnesses identified Appellant as possessing only a .9 mm handgun. Plus, during the course of the investigation, numerous weapons, casings, and projectiles were recovered from the scene. These included weapons and narcotics retrieved

from the ceiling in the basement of the bar, clearly the work of individuals trying to conceal weapons before police arrival. The only logical conclusion is that multiple shooters were involved, and they possessed different caliber weapons than the .9 mm handgun that Appellant possessed that night. Thus, it was error for the trial court to not grant Appellant's request for Rule 29 acquittal when reviewing all the evidence.

Fourth, the State did not prove beyond a reasonable doubt the offense of Weapons Under Disability. Under R.C. 2923.13, the State must prove that Appellant had a prior felony conviction and possessed a weapon. As mentioned above, the key witnesses at trial, Houston and Fagain, had trouble identifying Appellant as the patron possessing the weapon. The State's other witness, Demetri Evans, struck a deal in an attempt to stay out of prison. No reliable, physical evidence was presented proving Appellant was in possession of a firearm. Therefore, the trial court erred in failing to grant Appellant's motion for Rule 29 acquittal as to this count.

As such, in viewing the evidence in the light most favorable to the State, the burden as to each element of the offense has not been met, so the Rule 29 motion should have been granted by the trial court regarding all counts in the indictment.

PROPOSITION OF LAW NUMBER TWO

The Appellant takes issue with the argument below as presented by appellate counsel on appeal, which is being properly addressed in an application to reopen the appeal pursuant to App. R. 26(B). However, it is Appellant's understanding and belief that the instant appeal may not be utilized to raise issues or include argument not presented to the appellate court. That said, the Appellant does not concede that the claim is without merit, and in fact asserts that the appellate court erred in overruling the claim, even with the deficiencies by appellate counsel. Thus, the following argument is presented for this Honorable Court's consideration, as prepared by appellate counsel on appeal as of right.

THE TRIAL COURT ERRED BY FINDING APPELLANT GUILTY AND THEREBY DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY PROVISIONS OF THE OHIO CONSTITUTION BECAUSE THE VERDICT OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Assuming arguendo that this Court finds sufficient evidence to support Appellant's conviction, the verdict nonetheless is against the manifest weight of the evidence. *State v. Robinson*, 162 Ohio St. 486, 487 (1955), (holding that although a verdict is supported by sufficient evidence, a court of appeals may still determine that the verdict is against the manifest weight of the evidence); see also *State v. Banks*, 78 Ohio App.3d (1992), (applying the standards set forth in *Robinson*). The Ohio Supreme Court has promulgated the following standard for reviewing challenges relating to the manifest weight of the evidence:

The court, 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.

Id. (citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1983)).

Under this standard, the test for determining whether a verdict is against the manifest weight of the evidence is much broader and gives a reviewing court more latitude than the test for determining sufficiency of the evidence. *Banks*, 78 Ohio App.3d 206 (1992). Unlike the standard for challenges related to sufficiency of the evidence, the court in a manifest weight challenge has the opportunity to consider the entire record and independently evaluate the credibility of the witnesses.

As this Court [Tenth Judicial District] stated in *State v. Conley* (Dec. 16, 1993), Franklin App. No. 93AP-387, unreported, 1993 WL 524917:

When the manifest weight of the evidence is at issue, the evidence is not construed most strongly in favor of the state. Instead, the appellate court must engage in a limited weighing of the evidence to determine whether there is sufficient competent, credible evidence to permit reasonable minds to find guilt beyond a reasonable doubt.

Id. at 5437 (citing *State v. DeHass*, 10 Ohio St.2d 230 (1967)).

Appellant's conviction on all counts in the indictment was against the manifest weight of the evidence. As stated above, Appellant was identified at the scene as possessing a single chrome .9 mm handgun. When the shooting started, most of the eyewitnesses scattered to different locations inside the bar. Several different types of weapons, casings, and projectiles were retrieved from the scene. Plus, Tracy Furgeson died as a result of .40 caliber gunshot wounds, and Fagain was shot several times with a .40 caliber handgun. The only logical

conclusion given the amount of ammunition and handguns located at the scene is that multiple shooters were involved. This is not surprising given the fact that Officer Thiel testified it was a dangerous area, and he had been in the bar before because of violence. Id. at 48-9. Nevertheless, the State prosecuted Appellant for all injuries sustained in the bar that evening. This is not consistent with eyewitness testimony or the physical evidence presented at trial.

