

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2009-10-021 CA2009-10-022
- vs -	:	<u>OPINION</u> 5/24/2010
MAHMUD I. MORRAR,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case Nos. CRI20090087 and CRI20090100

Stephen J. Pronai, Madison County Prosecuting Attorney, Eamon P. Costello, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

Nicholas A. Adkins, 67 East High Street, London, Ohio 43140, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Mahmud Morrar, appeals his convictions in the Madison County Court of Common Pleas for discharging a firearm into a habitation, the accompanying gun specification, and fleeing and eluding. We affirm the convictions.

{¶2} As Shantanna and Nedal Aburokbeh lay in their bed in the early morning hours of June 18, 2009, they heard two gunshots fired. One bullet traveled approximately three feet above their bed, and became lodged in a door jamb. The other bullet was later recovered from a shed after it traveled through the Aburokbehs' attached

garage. After the shots were fired, Nedal ran outside and saw a dark Jeep Grand Cherokee leaving his property. Shantanna called 911 to report the gunfire, and during the investigation, told police that earlier that evening, the same Jeep appeared on their property twice. The first time, the Jeep drove onto the Aburokbehs' gravel driveway and peeled its tires. During the second incident, the Jeep parked in the trailer court next to their home and drove away suddenly when Nedal approached it.

{¶3} Minutes after the initial 911 call, police called Shantanna and asked for a description of the vehicle. The Aburokbehs then described the Jeep and identified Morrar as the driver. The Aburokbehs knew Morrar because he had at one point rented an apartment from them, and also contributed \$45,000 to a partnership so that he and Nedal could open a restaurant. However, the business prospect failed, and Morrar was unhappy about the use of his \$45,000 and Nedal's failure to pay him back. The Aburokbehs also sold Morrar the Jeep used on the night of the shooting.

{¶4} Approximately five minutes after the police were informed of the shooting, Officer Rodney Rutherford of the West Jefferson Police Department heard the description of the perpetrator's vehicle over the police radio and soon saw the Jeep traveling north on State Route 142. After confirming that the Jeep matched the description given by the Aburokbehs, Rutherford began pursuing the vehicle. Rutherford turned on his lights and siren as he approached the Jeep, trying to initiate a stop, but was forced to continue pursuit when the driver did not stop.

{¶5} The driver, later confirmed to be Morrar, continued to drive on SR 142 until he merged onto Interstate 70 heading toward Columbus. During the course of the chase, Morrar and the pursuing officers reached speeds exceeding 120 m.p.h. Morrar also swerved off of the road several times, drove into oncoming traffic, and at one point,

left the roadway and drove on a bicycle path. At some point, the Columbus Police Department joined the chase so that approximately 20 police cruisers were pursuing Morrar. Eventually, a Columbus police officer performed a PIT maneuver (Precision Immobilization Technique) in which the police cruiser made contact with the back end of Morrar's vehicle to make it spin around and stop.

{¶16} Morrar was traveling at 70 m.p.h. at the moment the officer performed the PIT, and as a result of the high speed, the Jeep flipped twice before it hit a retaining wall and came to a rest. At that point, police tried to detain Morrar, but were forced to taze him when he continued to resist arrest. After Morrar was taken to the hospital with minor injuries, his hands were tested for gunshot residue. The police were unable to find a gun in Morrar's possession that night.

{¶17} The following day, two significant developments in the case occurred. First, police located a gun on the bike path Morrar drove on during the chase. The Bureau of Criminal Investigation eventually tested the gun and confirmed that the slugs taken from the Aburokbehs' home were fired from the gun found on the bike path. Second, Diane Bidwell called the police to tell them that she saw footage of the chase on the local news, and recognized the Jeep from the night before. Bidwell told police that at approximately 12:45 a.m. that morning, she heard two gunshots and looked out her window in time to see the same Jeep fleeing the scene of Kitchens Cardinal, a store located next to her home. As a result, police went to the store and located two additional bullets that were also confirmed to be fired from the gun found on the bike path.

