[Cite as *State v. Thompson*, 2016-Ohio-7154.]

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. 2015-T-0087**
- vs -	:	
DAVID BRIAN THOMPSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas.
Case No. 2014 CR 00319.

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, 112 South Water Street, Suite C., Kent, OH 44240 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, David Brian Thompson, appeals from the July 10, 2015 judgment of the Trumbull County Court of Common Pleas, convicting him on one count of felonious assault with a firearm specification, following a jury trial. At issue is whether the conviction was against the manifest weight of the evidence. For the reasons that follow, the judgment of the trial court is affirmed.

{¶2} On May 4, 2014, appellant was indicted on one count of felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2)&(D)(1)(a); and one count of receiving stolen property, a felony of the fourth degree, in violation of R.C. 2913.41(A)&(C). The felonious assault count carried a firearm specification pursuant to R.C. 2941.145. Appellant pled not guilty, and the case was tried to a jury.

{¶3} The jury found appellant not guilty of receiving stolen property and guilty of felonious assault with a firearm specification. He was sentenced to five years in prison on the underlying felony and three years in prison on the firearm specification. The three-year sentence on the firearm specification was to be served prior to and consecutive to the underlying five-year sentence, resulting in an aggregate prison term of eight years.

{¶4} Appellant timely appealed and assigns one error for our review:

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

{¶6} Appellant argues his conviction for felonious assault, and therefore the firearm specification, was against the manifest weight because the evidence presented against him was inconsistent and contradictory.

{¶7} To determine whether a verdict is against the manifest weight of the evidence, a reviewing court must consider the weight of the evidence, including the credibility of the witnesses and all reasonable inferences, to determine whether the trier of fact "'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).

"This Court [is] not in a position to view the witnesses who testified below and observe their demeanor, gestures and voice inflections, and use those observations in weighing the credibility of the proffered testimony." *State v. Long*, 127 Ohio App.3d 328, 335 (4th Dist.1998) (citations omitted). Therefore, in weighing the evidence submitted at a criminal trial, an appellate court must give substantial deference to the factfinder's determinations of credibility. *State v. Tribble*, 2d Dist. Montgomery No. 24231, 2011-Ohio-3618, ¶30, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

{¶8} To convict appellant of felonious assault, the state was required to prove, beyond a reasonable doubt, that appellant knowingly caused or attempted to cause "physical harm to another * * * by means of a deadly weapon or dangerous ordnance." R.C. 2903.11(A)(2). "Attempt" occurs when a person, purposely or knowingly—"when purpose or knowledge is sufficient culpability for the commission of an offense"—engages "in conduct that, if successful, would constitute or result in the offense." R.C. 2923.02(A). "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶9} The shooting incident giving rise to the indictment occurred at 207 Atlantic Street in Warren, Ohio, on April 7, 2014. A company called Pro Flooring is on the first floor of the building. The second floor houses three apartments. Roger Morgan and John Stiffler moved into Apartment B about one to two weeks before the incident. John Taylor had resided in Apartment A for approximately two years; appellant had resided in

Apartment C for about the same length of time. Although pets were not generally permitted in the apartments, appellant had permission from the landlords to keep his companion/service dog, which had been assigned to him through the Veteran's Administration 15 years earlier.

{¶10} The following witnesses testified for the prosecution: Jason Polan, John Stiffler, John Taylor, Roger Morgan, Officer Michael Lynch, Lieutenant Martin Gargas, and Officer Thaddeus Stephenson. Appellant testified in his own behalf and called no other witnesses.

{¶11} Jason Polan, age 39, testified that he performs maintenance for Pro Flooring and the second-floor apartments. Polan stated he had multiple verbal confrontations with appellant during this time regarding late rent and other infractions: for example, he told appellant to remove an extension cord appellant was using to "borrow electricity" from Taylor in Apartment A. Polan also testified that he "must have" seen appellant's dog during this time, but he never had any contact with the dog.

