[Cite as *State v. Woods*, 2006-Ohio-7331.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 05AP-704
v.	:	(C.P.C. No. 04CR-11-7855)
John L. Woods,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on August 17, 2006

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER , J.

{¶1} Defendant-appellant, John L. Woods, was indicted on one count of aggravated robbery with firearm specification, a felony of the first degree in violation of R.C. 2911.01, two counts of robbery with firearm specification, felonies of the second degree in violation of R.C. 2911.02, one count of kidnapping with firearm specification, a felony of the first degree in violation of R.C. 2905.01, one count of carrying a concealed weapon, a felony of the fourth degree in violation of R.C. 2923.12, and one count of

having a weapon while under disability, a felony of the third degree in violation of R.C. 2923.13. All counts where tried to a jury, except the count of having a weapon while under disability, which was tried to the court. Appellant appeals the June 14, 2005 judgment of the Franklin County Court of Common Pleas, which entered a judgment of guilty on all counts. For the following reasons, we affirm.

{¶2} The following facts were adduced at trial. David A. Koonts ("Koonts"), the victim, testified on behalf of the prosecution. In November 2004, Koonts, who is hearing-impaired but can read lips, was employed by Roberts Transfer, which was located on 17th Avenue in Columbus, Ohio. Roberts Transfer's business consisted of taking waste material from construction and building renovation from customers and disposing of it by burying it. Koonts was employed to wait for customers to arrive at the 17th Avenue location, allow them to dump the waste material on the property, and hold the customer's payments, which were made by cash or check. Although a trailer was on the site, it was not electrified and one of its windows was broken. Koonts would wait for customers in his pick-up truck, and keep invoices from the transactions in his vehicle as well as the cash and the checks in a cup near the gear shifter.

{¶3} Koonts was usually the only employee at the 17th Avenue site. The only other employees of Roberts Transfer's 17th Avenue location were truck drivers that would be away from the site for periods up to two and a half hours while delivering waste material. Although Koonts' supervisor was supposed to visit the site daily to pick up the money and checks from Koonts, he usually only visited the site twice a week. Other individuals who were not employees or customers of Roberts Transfer also visited the

site. Koonts would allow these individuals to sort through the waste materials and collect scrap metal. They would take the scrap metal to a nearby recycling plant and exchange it for money.

{¶4} On November 16, 2004, Koonts arrived at work between 5:30 and 5:35 a.m. He was expecting an individual to arrive at 6:00 a.m. to pick up the waste material. Because it was raining, Koonts was waiting in his pick-up truck when appellant approached him. Koonts knew appellant as "Dukem," whom he previously knew from the "Playaz" adult nightclub. Though Koonts considered appellant only an acquaintance, he would engage in friendly conversation with appellant when he saw him. Appellant had been one of the individuals that Koonts allowed to sort through the waste material in the past, but Koonts had told him prior to that morning that he could no longer do so.

{¶5} Appellant began pounding on Koonts' passenger side window asking for a cigarette. According to Koonts, appellant knew that he had to pound on the window because Koonts would not otherwise hear him. Koonts offered appellant a cigarette and appellant walked around to the driver's side of the truck to take it from him. Appellant often asked Koonts for cigarettes or money for bus fare. After Koonts handed appellant the cigarette, appellant asked to use Koonts' cell phone. Koonts explained to appellant that his cell phone was out of power. Koonts showed appellant the cell phone and how it was charging by using the truck's cigarette lighter. According to Koonts, appellant grabbed the cell phone, breaking the charging cord in the process, and threw the phone back into the truck.

{¶6} Appellant then asked Koonts for money, but Koonts initially refused. According to Koonts, appellant stated, "come on, Dave, * * * I've had it with this shit, * * * I want some money." (Tr. 78.) Appellant reached inside of his coat pocket and revealed a firearm in his hand, which he rested on the driver's side windowsill. Koontz stated that he could only see the barrel of the firearm. Koontz first described the firearm as a revolver, but after further questioning, called it an automatic handgun. Appellant again told Koonts that he wanted money. Koonts testified that he was unable to walk or drive away, and was scared that if he did so appellant would shoot him. Appellant knew that Koonts kept Roberts Transfer's money in the cup in his pick-up truck because appellant had watched Koonts give customers change. Koonts told appellant, "you know I don't own that money, just put the gun away." (Tr. 81.) Koonts believed that the firearm was loaded because appellant cocked the gun when Koonts initially refused to give him money.

{¶7} Koonts testified that he "could tell by from the looks of him that there was something wrong. He didn't look normal to me." (Tr. 81.) Appellant again asked Koonts for the money, so Koonts handed him his wallet. Appellant told Koonts to open it, and Koonts complied by opening his wallet and handing the money to appellant, which amounted to $250. Appellant took the money and placed it into his coat pocket, and then asked for the money in the cup near the gearshift. Koonts testified that he was afraid he would get shot "because of the way he was acting and shaking." (Tr. 82.) At the time, appellant was leaning on the truck's windowsill and pointing the firearm at Koonts. Koonts gave appellant the cup, which contained $1,850.

{¶8} After appellant took the money from Koonts, he started walking away from Koonts down 17th Avenue. Koonts watched appellant "until he got so far," at which point Koonts began to follow him in his pick-up truck, keeping a distance of approximately 25 yards. (Tr. 83-84.) Koonts continued to follow appellant for about a half-hour until he reached a store on Joyce Avenue, where he disappeared.