{¶18} Morrar was eventually charged by two separate indictments.¹ The first, filed

1. This court sua sponte consolidated the two cases for the sole purpose of this appeal.

July 9, 2009, charged Morrar with one count of fleeing and eluding and an accompanying gun specification. The second indictment, filed August 13, 2009, charged Morrar with one count of improper handling of a firearm in a motor vehicle with an accompanying gun specification, as well as one count of discharging a firearm into a habitation. The improper handling of a firearm in a motor vehicle charge was specific to the state's claim that Morrar fired two shots into the store.

{¶9} After a two-day trial, Morrar made a Crim.R. 29(A) motion as to the gun specification involving fleeing and eluding, and the trial court sustained that motion. A jury acquitted Morrar of improper handling of a firearm in a motor vehicle, but found him guilty of fleeing and eluding and discharging a firearm into a habitation along with its accompanying gun specification. The trial court sentenced Morrar to five-year prison terms on each count and specification, to run consecutive to each other, resulting in a 15-year aggregate prison term. Morrar now appeals his convictions and sentence, raising the following assignments of error.

{¶10} Assignment of Error No. 1:

{¶11} "THE TRIAL COURT ERRED IN THAT THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶12} In his first assignment of error, Morrar asserts that his convictions for discharging a weapon into a habitation and the accompanying gun specification were against the manifest weight of the evidence. This argument lacks merit.

{¶13} A manifest weight challenge examines the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298. "In determining whether a conviction is against the manifest weight of the evidence, the

court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Cummings*, Butler App. No. CA2006-09-224, 2007-Ohio-4970, ¶12.

{¶14} While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, "these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence." *State v. Walker*, Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶26. Therefore, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶15} According to R.C. 2923.161(A), "no person, without privilege to do so, shall knowingly do any of the following: (1) discharge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual." The accompanying gun specification, as stated in R.C. 2941.146, requires the imposition of a five-year sentence should the defendant "purposely or knowingly caus[e] or attempt[] to cause the death of or physical harm to another *** by discharging a firearm from a motor vehicle ***."

{¶16} Essentially, Morrar claims that his convictions are not supported by the manifest weight because the evidence did not establish that Morrar was in fact the perpetrator, or that the shots were fired from a vehicle. Instead, Morrar asserts that the

witnesses failed to positively identify him as the person who fired shots into the Aburokbehs' residence. However, after reviewing the record, we do not find that the evidence presented at trial weighs heavily in favor of acquittal.

{¶17} Instead, the state presented three witnesses who testified about the shooting incident at the Aburokbehs' residence. Charles Griffith, Shantanna's father, testified that he was visiting his daughter and son-in-law on the day of the shooting. Griffith recalled that at some point in the evening, an SUV entered his daughter's driveway and spun its tires before rapidly driving away. Griffith later recalled going to bed and hearing two gunshots.

{¶18} The state then called Shantanna who briefly described the relationship she and Nedal had with Morrar, and how the business dealings between them had failed. She also recalled that on the night of the shooting, she was outside with Nedal and her father when a Jeep Cherokee pulled into her driveway and started spinning its tires and throwing the gravel from the driveway. Shantanna specifically stated that she was familiar with the Jeep because she and Nedal owned the SUV before selling it to Morrar, and because she recognized the damaged rear-end of the Jeep.

{¶19} Shantanna later testified that after the first incident in her driveway, the Jeep came back and parked at a trailer court next to her house, but left as soon as Nedal approached the Jeep. She then testified that a few moments after she and Nedal went to bed, she heard two gunshots. As Nedal ran out to see where the shots were coming from, Shantanna went down the hall to protect her daughter from the gunfire. Shantanna called 911 to report the gunfire and eventually told the police that Nedal had seen Morrar's Jeep pull away after the shots had been fired.

{¶20} Nedal also testified that on the night of the shooting, he recognized

Morrar's Jeep in his driveway and at the trailer court next to his home. Specific to the second incident at the trailer park, Nedal testified that he made a positive identification of Morrar. While he could not identify the passenger, he clearly saw Morrar and stated that "I saw the sides of his face from the shine of the light in his window. The small person with the glasses, it's Muhmud Morrar."