{¶12} Polan testified that he arrived at the Atlantic Street building on the afternoon of April 7, 2014, with mailbox keys he had made for the new tenants in Apartment B (i.e., Morgan and Stiffler). He took the mail and the keys upstairs to Apartment B and knocked on the door. Polan testified that Morgan opened the door halfway, and he could see there was a dog in the apartment. He stated he did not recognize that it was appellant's dog, and he asked Morgan, "Who the F's dog is that?" He testified that "the door opened the rest of the way and I seen a gun come at me and shot at me." The bullet did not strike Polan. Polan stated appellant was holding the gun and did not say anything. He first testified appellant was about two arm lengths away

from him but later, during cross-examination, stated appellant was about eight feet away from him. He testified that after the gunshot, "I grabbed the barrel of the gun and wrestled [appellant] into the apartment and forced him to the ground and took the gun away from him." Polan's hand was broken in the struggle.

{¶13} Polan testified he left the apartment, and appellant followed him down the stairs asking for his gun back. Polan then drove to the Warren City Police Department and turned in the gun; he told the officers he was not sure whether appellant pulled the trigger or whether the gun went off when he knocked the gun to the side in the struggle. His testimony, however, was that appellant "definitely shot at me before I grabbed the gun," and that Polan "didn't even see the gun until it went off." He testified that the narrative he told the police at the station was different from his trial testimony because he was nervous, surprised, anxious, and "everything wasn't really clear to me at that time." Polan also testified that he carries a handgun, for which he has a concealed carry permit, but did not pull it out during the altercation with appellant.

{¶14} Roger Morgan, age 52, testified he had known appellant for about one year—prior to moving into Apartment B with John Stiffler. He testified that appellant was at their apartment on the afternoon of April 7, 2014, using their electricity to charge his computer. Morgan said he received a phone call from Polan about the mailbox key while appellant was there. Morgan testified that when appellant heard Polan was coming to the building, appellant said he was going to grab his gun because "they had a beef going on or whatever." Morgan went with appellant to appellant's apartment; Morgan saw the gun in Apartment C but did not see appellant bring it back to Apartment B. According to Morgan, appellant stated that if Polan "comes up, I'm going to shoot

him." Morgan then walked to a nearby convenience store to get a soda for himself and a beer for appellant. Neither he nor Stiffler were drinking that afternoon, he testified.

{¶15} After he had returned, Morgan heard Polan arrive in the parking lot. Morgan stated appellant was sitting on the floor in the middle of the apartment. Morgan testified that he went halfway down the stairs in an attempt to stop Polan from coming up to the apartment, but he was too late. When Polan got to the top of the stairs, appellant's dog came out into the hallway, and Polan asked whose it was. Morgan said, "You know whose dog it is. It's [appellant's] dog." Polan gave Morgan the mail, and Morgan turned to enter the apartment and shut the door: "By the time I walked in the apartment, [appellant] was coming past me so I went around [appellant], you know, this way and then I hear the shot." Morgan's back was to them, and he did not see appellant with the gun before the shot. He had, however, seen the gun on the coffee table before Polan came up the stairs. He stated there was a scuffle into one of the bedrooms, and Polan was yelling at appellant to give him the gun. Polan eventually got the gun and walked out; appellant followed behind asking for his gun back.

{¶16} Morgan testified that when appellant was later arrested, appellant gave Morgan the keys to his apartment; Morgan then gave them to appellant's "wife – or his ex-wife or whoever it was." When appellant was released on bail, he accused Morgan of taking many items from his apartment. Finally, Morgan testified that he is on medication that affects his judgment and memory: two kinds of sleeping pills, anti-anxiety medication, and muscle relaxers.

{¶17} John Stiffler, age 73, testified that he and Roger Morgan had recently moved into Apartment B and had known appellant only for about a day or two. On April

7, 2014, appellant was in their apartment visiting Morgan, as the two of them had become friends. Stiffler testified that appellant brought his dog and a beer, and he sat down on the floor; Stiffler was in the kitchen when appellant came in. He said that neither he nor Morgan were drinking beer. Stiffler testified that Morgan got a phone call from Polan regarding the mailbox key.

