

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-815
Deondre Dingess,	:	(C.P.C. No. 09CR10-6168)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 8, 2011

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Robert D. Essex, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Deondre Dingess is appealing from his convictions and sentences on charges of aggravated burglary, felonious assault and tampering with evidence. He assigns four errors for our consideration:

First Assignment of Error: The evidence was legally insufficient to support appellant's convictions for Aggravated Burglary and Felonious Assault.

Second Assignment of Error: The Court erroneously overruled appellant's motions for acquittal pursuant to Criminal Rule 29.

Third Assignment of Error: Appellant's convictions are against the manifest weight of the evidence.

Fourth Assignment of Error: In light of Oregon v. Ice, the trial court erred in failing to make the required findings under O.R.C. 2929.14(E)(4) to justify consecutive sentences.

{¶2} The fourth assignment of error asserts that the Supreme Court of the United States overruled the decision of the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 when the United States Supreme Court decided *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711.

{¶3} To date, the Ohio Supreme Court has not modified its *Foster* decision. See *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983 and *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478. See also *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320. We are not at liberty to overrule the Ohio Supreme Court and therefore must overrule this assignment of error.

{¶4} The other three assignments of error ask us to address the weight and sufficiency of the evidence presented at the trial of Deondre Dingess. We briefly recap that evidence.

{¶5} According to the State of Ohio's evidence, on February 14, 2009, a masked man broke into an apartment at 718 South Chesterfield Road. Sydney Smith, who lived in the apartment was home, as were Jeff Peppers and three children. The masked man demanded money. Smith and the masked man struggled over the intruder's gun. The gun discharged wounding Smith and the intruder. DNA testing on blood inside and outside the apartment was matched to Deondre Dingess.

{¶6} After initially denying any involvement, Dingess admitted being at the apartment with his brother. He also admitted to disposing of the gun after the shooting.

{¶7} In the defense case, Dingess testified that he was not wearing a mask and had no intention of robbing anyone. He claimed he broke into the apartment when he heard a disturbance inside and saw Smith pointing a gun at his brother. Smith and Dingess struggled over the gun and a shot was fired. Dingess then fled with the gun.

{¶8} Sufficiency of the evidence is the legal standard applied to determine whether the case should have gone to the jury. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. In other words, sufficiency tests the adequacy of the evidence and asks whether the evidence introduced at trial is legally sufficient as a matter of law to support a verdict. *Id.* "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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781. The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks* at 273. If the court determines that the evidence is insufficient as a matter of law, a judgment of acquittal must be entered for the defendant. See *Thompkins* at 387.

{¶9} Even though supported by sufficient evidence, a conviction may still be reversed as being against the manifest weight of the evidence. *Thompkins* at 387. In so doing, 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.' " *Id.* (quoting *State v. Martin* [1983], 20 Ohio App.3d 172, 175); see, also, *Columbus v. Henry* (1995), 105 Ohio App.3d 545, 547-48. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387.

{¶10} As this court has previously stated, "[w]hile the jury may take note of the inconsistencies and resolve or discount them accordingly, see [*State v.*] *DeHass* [(1967), 10 Ohio St.2d 230], such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236. It was within the province of the jury to make the credibility decisions in this case. See *State v. Lakes* (1964), 120 Ohio App. 213, 217 ("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.")

{¶11} See *State v. Harris* (1991), 73 Ohio App.3d 57, 63 (even though there was reason to doubt the credibility of the prosecution's chief witness, he was not so unbelievable as to render verdict against the manifest weight).

{¶12} The jury in this case clearly weighed the evidence carefully in reaching a verdict. If Smith were completely believed, Dingess was guilty of aggravated robbery, aggravated burglary, felonious assault and tampering with evidence, along with an associated firearm specification. If Dingess were to be believed, he was guilty of only tampering with evidence, for disposing of the gun after the shooting. One explanation for the verdicts is the jury had credibility problems with both Smith, who admitted absorbing a

significant quantity of cocaine that day, and Dingess, who lied repeatedly to police about what happened before the DNA testing showed his blood to be in the apartment.

{¶13} The evidence was sufficient to support the verdicts rendered and, indeed, would have supported guilty verdicts as to aggravated robbery with a firearm specification. The trial court judge was correct to overrule the Crim.R. 29 motion for a judgment of acquittal. The second assignment of error is overruled.

{¶14} The evidence being sufficient to sustain the jury's verdicts, we also overrule the first assignment of error.

{¶15} Addressing the third assignment of error, we are not in a position to overturn the jury's verdicts based upon the weight of the evidence. Since appellate judges are not in the courtroom when the witnesses are testifying, we cannot make credibility determinations with the same accuracy that 12 jurors can make. Thus, the case law clearly supports upholding the jury's verdicts when the verdicts heavily involve weighing conflicting testimony which was given live.

{¶16} Based upon the record before us, we cannot say the jury was wrong in its weighing of the evidence.

{¶17} The third assignment of error is overruled.

{¶18} All four assignments of error having been overruled, the judgment and sentence of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and SADLER, J., concur.