To make its case, the State relied on the fact that the .40 caliber clip retrieved from the scene had Appellant's DNA on it. However, the State's own expert admitted that DNA can be present on objects near individuals and that no direct contact is needed with an object to leave behind DNA evidence. Id. at 595. This attempt to link Appellant to a .40 caliber weapon, then, is speculative at best, and it certainly does not qualify as evidence beyond a reasonable doubt.

Consequently, the State did not produce enough evidence to convince reasonable minds that Appellant was guilty of these offenses beyond a reasonable doubt. As a result, the verdict on all counts in the indictment was against the manifest weight of the evidence.

CONCLUSION

Based on the foregoing, Appellant respectfully requests the Court to sustain the Assignments of Error, reverse the decision and entry of the [appellate] court, and remand for further proceedings consistent with the law.

Respectfully submitted,



Levander R. Davis #A656768

Allen Correctional Institution
Attention C-Unit
2338 North West St.
Lima, Ohio 45801
Phone: (419) 224-8000
DEFENDANT-APPELLANT, PRO SE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by first-class United States mail to counsel for the plaintiff-appellee Ron O'Brien, Franklin County Prosecuting Attorney, 373 South High St. 13th Floor, Columbus, Ohio 43215 on the 2nd day of August, 2013.



Levander R. Davis #A656768
DEFENDANT-APPELLANT, PRO SE

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

LEVANDER R. DAVIS,

Defendant-Appellant.

Case No. _____

Appeal taken from the:
Tenth Judicial District
Franklin County, Ohio

COA Case No. 12AP-156

APPENDIX TO THE
MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT LEVANDER R. DAVIS

- 1) Judgment Entry filed July 1, 2013, overruling Appellant's assignments of error and affirming the judgment of the Franklin County Court of Common Pleas (2 pages total).
- 2) Decision by the Tenth Judicial District Court of Appeals that was rendered on June 28, 2013 (7 pages total).

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-156
 : (C.P.C. No. 11CR-05-2313)
 Levander R. Davis, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 28, 2013, appellant's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

CONNOR, J., KLATT, P.J., and DORRIAN, J.

/s/ _____
Judge John A. Connor

Tenth District Court of Appeals

Date: 07-01-2013
Case Title: STATE OF OHIO -VS- LEVANDER R DAVIS
Case Number: 12AP000156
Type: JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge John A. Connor

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-156
 : (C.P.C. No. 11CR-05-2313)
 :
 Levander R. Davis, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 28, 2013

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

R. William Meeks Co., L.P.A., and *David H. Thomas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Levander R. Davis ("defendant"), appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a jury verdict, of one count of murder, in violation of R.C. 2903.02, one count of attempted murder, in violation of R.C. 2903.02, and one count of felonious assault, in violation of R.C. 2903.11. Defendant waived his right to a trial by jury and the trial judge found defendant guilty of having a weapon while under disability, in violation of R.C. 2923.13. Because sufficient evidence and the manifest weight of the evidence support defendant's convictions, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On May 2, 2011, defendant was indicted on one count each of murder, attempted murder, felonious assault, having a weapon while under disability, and illegal

possession of a firearm in a liquor permit premises. Each charge also carried a firearm specification. Upon application of the assistant prosecuting attorney, and for good cause shown, the trial court ordered that a nolle prosequi be entered as to the illegal possession of a firearm in a liquor permit premises charge. Following trial, defendant was found guilty of the remaining charges in the indictment. The events giving rise to the indictment occurred during the early morning hours of March 8, 2012.

{¶ 3} On March 8, 2012, defendant was a patron at Mike's Bar in Columbus, Ohio. The area where Mike's Bar is located is a high-crime area known to have gang related activity. That night, there were several patrons inside the bar near defendant, including Brandon Houston, DeAndre Fagain, and Dimetri Evans, all of whom testified at defendant's trial.

{¶ 4} Houston testified that he was at the bar with his friends, Tumarcus Steele, Donatello Taliaferro, Fagain, and a man named Al, whose last name Houston did not know. According to Houston, there were approximately 40 patrons inside Mike's Bar that evening. Houston testified that he observed defendant at the bar with two other men, neither of whom Houston knew: Tracy Ferguson, Jr., and a man with tattoos on his face who was later identified as Evans. Shortly after Houston arrived, he saw defendant lift his shirt and expose a gun. At the same time, Houston observed Ferguson "throwing up gang signs in the mirror." (Tr. 101.) At that time, Evans approached Ferguson and tried to get him to stop. Instead, Ferguson became more hostile and began arguing with Evans and defendant. At that time, Houston observed defendant reach for his hip and extend his arm. Houston heard the first gun shot at which time he turned and ran into the bathroom. According to Houston, he heard three gun shots, followed by silence and then additional gunfire and screaming. Houston stayed in the bathroom until the bar was quiet. Houston did not see defendant actually fire the gun and did not see anyone get shot. As he left the bar, Houston stumbled on a magazine clip from a gun which he pointed out to police.