{¶18} After appellant had been there for about an hour, Stiffler testified, Polan knocked on the door; Morgan opened the door, Stiffler was in a rocking chair, and appellant was still on the floor. He testified, "[Polan] come in and said here's the key to the mailbox. [Morgan] took the key, went and sat down on the other side of me and then [Polan] asked who in the hell does the dog belong to." According to Stiffler, appellant then turned around and grabbed a gun from under a floral arrangement on the coffee table, stood up, and shot without saying anything. The bullet hit the door of Apartment A across the hall. Stiffler testified that Polan then came in the apartment and grabbed appellant, they scuffled into Stiffler's bedroom, and then stopped. Neither one said anything, and Polan left with the gun.

{¶19} Stiffler testified he did not observe anything from Polan that would have been considered a threat. He also testified he did not see appellant enter the apartment with a gun, and he did not know whether appellant left and came back with a gun. At one point in his testimony, Stiffler indicated he could not remember certain details due to his age.

{¶20} John Taylor, age 55, testified he had lived in Apartment A for approximately two years. On April 7, 2014, he was in his apartment and heard an "explosion"; he looked out the door, and the hallway was "full of smoke out there from

the gun." He saw appellant and Morgan, and then Polan came running out of Apartment B saying, "he tried to shoot me." Taylor stated appellant waited in Apartment B until the police arrived. Taylor testified that Polan yelled at appellant a lot and that Polan threatened to evict Taylor if he did not disconnect the extension cord running to appellant's apartment. Finally, Taylor testified that Polan always carried a gun; he would pull it out, flash it around, and do tricks with it.

{¶21} Officer Lynch, with the Shenango Township Police in Lawrence County, Pennsylvania, testified regarding the gun involved. He stated the same gun was stolen from a house in New Castle in 2012: a .44 caliber F.LLI Pietta single-shot ball and cap black powder pistol.

{¶22} Lieutenant Gargas, with the Warren City Police Department, testified that he spoke with Polan briefly when he turned in the gun. The lieutenant stated it was a single action gun, meaning it must be cocked before pulling the trigger in order to fire it. The gun was loaded when it was turned in and disassembled at the police station. Lieutenant Gargas also testified that he wrote out a "recovered firearm form that we send to BATF through our liaison officer describing persons and addresses attached to a weapon with a brief narrative." He testified that his brief written narrative was as follows: "Polan came to HQ. Stated [appellant] pointed the weapon at him and Polan grabbed it. A shot was fired. Polan got the gun away from [appellant] and came to HQ, headquarters, gun stolen from Shenango Township."

{¶23} Officer Stephenson, a patrolman with the Warren City Police Department, testified that he spoke with Polan at the station but did not take a written or recorded statement. Instead, he later wrote out a summary of their conversation based on notes

he took while they were speaking. Officer Stephenson testified that Polan was "shaken up" and "his voice was a little shaky." He stated, "it almost appeared he was in shock, his voice was trembling. Just very nervous. Freaked out, I guess you could say." He testified that his report includes the following statement: "The gun then fired (Polan stated to me that he didn't know if Thompson pulled the trigger or if the gun went off because he had hit the gun hand to the side) sending a round into the door of Apartment A."

{¶24} Officer Stephenson arrested appellant in Apartment B and transported him to the station; he testified that he did not Mirandize or question appellant. On cross-examination, defense counsel asked Officer Stephenson a series of questions regarding his report of the conversation he had with Polan. Following each question, the officer was asked if he had written that statement down "verbatim," to which he responded he had. On redirect, the prosecutor elicited from Officer Stephenson that he did not know the meaning of "verbatim" and that the only actual quote in his entire summary related to Polan's question to Morgan about the dog.