{¶21} Nedal also testified that after the shots were fired into his home, he ran and looked through his living room window and saw Morrar's Jeep leaving his driveway. Nedal testified that while it was dark, he clearly saw the Jeep, and saw two people inside. While Nedal admitted that the Jeep was moving away from the house and the people's faces were not clear, he "could tell it was Mahmud the driver." Nedal later confirmed that he was able to see Morrar in the Jeep after the two instances earlier in the evening, and after shots were fired into his home. Nedal also testified that he did not hear any car doors open or close before or after he heard the shots. Nedal did testify that the only noise he heard besides the gunfire was tires squealing. From this testimony, the jury was free to infer that the bullets were fired from a vehicle.

{¶22} Morrar now argues that the testimony failed to establish that he was the perpetrator on the night of the shooting. Regarding Shantanna and her father, Morrar dismisses their testimony because they were unable to positively identify him as the shooter. Morrar also claims that Nedal was not a credible witness because his testimony did not exactly match his written statement given to police on the night of the incident. However, the jury was able to observe the witnesses and determine what weight to give their testimony, and we recognize that assessment of witness credibility is within the province of the trier of fact. *State v. Mayes*, Franklin App. No. 03AP-1154, 2005-Ohio-1769.

{¶23} Morrar's defense counsel cross-examined the state's witnesses and brought any inconsistencies within their testimony to the jury's attention, including whether they were able to positively identify the shooter. Additionally, Morrar cross-examined Nedal and referenced his statement to police and how that may have differed from the testimony he gave at trial. The jury was free to believe all, part, or none of Nedal's testimony, as well as the other witnesses on behalf of the state. As such, any weight that should be given to alleged inconsistencies or lack of clarity in the witnesses' testimony were left within the province of the jury and do not render a conviction against the manifest weight of the evidence.

{¶24} We also note that Morrar's conviction is supported by other evidence offered at trial. Approximately five minutes after police were advised of the shooting, law enforcement tried to stop Morrar's Jeep because it matched the description given by the Aburokbehs of the vehicle that left their house seconds after the gunfire. However, Morrar refused to stop and officers were forced to chase him, perform a PIT maneuver, and taze him before Morrar would be taken into custody.

{¶25} More significantly, the state presented physical evidence from several police officers and members of the Bureau of Criminal Investigation, which confirmed that the bullets found in the Aburokbeh residence were fired from the same gun found on the bike path that Morrar drove across during his attempt to elude police. The state also presented evidence confirming that Morrar's hands tested positive for gunshot residue.

{¶26} After reviewing the entire record, weighing the evidence and all reasonable inferences, we find that the jury did not clearly lose its way or create such a manifest miscarriage of justice that Morrar's conviction for discharging a firearm into a habitation,

and the accompanying gun specification, must be reversed and a new trial ordered. Having found that Morrar's convictions are supported by the manifest weight of evidence, his first assignment of error is overruled.

{¶27} Assignment of Error No. 2

{¶28} "THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT A CONTINUANCE."

{¶29} In his second assignment of error, Morrar asserts that the trial court abused its discretion by denying his request for a continuance. There is no merit to this argument.

{¶30} The decision to grant or deny a continuance rests in the broad discretion of the trial court and will not be reversed absent an abuse of that discretion. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304. An abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶181. "While there is no bright-line test for determining whether a continuance should be allowed, a court should be guided by consideration of several factors, including the length of the requested delay, whether other continuances have been requested and received, the inconveniences likely to result, the reasons for the delay, and whether the defendant contributed to the circumstances giving rise to the need for delay." *Franklin* at ¶18.

{¶31} While Morrar had not been granted any other continuances, the first time he indicated his desire for a continuance was the morning of his trial. Additionally, Morrar failed to specify how long a continuance he was requesting. Instead, Morrar simply stated that he wanted to replace counsel, and have enough time for new counsel

to prepare a defense. However, there was no indication how long replacing counsel would take, and Morrarr failed to state how long he thought it would take for new counsel to prepare his defense.