{¶ 5} Fagain testified that he observed three people in the bar having an argument, and described one of those men as trying to calm down one of the other two men. Fagain observed defendant first hit Ferguson and then pull out a gun and shoot Ferguson. Fagain testified further that, after defendant shot Ferguson, defendant "just started shooting up the club." (Tr. 260.) Fagain testified that defendant was the only one

shooting at the time. When the shooting began, Fagain turned to run and was shot several times.

{¶ 6} Evans was at the bar that night with defendant and Ferguson. Evans' testimony corroborated Houston's testimony that Ferguson was throwing up gang signs. Evans testified that he knew defendant had several different guns, he knew defendant frequently carried a gun, and sometimes carried more than one gun. Evans testified that he saw defendant with a gun on the night in question, and saw defendant shoot Ferguson.

{¶ 7} Columbus Police Officer Jim Thiel was the first officer to arrive at the scene. Officer Thiel saw four to five shell casings lying in the entrance to the bar. Columbus Police Officer Timothy Mounts testified that eleven 9mm spent shell casings were recovered from the north end of the bar and that, in that same area, thirty-three 40 caliber spent shell casings were also recovered. It was determined that the 9mm shell casings had been fired from a 9mm gun which was later recovered from defendant. Columbus Police Officer Kevin Jackson testified and identified photographs he took at the scene. Columbus Police Detective Jacqueline Mitchell identified evidence which she collected and logged, including a black ammunition magazine clip found near the entrance to the bar.

{¶ 8} Columbus Police Sergeant Jeff Matthias testified concerning the circumstances surrounding defendant's arrest. At the time of his arrest, defendant admitted that he had a gun in his waistband. Sergeant Matthias identified the gun recovered from defendant as a loaded 9mm Smith & Wesson. A ballistics expert determined that the 9mm casings found at the scene were fired from defendant's handgun. The 40 caliber handgun was never recovered.

{¶ 9} The magazine clip Houston saw in the doorway was recovered and was determined to be a 40 caliber handgun magazine clip. DNA obtained from the magazine clip was compared to a sample of defendant's DNA and it was determined that defendant was a major contributor to the DNA on the magazine clip. During cross-examination, the forensic scientist who processed the DNA sample explained that a major contributor "relates to the quantity of that DNA being left on that item." (Tr. 597.) The analyst also testified that DNA can be transferred from one object to another.

{¶ 10} Defendant's counsel called Columbus Police Detective Robert Wachalec to testify. Detective Wachalec was the blind administrator for a photo array presented to

Fagain. In his report regarding the photo array, Detective Wachalec indicated that Fagain identified Evans as the shooter. Detective Wachalec testified at trial that his summary of the identification was not accurate, because Fagain had actually identified defendant as the shooter.

{¶ 11} Following a sentencing hearing on January 18, 2012, defendant was sentenced to serve 15 years to life for the murder conviction, ten years for the attempted murder conviction, eight years for the felonious assault conviction, three years for having a weapon while under disability conviction, and three years for each firearm specification. The trial court ordered that defendant serve the attempted murder, felonious assault, and having a weapon while under disability sentences concurrently to each other, but consecutive to the murder sentence and consecutive to the firearm specifications. The court merged two of the sentences for the firearm specifications. The court further ordered that defendant serve the sentence herein consecutive to a ten years prison sentence from common pleas case No. 11CR-2202, for a total prison term of 44 years to life.

II. ASSIGNMENTS OF ERROR

{¶ 12} Defendant appeals and presents the following two assignments of error:

[I.] THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S CRIM. R. 29 MOTION FOR JUDGMENT OF ACQUITTAL, AND THEREBY DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.

[II.] THE TRIAL COURT ERRED BY FINDING APPELLANT GUILTY AND THEREBY DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY PROVISIONS OF THE OHIO CONSTITUTION BECAUSE THE VERDICT OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 13} Defendant's first assignment of error asserts the court erred in failing to grant his Crim.R. 29 motion. Defendant moved for acquittal pursuant to Crim.R. 29 at the close of the State of Ohio's, plaintiff-appellee, ("State"), case-in-chief.