{¶25} Appellant, age 55, testified in his own behalf. He stated he had been living in Apartment C for approximately two years and did not know Stiffler or Morgan before they moved in. The landlord allowed appellant's dog to live with him, who was certified by the Veteran's Administration as a companion animal for anxiety and depression; he owned the dog for 15 years. Appellant testified he had known Polan for about six months prior to the incident from seeing him around the building; he testified that Polan had seen appellant with his dog and had seen the dog in Apartment C. He

opined that Polan was arrogant and threatening and stated Polan always kept his handgun in plain sight.

{¶26} Appellant testified that on the afternoon of April 7, 2014, he went to Apartment B with his dog, cane, computer, and charging cord; Morgan and Stiffler were both drinking beer. The three of them discussed appellant's collection of Civil War memorabilia, and appellant offered to show them his Civil War replica pistol. Appellant testified the pistol was given to him by the boyfriend of a previous tenant as collateral for a $50 loan; this occurred about seven months prior, and the man had not returned to claim the pistol. Appellant stated he retrieved the pistol from his apartment alone, brought it back to Apartment B, and set it on the coffee table while he waited for his computer to finish charging. He testified there was not a flower arrangement on the table, only a small vase, and that he did not hide the pistol. He said that Morgan then left for the convenience store and brought back a 40 ounce bottle of beer for appellant.

{¶27} Appellant testified he was not aware that Polan was coming to Apartment B; if he had known, he would not have been there at that time. He also testified he did not witness Morgan take a phone call, and he did not make any threats regarding Polan. Appellant stated Polan knocked on the door, the dog followed Morgan to answer the door, then "the MF thing went on about the dog." Morgan stepped back and said the dog belonged to appellant; Polan then threatened "to kick its ass out of the building." Appellant testified that, in response to the threat against his dog, "I just stood up and I got my pistol and pulled the door open a little farther so he could see me. And I pointed the pistol in his direction" in order to "maybe rattle him a little bit." Appellant testified he

did not cock the pistol, did not have his finger on the trigger, and did not shoot at Polan. He described how the gunshot occurred:

> There was a struggle over the pistol. [Polan] immediately knocked it to the side pulling, I grabbed hold of and as I was pulling – it's a single action. It doesn't take a lot of pressure. When you pull the hammer back, it has to go all the way back for the trigger but if it doesn't go all the way back, if it's just back far enough when the hammer is released by hand or whatever reason, it only takes a little pressure to get a percussion cap to set the pistol off. That is why it went around [Polan] and went into the door because he had had it to the side.

{¶28} Appellant then testified that he was standing only three feet away from Polan when he initially pointed the pistol at him. Appellant also testified that he had been trained with firearms in the army, including pistols, and that he knows how to handle and shoot them. He said if he wanted to shoot him, there was "zero" likelihood he would have missed. Appellant explained that he eventually let go of the pistol during the struggle with Polan because he did not want the same thing, i.e. an accidental gunshot, to happen again. He followed Polan outside, asking for his gun back, but Polan pulled out of the driveway with the gun.

{¶29} Appellant testified that while he was sitting in the back of the police cruiser, he told Officer Stephenson it was an accident, but he had not been Mirandized. He further testified he did not know the gun had been stolen and that he had never looked very closely at the gun to determine whether it was loaded. He testified that the police gave his apartment keys to Morgan and many items were missing when he returned after making bail. He made a police report accusing both Morgan and Stiffler of theft.

{¶30} The jury found appellant guilty of felonious assault and not guilty of receiving stolen property. The trial court had instructed the jury that "[t]he act of pointing a deadly weapon at another, without additional evidence regarding the actor's intentions, is insufficient to convict a Defendant of the offense of Felonious Assault as defined by Section 2903.11(A)(2)." Although the witnesses and appellant provided inconsistent and contradictory testimony regarding how the gun went off, the jury was in the best position to view the witnesses and evaluate their credibility. Further, there was additional evidence presented regarding appellant's intentions when he pointed the gun at Polan. Upon review of the evidence outlined above, we find that the jury did not lose its way or create a manifest miscarriage of justice by finding appellant guilty of felonious assault. Appellant's conviction for felonious assault, and therefore the firearm specification, is supported by the manifest weight of the evidence.

