

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

STATE OF OHIO,	:	APPEAL NOS. C-170638
		C-170639
Plaintiff-Appellee,	:	TRIAL NOS. 17CRB-25351B
		17CRB-25277
vs.	:	
		<i>OPINION.</i>
TYQUINE COX,	:	
Defendant-Appellant.	:	

Criminal Appeals From: Hamilton County Municipal Court

Judgments Appealed From Are: Affirmed

Date of Judgment Entry on Appeal: December 21, 2018

Paula Boggs Muething, City Solicitor, *Natalia S. Harris*, City Prosecutor, and *Scott Crowley*, Assistant City Prosecutor, for Plaintiff-Appellee,

Raymond T. Faller, Hamilton County Public Defender, and *David Hoffman*, Assistant Public Defender, for Defendant-Appellant.

DETERS, Judge.

{¶1} Following a bench trial, defendant-appellant Tyquine Cox was convicted of one count of assault under R.C. 2903.13 and one count of aggravated menacing under R.C. 2903.21. We find no merit in his two assignments of error, and we affirm his convictions.

{¶2} The record shows that Cox and Deanna Hunter have a child together. On September 10, 2017, Hunter had trouble locating Cox when she went to pick up the child. She eventually found Cox at his stepfather's apartment. Hunter had her friend Tekoah Isreal and three other children in the car.

{¶3} Hunter pleaded with Cox to return the child. Cox responded by waving a gun around. Several people, including Cox's family members and other associates, surrounded the car. Someone in the crowd held the child and would not give the child to Hunter.

{¶4} Eventually, Cox's mother placed the child in the car. She and Isreal, who was sitting in the passenger seat, exchanged words. Cox's mother closed the door, and threw a cigarette at Hunter. She then attacked Isreal, and others joined in the fight.

{¶5} Cox came around to the driver's side of the car and punched Hunter in the face with a closed fist, hitting her left cheek bone. Hunter stated that the punch hurt, although she was not as bruised as Isreal, and that it almost caused her to crash her car. Hunter left the scene and reported the assault to the police.

{¶6} After this incident, Hunter spent the night at Isreal's home because she did not feel safe going to her own apartment. She returned home the following morning with her children. While she was cleaning, she heard a knock on her door.

{¶7} Hunter looked out the peephole and saw a hand covering it. She said that she knew it was Cox because every time he had come to her apartment, he had put his hand over the peephole. She asked who it was, but the knocking just continued. She told him, “If you don’t leave, you know what’s going to happen, so I advise you to leave.” She then called the police.

{¶8} After the knocking stopped, Hunter cracked open the door to see what Cox was wearing so that she could tell the police. She saw Cox on the stairs pointing a gun at her. She immediately closed the door and begged the 911 operator to get the police to her location quickly, as she was afraid for her life.

{¶9} Cox presented the testimony of Marissa Jones, with whom he also had a child. Jones testified that she was present for the altercation at Cox’s stepfather’s apartment complex. She stated that while there was a verbal argument, no physical altercation took place. She further stated that Cox never waived a gun or punched Hunter.

{¶10} Cox presented an alibi defense on the aggravated-menacing charge. He presented the testimony of Jones, who stated that Cox came to her home at about 7:45 a.m. on the day that he had allegedly pointed the gun at Hunter and stayed until “about 9:45, 9:50.” Cox also presented the testimony of Samira Cole, who testified that Cox arrived at her home about 10:10 that morning and that he stayed with her the rest of the day.

{¶11} We address Cox’s assignments of error out of order. In his second assignment of error, Cox contends that the trial erred in holding that he had the burden to prove his alibi by a preponderance of the evidence. While the trial court

did err, Cox did not object to the error, and we cannot hold that a manifest injustice occurred. Therefore, this assignment of error is not well taken.

{¶12} Cox correctly asserts that alibi is not an affirmative defense. The burden of persuasion is not on the defendant, but remains with the state. *State v. Robinson*, 47 Ohio St.2d 103, 108, 35 N.E.2d 88 (1976); *State v. Goetz*, 1st Dist. Hamilton No. C-970503, 1998 WL 735358, *2 (Oct. 23, 1998); *State v. Sorrells*, 71 Ohio App.3d 162, 167, 593 N.E.2d 313 (1st Dist.1991). Because Cox did not object, we apply a plain-error analysis.

