

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE: ORLANDO JACKSON : APPEAL NOS. C-100044
 : C-100045
 : TRIAL NOS. 09-7964
 : 09-7965
 : *JUDGMENT ENTRY.*

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Orlando Jackson appeals from the juvenile court’s adoption of a magistrate’s decision adjudicating Jackson a delinquent child for two counts of aggravated robbery and accompanying gun specifications, first-degree felonies if committed by an adult. We affirm the judgment of the trial court.

Frederick Smith testified that on the night of June 18, 2009, he and Edward Foster had been walking down the street when they were approached by three males. One told Smith and Foster to “give us everything.” Smith stated that one pointed a gun at him and Foster. According to Smith, he gave the men his cellular phone, his MP3 player, and his Air Jordan shoes, and Foster gave them whatever was in his pockets. After the three men ran away, Smith and Foster walked back to his house, where they told Smith’s mother about what had happened. Smith, Foster, Smith’s mother, and Smith’s brother drove back to the scene of the robbery in an attempt to find the suspects. According to Smith, the group told a police officer from Silverton about the robbery. Smith stated that his brother believed that he knew where one of the robbers lived, so Smith, Foster, Smith’s mother, and Smith’s brother went to an apartment where Jackson’s co-defendant lived. While outside the apartment, the

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

group saw the people who had robbed them entering the building. Smith's group told Cincinnati police officers where the suspects were.

When Cincinnati police officers entered an abandoned apartment, they found Jackson, Nathaniel McDowell, and another man. They also found Air Jordan shoes that matched the description of Smith's shoes and a gun. The gun matched the description given by Smith. Testing of the gun revealed Jackson's DNA. When the police officers brought the men out of the house, Smith and Foster identified them as the men who had robbed them. During the hearing before the magistrate, Smith and Foster identified Jackson as the person who had pointed a gun at them.

In their defense, Jackson and McDowell's attorneys questioned the credibility of Smith and Foster. Particularly, they contended that their testimony during the delinquency hearing differed from the testimony given during the bindover hearing. Jackson's father also testified that, shortly before the alleged robbery, he had bought for Jackson Air Jordan shoes that matched the description of those that had been found by the police officers in the abandoned apartment.

At the conclusion of the hearing, the magistrate adjudicated Jackson delinquent for two counts of aggravated robbery with specifications. Jackson filed objections to the magistrate's decision. In a hearing before the trial court, Jackson's counsel urged the trial court to review the testimony offered during the bindover hearing in addition to the testimony offered during the hearing before the magistrate. The trial court accepted the decision of the magistrate.

In his first assignment of error, Jackson asserts that the trial court erred when it did not undertake an independent review of the evidence presented during the bindover hearing. We note that it is unclear from the record whether the trial court reviewed the transcript from the bindover hearing. The court asked for a copy of the transcript. But the transcript was not filed with the court prior to its decision.² We conclude that even if the trial court did not review the transcript from the bindover hearing, there was not error.

² The transcript has been filed with this court.

Juv.R. 40(D)(4)(d) provides that, if a party objects to a decision of a magistrate, “the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.” Jackson contends that the trial court’s independent review should have necessarily encompassed the bindover hearing. But the trial court was considering the magistrate’s decision on evidence presented during the delinquency hearing. It was not considering matters decided during the bindover hearing. The testimony presented at the bindover hearing was ancillary to evidence at the delinquency hearing. Accordingly, the trial court was not required to review the testimony.

Jackson also argues that the trial court should have reviewed the bindover testimony as “additional evidence.” The determination of whether to review additional evidence is within the trial court’s discretion. As indicated by the trial court, Jackson’s attorney had an opportunity to point out any of the inconsistencies in Smith and Foster’s testimony by impeaching them with their previous testimony. The transcript of the delinquency hearing demonstrates that counsel did so. We conclude that, even if it did not review the transcript of the bindover hearing, the trial court did not abuse its discretion.

Within this assignment of error, Jackson also suggests that the trial court used the wrong standard when reviewing the magistrate’s decision. Jackson points to the following statement made by the trial court during the hearing: “[I]t would be unfair of me to hold the Magistrate to make a ruling on evidence that the Magistrate didn’t have that I’m looking at.” Jackson contends that this statement demonstrates that the trial court applied an abuse-of-discretion standard when reviewing the magistrate’s decision. But the trial court’s judgment entry makes clear that it

properly conducted an independent review of the evidence, as required by Juv.R. 40(D)(4)(d). The first assignment of error is overruled.

In the second assignment of error, Jackson asserts that the adjudication was against the manifest weight of the evidence. When reviewing whether a judgment is against the manifest weight of the evidence, we must determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.³

Jackson contends that the testimony of Smith and Foster was riddled with inconsistencies. He claims that the testimony given during the delinquency hearing conflicted with testimony given during the bindover hearing, and that Smith and Foster's accounts of the robbery conflicted. We have thoroughly reviewed the record and are unable to conclude that the trial court lost its way when it adjudicated Jackson delinquent. Both Smith and Foster consistently identified Jackson as the person who had pointed a gun at them. A gun matching the description given by Smith and Foster was found at the apartment where Jackson was found. And Jackson's DNA was on the gun. Further, shoes matching the description of the ones taken from Smith were found in the apartment. As for the alleged inconsistencies in the testimony of the Smith and Foster, the trier of fact was in the best position to determine the witnesses' credibility. The second assignment of error is not well taken, and the trial court's judgment is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on October 6, 2010
per order of the Court _____.

Presiding Judge

³ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.