{¶31} The dissenting judge accuses this majority of abdicating its responsibility to conduct a meaningful review of the credibility of the evidence in the record by not properly considering the "factors" provided by *State v. Mattison*, 23 Ohio App.3d 10 (8th Dist.1985). The "factors" to which the dissent refers are actually "*guidelines* to be taken into account by the reviewing court." *Id.* at syllabus (emphasis added). Also, as the dissenting judge has previously recognized, we have "repeatedly held" that the *Mattison* Court has provided "'helpful guides when exploring whether a verdict is against the weight of the evidence * * * [but] they do not create a specific standard [of review] to be applied to manifest weight claims.'" *State v. Higgins*, 11th Dist. Lake No. 2005-L-215, 2006-Ohio-5372, ¶38, quoting *State v. Torres-Flores*, 11th Dist. Lake No. 2005-L-046, 2006-Ohio-3212, ¶29. Rather, we have "'repeatedly deferred to the standards of review

set forth by the Supreme Court of Ohio.'" *Id.*, quoting *State v. Peck*, 11th Dist. Lake No. 2004-L-021, 2005-Ohio-1413, ¶13. Within this opinion, we have extensively outlined the various issues with the evidence and witness credibility while also granting appropriate deference to the trier of fact. By applying the legal standards dictated by the Ohio Supreme Court in *Thompson* and *DeHass*, we have in no way abdicated our responsibility to conduct a meaningful review of appellant's manifest weight challenge.

{¶32} Appellant's assignment of error is without merit.

{¶33} The judgment of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, P.J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶34} While the majority is correct in concluding that deference is due to the factfinder's determinations of credibility, my colleagues provide too much deference, and, in so doing, fail to provide meaningful review of the reliability of the testimony presented below. Thus, I must respectfully dissent from the majority's decision.

{¶35} As the majority correctly notes in its citation of *Thompkins*, appellate courts reviewing manifest weight of the evidence challenges must conduct a review of the entire record, weigh the evidence and any reasonable inferences that can be drawn from it, and evaluate the credibility of witnesses, all of which allows the reviewing court to determine whether the jury clearly lost its way when it resolved conflicts in that

evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In doing so, appellate courts should review, *inter alia*, the certainty and reliability of that evidence, whether the evidence is contradicted, the extent to which a witness may have an incentive to advance or defend his or her testimony, and the extent to which the evidence is vague, uncertain, conflicting, or fragmentary. *State v. Mattison*, 23 Ohio App.3d 10, 14, 490 N.E.2d 926 (8th Dist.1985). The guidelines provided in *Mattison* prescribe factors to be considered by appellate courts when reviewing and weighing evidence, including witness' testimony.

{¶36} To be sure, there are practical limits to the extent to which this weighing of the evidence can be carried out, since appellate courts cannot view the demeanor of the witnesses who testified. *State v. Long*, 127 Ohio App.3d 328, 335, 713 N.E.2d 1 (4th Dist.1998), citing *Myers v. Garson*, 66 Ohio St.3d 610, 615, 614 N.E.2d 742 (1993). However, the majority incorrectly relies on deference under *Long* and *Myers* to abdicate its responsibility under *Mattison* to conduct meaningful review of the credibility of the evidence in the record.

{¶37} A review of the evidence presented suggests that several of the issues the Eighth District identified in *Mattison* as considerations for weighing evidence in manifest weight challenges are present in this case. Since it is the responsibility of this court to utilize established factors/guidelines to reach a well-reasoned and accurate decision, I will address each relevant issue in turn.