{¶32} Regarding the reasons for delay and the defendant's contribution to the circumstances giving rise to the need for delay, the trial court noted Morrarr's unwillingness to waive his speedy trial rights. Initially, Morrarr was charged by indictment on July 9, 2009, and the second indictment was filed August 13, 2009. Because the charges stemmed from the same fact scenario and were all interrelated, a single trial was scheduled, and the 90-day speedy trial period was calculated using the first indictment date. During the pretrial phase, defense counsel and the trial court repeatedly suggested that Morrarr waive his speedy trial right so that the extra time could be spent on gathering evidence and securing witness testimony. However, Morrarr refused to waive his speedy trial rights.

{¶33} On his own and without Morrarr's agreement, Morrarr's counsel first requested a continuance on September 10, 2009, five days before the trial was to begin. However, the trial court denied the request, citing Morrarr's unwillingness to waive his speedy trial rights. Minutes before voire dire was to start, defense counsel expressed Morrarr's wish to dismiss him and have different counsel appointed. The court then addressed Morrarr and the following exchange occurred.

{¶34} [Morrarr] "I waive my speedy trial rights.

{¶35} [Court] "Well, I think it's too late in the process. You've put us in this position. And I, again, have no criticism on that. But as a result of that, apparently the Bureau's been scrambling to get the DNA done, we have a jury – 30 people sitting out in the hall ready to go."

{¶36} The trial court then advised Morrar that he had the choice to proceed with his counsel, or could waive his right to counsel and proceed pro se. Morrar then expressed his displeasure regarding the choices the trial court gave him, and suggested that if the trial court was going to deny his request to replace counsel, it had already found him guilty. "As far as I'm – as far as what it looks like to me, I'm already tried and convicted. This is all just a routine, a play." Morrar further suggested that the trial court should "get a rope and hang" him from a tree if it was not going to grant his request for a continuance in order to procure new counsel. The trial court was not baited by Morrar's comment, and instead explained that a jury would determine his fate, and then reminded Morrar that the court had explained "in full length *** every aspect of" the effects of not waiving speedy trial rights.

{¶37} Specifically, the trial court noted that on several occasions, it had explained the consequences of not waiving speedy trial rights and that demanding a trial within 90 days placed certain burdens on his defense that would be alleviated should he agree to waive his right. During the exchange, Morrar agreed with the trial court that it had explained the consequences of not waiving the 90-day rule and conceded the fact that he had continually refused to waive his speedy trial rights.

{¶38} The first time Morrar made any attempt or showed any willingness to waive his speedy trial rights was in the moments before the trial was to begin. Therefore, Morrar's contribution to the circumstances giving rise to the need for delay could have been avoided much earlier.

{¶39} The trial court also considered the inconveniences that would result should a continuance occur. Most significantly, Morrar made his motion and agreed to waive his speedy trial rights mere moments before voire dire was to begin. The trial court

noted that the potential jurors were waiting outside to be seated, and that the multiple witnesses had appeared that day. The court also noted that multiple parties, including the Bureau of Criminal Investigation, the state, the court, and Morrar's counsel hurried their normal processes in order to protect Morrar's right to a speedy trial.

{¶40} We also note that although the trial court denied the continuance, it also took precautions to guarantee that Morrar would not suffer prejudice for his decision to demand a speedy trial. Specifically, the court granted Morrar's motion to exclude DNA evidence that was not ready until the day before trial. The court, therefore, excluded the evidence because Morrar had not had ample time to review the report or defend against it.

{¶41} In summarizing its decision to deny the continuance, the trial court stated, "He's entitled to have the case tried in 90 days, but on the 86th day can't complain that it's being tried within 90 days." We agree.

{¶42} After reviewing the record and balancing the pertinent factors, we find that the trial court's decision to deny Morrar's request for a continuance was not arbitrary, unreasonable, or unconscionable. Having found no abuse of discretion, Morrar's second assignment of error is overruled.

{¶43} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.