{¶ 14} Pursuant to Crim.R. 29(A), a court "shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction

of such offense or offenses." Because a Crim.R. 29 motion questions the sufficiency of the evidence, "[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence." *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶ 6; *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37.

{¶ 15} Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Conley*, 10th Dist. No. 93AP-387 (Dec. 16, 1993). When reviewing the sufficiency of the evidence, the court does not weigh the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79.

{¶ 16} Defendant argues that the State did not demonstrate that he: (1) purposely caused the death of Ferguson, (2) attempted to purposely cause the death of Fagain, (3) knowingly caused serious physical harm to others, or (4) that he had a prior felony conviction and possessed a weapon. According to defendant, the State failed to prove beyond a reasonable doubt that he fired a 40 caliber handgun that night.

{¶ 17} The State presented two eyewitnesses who saw defendant shoot Ferguson, and a third eyewitness who saw defendant with a gun that night. Further, although defendant claimed that there were multiple shooters in the bar that night, all three eyewitnesses who testified saw only one person with a gun in the bar before the shooting, and that person was the defendant.

{¶ 18} Although a 40 caliber handgun was not recovered that night, a 40 caliber magazine clip was recovered. Forensic evidence established that defendant was a major contributor of DNA on the magazine clip. Further, the 9mm and 40 caliber spent shell casings which were recovered from the bar were all found in the same general area, the north end of the bar.

{¶ 19} Here, both eyewitness testimony and circumstantial evidence indicated that defendant was the shooter at Mike's Bar that night and that he was the one who killed Ferguson and wounded Fagain. Accordingly, sufficient evidence supported the jury's conclusion that defendant purposely caused Ferguson's death, attempted to cause

Fagain's death, knowingly caused serious physical harm to others, and had a weapon while under disability.

{¶ 20} Because the evidence, when viewed in a light most favorable to the State was legally sufficient to support defendant's conviction, the trial court properly overruled defendant's Crim.R. 29 motion. Defendant's first assignment of error is therefore overruled.

{¶ 21} Defendant's second assignment of error asserts that his convictions are against the manifest weight of evidence presented at trial. Sufficiency of the evidence and manifest weight of the evidence are distinct concepts; they are "quantitatively and qualitatively different." *Thompkins* at 386. When presented with a manifest weight argument, we engage in a limited weighing of evidence to determine whether sufficient, competent, credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *Conley*. *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). In the manifest weight analysis, the appellate court considers the credibility of the witnesses and determines whether 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." *Id.*, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1983). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 22} In support of his argument, defendant asserts: (1) he was only seen with a 9mm handgun, (2) all the witnesses ran when the shooting began, (3) the victim and Fagain were shot several times with a 40 caliber handgun, and (4) to the extent that his DNA was found on the 40 caliber magazine clip, the State's expert admitted that DNA can be transferred to an object even if the object is never touched by the person.

{¶ 23} The State presented physical and scientific evidence establishing that defendant possessed a 40 caliber handgun on the night of the shooting. First, the State presented two eyewitnesses who saw defendant shoot Ferguson, and one of those

eyewitnesses was a friend of defendant. Second, Fagain specifically testified that defendant shot him. The evidence established that Fagain was shot twice in the stomach, indicating that he was facing defendant at the time the shots were fired. Second, there were thirty-three 40 caliber shell casings found inside the bar in the same general area as the 9mm shell casings which were fired from the gun recovered from defendant. This indicates that both guns were fired from the same general area. Third, DNA testing revealed that defendant was a major contributor to the DNA recovered from the 40 caliber magazine clip. As the State's expert noted, there are major contributors and minor contributors and here defendant was a major contributor to the DNA present on the 40 caliber magazine clip. Fourth, there was testimony that defendant owned several handguns and was known to carry more than one gun on occasion.

{¶ 24} Engaging in the limited weighing of the evidence, which we are permitted, the record does not indicate that the jury clearly lost its way. The direct and circumstantial evidence indicating that defendant shot and killed Ferguson and wounded Fagain, including eyewitness testimony and other physical evidence recovered from the scene, provided the jury with credible, competent evidence on which to find defendant guilty on all counts beyond a reasonable doubt.

{¶ 25} Defendant's second assignment of error is overruled.

III. CONCLUSION

{¶ 26} Having overruled defendant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT, P.J., and DORRIAN, J., concur.