{¶38} The evidence presented cannot fairly be considered to be both certain and reliable. Jason Polan, the alleged victim, originally told police, directly after the incident, that the gun went off during the struggle for it between Thompson and himself, likely

due to Polan trying to knock the gun from Thompson's hand. Polan made similar statements to multiple officers. However, Polan recanted this story during his testimony at trial, and instead claimed that Thompson shot at him before he grabbed the gun. Statements made shortly after a stressful event are often more reliable than those that are made weeks, months, or years after the inciting event, and this is reflected in the principles forming the basis for certain exceptions to the rule against hearsay. Evid.R. 803(1) and 803(2) reflect the general principle that statements made immediately after an event or that are made by a person who is under the stress or excitement of an event are generally trustworthy; such statements are admissible as exceptions to the general rule against hearsay. That same general principle can be applied here. Polan was more likely to make an accurate statement immediately after the altercation than once he had been removed from the situation, because his memory had not had sufficient time to begin to deteriorate.

{¶39} The testimony of the other witnesses is also neither certain nor reliable. Roger Morgan had his back turned and did not see what occurred before the shot was fired. However, even the limited amount that he did see is of questionable reliability, because he was taking no fewer than four medications that affected his judgment and memory: two different types of sleep aids, an anti-anxiety medication, and a muscle relaxant. Importantly, Morgan's testimony that Thompson said he would shoot Polan if he came over is also highly suspect. Although Morgan spoke with Polan immediately before the shooting, he did not make any attempt to warn him of the threat. John Stiffler, the only other person in the apartment at the time of the shooting, testified that he could not remember certain details due to old age, which weighs heavily against his

testimony. This lack of reliability is an important factor to be considered when weighing the evidence. *See State v. Cox*, 11th Dist. Trumbull No. 95-T-5279, 1997 Ohio App. LEXIS 2244, 27 (May 23, 1997) (when weighing the weight of the evidence, the appellate court should look at factors/guidelines including the reliability of the evidence, whether the witness was impeached, and whether evidence is uncontradicted).

{¶40} Further, even if the evidence in this case were certain and reliable, there are significant contradictions in the testimony. Polan's testimony is obviously self-contradictory, but even considering only the trial testimony, he provided two different and conflicting answers at trial as to how far he was from Thompson. When considering the testimony of all the witnesses, there are also considerable contradictions. Stiffler testified that Polan was inside the apartment when the shot was fired, while Polan and Morgan testified that he was outside. These contradictions are material to the assertions made by the State.

{¶41} The witnesses certainly have incentives to testify in the manner that they did. While this in itself does not invalidate their testimony, it must also be considered in weighing all the evidence presented. Over the two years Thompson lived in the apartment building, Polan had multiple confrontations with him. It is not unreasonable to infer that this may account for how Polan's version of events changed from the time he spoke to police to the time he testified at trial. Likewise, since the incident, Stiffler and Morgan have gained an incentive to remember events differently, because Thompson filed police reports alleging that they stole items of his personal property.

{¶42} The evidence presented is certainly vague, uncertain, conflicting, and fragmentary. Stiffler's account of the events is completely different from every other

account, and he could not remember some details due to old age. Morgan had his back turned during the events immediately prior to the shot being fired, and whatever memory he ever had is highly suspect due to his multiple medications, which affect both his judgment and his memory. Polan's testimony changed significantly from the time of the incident to the time of the trial. Finally, the testimony of the other witnesses, such as Taylor and the police officers, cannot provide any information about what led to the shooting.

{¶43} If only one of the *Mattison* considerations existed in isolation in this case, I might perhaps be less wary of joining the majority. However, even though each one by itself might not be enough to conclude that the jury's decision was against the manifest weight of the evidence, considering all of these problems with the credibility of the witnesses leads to the conclusion that the jury lost its way. Simply put, the presence of four such elements suggests that the credibility of the witnesses upon which the State's case is based has been damaged beyond repair. The effect of these elements leads to the conclusion that the jury lost its way and that its verdict is against the manifest weight of the evidence.