{¶13} Cox relies on *State v. Walker*, 2 Ohio App.3d 483, 442 N.E.2d 1319 (1st Dist.1981), in which this court held that the trial court committed plain error in instructing the jury that the defendant bore the burden of proving alibi beyond a reasonable doubt. *Id.* at 484-485. In *Walker*, we discussed the definition of plain error set forth in *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), in which the Ohio Supreme Court did not find plain error. We stated:

The instructions given in *State v. Long, supra*, required the defendant to prove self-defense by a preponderance of the evidence; the instructions given in the case *sub judice* required appellant to prove his alibi beyond a reasonable doubt. Both instructions were incorrect, but in requiring that appellant prove his alibi beyond a reasonable doubt the court below placed a heavier burden upon him than was placed in *State v. Long, supra*. Thus, the court below committed a greater error. The erroneous instruction “could not have done other than mislead the jury,” * * * and could have led to a “manifest miscarriage of justice.”

(Citations omitted.) *Walker* at 484-485.

{¶14} The state relies on *State v. Douthit*, 1st Dist. Hamilton Nos. C-910394 and C-910395, 1992 WL 180875 (July 29, 1992), in which we distinguished *Walker*. In *Douthit*, the trial court instructed the jury that the defendant had the burden to prove his alibi by a preponderance of the evidence. The defendant did not object. We held that no plain error occurred because the outcome of the trial would not clearly have been otherwise but for the error. That determination was based on the strength of the state’s case, the weakness of the alibi defense, and the trial court’s later instruction that the state always had the burden to prove its case beyond a reasonable doubt. *Id.* at *2.

{¶15} In this case, the trial court erroneously stated that Cox had the burden to prove his alibi by a preponderance of evidence. It erred in shifting the burden of persuasion to Cox. Nevertheless, Cox did not object, so we review for plain error.

{¶16} An appellate court’s power to review a claim of plain error is discretionary. *State v. Turner*, 1st Dist. Hamilton No. C-990388, 2000 WL 770136, *6 (June 16, 2000); *State v. Fields*, 97 Ohio App.3d 337, 344, 646 N.E.2d 866 (1st Dist.1994). Under a plain-error analysis, a court determines (1) whether an error occurred; (2) whether it was plain error; and (3) whether the defendant was prejudiced. *Fields* at 344, citing *United States v. Olano*, 507 U.S. 725, 733-735, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). The court “determines prejudice by asking whether the error created a manifest injustice or seriously affected the ‘fairness, integrity or public reputation of [the] judicial proceedings.’ ” *Fields* at 344, quoting *Olano* at 736. The plain-error rule should be applied with the utmost caution and only under exceptional circumstances to prevent a manifest miscarriage of justice.

Long, 53 Ohio St.2d at 95-96, 372 N.E.2d 804; *State v. Beck*, 2016-Ohio-8122, 75 N.E.3d 899, ¶ 11 (1st Dist.).

{¶17} This case does not present those exceptional circumstances. Cox's alibi defense was weak. His own evidence showed that a 25-minute window of time existed for which he could not account, in which he could have committed the offense. The state, on the other hand, had a witness who testified that Cox had assaulted her, and, on the following day, he had appeared on her doorstep and threatened her with a gun. Given the strength of the state's case and the weakness of the alibi defense, we cannot hold that a manifest miscarriage of justice occurred. Therefore, we overrule Cox's second assignment of error.

{¶18} In his first assignment of error, Cox contends that his convictions were against the manifest weight of the evidence. He points to various alleged inconsistencies in Hunter's testimony, in arguing that her testimony was not credible. This assignment of error is not well taken

{¶19} After reviewing the record, we cannot say that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse Cox's convictions and order a new trial. Therefore, the convictions were not against the manifest weight of the evidence. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Jillson*, 1st Dist. Hamilton No. C-110430, 2012-Ohio-1034, ¶ 6.

{¶20} The record shows that the trial court found the state's evidence to be more credible. Matters as to the credibility of evidence are for the trier of fact to decide. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 116; *State v. Wallace*, 1st Dist. Hamilton No. C-160613, 2017-Ohio-9187, ¶ 70. The trier

of fact may believe some, all, or none of any witness's testimony. *State v. Jones*, 1st Dist. Hamilton No. C-080518, 2009-Ohio-4190, ¶ 43. Consequently, we overrule Cox's first assignment of error and affirm the trial court's judgments.

Judgments affirmed.

CUNNINGHAM, P.J., and **MILLER, J.**, concur.

Please note:

The court has recorded its own entry this date.