{¶44} However, most concerning is my colleagues' choice not to seriously evaluate the jury's decisions involving the reliability problems of the witnesses. While proper deference must be given to the decisions of juries about witness credibility, *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967), appellate courts need not give total deference, as that defeats the entire purpose of a manifest weight review. The degree of deference the majority provides would certainly be appropriate for a challenge to the sufficiency of the evidence, but is entirely inappropriate for evaluating a

claim that a conviction is against the manifest weight of the evidence. *See Thompkins*, 78 Ohio St.3d at 386-87, 678 N.E.2d 541 (finding that sufficiency of the evidence and manifest weight of the evidence are qualitatively and quantitatively different challenges). *See generally State v. Troisi*, 124 Ohio St.3d 404, 2010-Ohio-275, 922 N.E.2d 957, ¶ 7 (noting the standards applicable for evaluating challenges to the sufficiency of the evidence). As such, the majority denies Appellant proper review of his challenge by evaluating it in a light more appropriate to a sufficiency of the evidence challenge, which is far more deferential to the jury's decision. The issue is not whether the majority applied the legal standards dictated by the Ohio Supreme Court, but rather that the majority failed to apply those dictated standards properly.

{¶45} The majority correctly concludes that *Mattison* creates no specific standard of review for manifest weight challenges. *Supra* at ¶ 32. The standard instead comes from another place: *Thompkins*. As recently as last year, the Ohio Supreme Court reemphasized that the responsibility of a court of appeals is to "review[] the entire record, weigh[] the evidence and all reasonable inferences, consider[] the credibility of witnesses and determine[] 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." *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 151, quoting *Thompkins* at 387. The majority has properly reviewed the record – it provides a 20-paragraph-long summary of the proceedings at trial. However, reviewing the record is only one part of our responsibility. The problem is that the majority's factual summary is followed by exactly one paragraph weighing the evidence and all reasonable inferences, considering the credibility of witnesses, and

determining whether the jury lost its way in resolving conflicts in the evidence. *Supra* at ¶ 30. It taxes the imagination to conclude that this is the type of review of manifest weight challenges that the Ohio Supreme Court envisioned under *Thompkins*. This looks nothing like this Court "sit[ting] as the 'thirteenth juror' [who] disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

{¶46} As the Supreme Court of the United States recognized in *Tibbs*, and as the Ohio Supreme Court recognized in *Thompkins* and *Dean*, when this Court reviews a challenge to the manifest weight of the evidence, it is entitled to disagree with how the trier of fact resolved conflicting evidence and testimony. While the majority today rejects the *Mattison* guidelines, its analysis conflicts with even the most cursory reading of *Thompkins* and *Dean*. The trier of fact's decisions regarding witness demeanor, and therefore, to a limited extent, witness credibility, are entitled to deference under *Long* and *Myers*. However, this deference cannot be absolute, for that would defeat the entire purpose of manifest weight challenges. Because we are explicitly instructed by the Ohio Supreme Court in *Thompkins* to consider the credibility of witnesses, we cannot accept the majority's refusal to seriously question the credibility of the State's witnesses.

{¶47} Thompson was convicted based on the testimony of a victim with whom he had multiple prior confrontations (and whose version of events changed significantly over time), a man who was taking no fewer than four medications affecting his memory and judgment, and a man who testified at trial that he could not remember details of the altercation due to old age. Thompson will spend eight years in prison because the

majority has abdicated its duty to conduct a meaningful review of the manifest weight of the evidence. The fact that Thompson was sentenced to eight years in prison is noteworthy. While obviously the sentence alone does not prove that anything is wrong with the method by which Thompson was convicted, it should give us pause that there are serious questions outstanding about how the gun was fired, the potential accidental nature of the shot during the struggle for the gun, and the witness credibility issues outlined above.

{¶48} When applying the proper degree of deference to the jury's credibility decisions, it is apparent that the jury lost its way when resolving conflicts in the evidence, and its verdict was against the manifest weight of the evidence. Thompson is entitled to meaningful review of his conviction. Because the majority has effectively denied him that right, I respectfully dissent.