{¶9} Koonts returned to Roberts Transfer. He considered using a pay phone to call for help, but because he knew he would not be able to hear the person he called, he decided to wait for help. Koonts observed a police van between 7:00 and 7:40 a.m., and contacted it by flashing his lights on and off until they came over to him. The police officers told Koonts that they contacted another officer to come assist him. While waiting for that officer, one of the officers stayed with Koonts to complete a report, while the other officer took the police van down 17th Avenue to look for appellant. Officer Sloan ("Sloan") arrived and took Koonts' report. Koonts only knew appellant at the time of the robbery as "Dukem," but told Sloan that he could find out appellant's real name.

{¶10} After Koonts obtained the name and location of appellant several days later, he contacted Sloan. Sloan came to Roberts Transfer and followed Koonts to the recycling center on Joyce Avenue, approximately three blocks from the 17th Avenue site. After arriving at the recycling center, Koonts identified appellant among a group of individuals surrounding an automobile. The police took appellant into custody without incident.

{¶11} On cross-examination, Koonts was questioned regarding the amount of money that was stolen. Koonts testified that he told Sloan that appellant took $1,700 that

belonged to Roberts Transfer. Appellant further questioned Koonts if he remembered telling another police officer that appellant took $2,100. Koonts explained that he did not tell the police officer that $2,100 was taken, but rather the average amount of money he kept in his possession for Roberts Transfer amounted to $2,100.

{¶12} Donald Junk ("Junk"), a detective for the Columbus Division of Police, also testified for the prosecution. After Koonts had identified appellant and the police had taken him into custody at the recycling center on Joyce Avenue, Junk interviewed appellant at the Columbus Police Headquarters, Detective Bureau, as part of his investigation. Appellant chose to speak with Junk after waiving his *Miranda* rights. Junk videotaped the entire interview, which was edited and played at trial.

{¶13} During the interview, appellant denied robbing Koonts. Junk asked where appellant was during the time that Koonts alleged he was robbed. Appellant stated that he was sleeping at the home of the mother of his child, Angie Dickson ("Dickson"). Junk obtained the telephone number of Dickson, left the interrogation room, and called her. Junk returned to the interview room and told appellant that Dickson stated that he had not slept at her house recently, but that he did stop by the day after the robbery. Appellant then offered to "let it all out" to Junk, and told him that Koonts had given him $100 to purchase cocaine powder, but that he kept the $100 and did not return with the cocaine.

{¶14} At trial, Junk testified regarding his interview with appellant. Over the objection of appellant, Junk was permitted to testify regarding Dickson's statement. Following Junk's testimony regarding Dickson's statement, the trial court provided a limiting instruction to the jury, which defined and explained hearsay. The trial court then

instructed the jury stating that "whatever Miss Dickson may have said or not said is not being presented here to prove that what she said was true, just to explain the context of the conversation between Detective Junk and Mr. Woods." The jury then watched the edited videotape of the interview, which included the portion of the interview where Junk communicates Dickson's statement to appellant.

{¶15} At the close of appellee's case-in-chief, appellant made a Crim.R. 29 motion for acquittal, which the trial court overruled.

{¶16} Appellant called one witness to testify on his behalf, Michael West ("West"). West testified that he was the owner of "Playaz." He further testified that he had seen Koonts in his establishment approximately 20 times, and that he had seen Koonts and appellant talking to each other on several occasions. He additionally testified that he observed them driving away from the establishment two times in Koonts' pick-up truck. On cross-examination, West testified that he did not know what Koonts and appellant discussed during their conversations, and that the two times they drove off together, they returned to his establishment later in the evening both times.

{¶17} Appellant did not testify in his own defense. The jury found appellant guilty on all counts with which it was charged, and the trial court found appellant guilty of having a weapon while under disability.

{¶18} On appeal, appellant asserts the following two assignments of error for our review:

> The trial court deprived Appellant of his Sixth Amendment right to be confronted with the witnesses against him.

Appellant's convictions are against the manifest weight of the evidence.

{¶19} We begin with appellant's first assignment of error. We note that the admission or exclusion of evidence lies within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343. In order to find an abuse of discretion, we must determine that the trial court 's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or of judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 5 OBR 481, 450 N.E.2d 1140.

{¶20} Appellant asserts that the trial court erred in admitting (1) the testimony of Junk regarding Dickson's statement that appellant was not sleeping at their house on the morning of the robbery, and (2) the out-of-court videotaped statement of Junk communicating to appellant during the police interview that Dickson stated that appellant did not sleep at her house on the morning of the robbery. Appellant asserts that these statements violate his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. Appellant asserts that these statements are inadmissible under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, because appellant was not permitted to examine Dickson as she was not called as a witness. Appellant argues that these statements were clearly relevant because they contradicted appellant's alibi, but were prejudicial because they impeached appellant though he never testified in his own defense.

{¶21} Furthermore, appellant asserts that the trial court's limiting instruction explaining to the jury that the statements were "not being presented here to prove that

what [Dickson] said was true, just to explain the context of the conversation between Detective Junk and Mr. Woods" failed to cure the error under *Crawford* because it failed to explain what the court meant by "contextual." Appellant contends that the prosecution could have placed the conversation of Junk and appellant into context by having Junk explain what he did that prompted appellant to change his account rather than introducing the statements of Dickson.

{¶22} In response, appellee asserts that the trial court properly permitted the introduction of the statements because the statements were not hearsay and were only offered to give context to the conversation between Junk and appellant, and not to prove the truth of the matter asserted, but rather to explain Junk's conduct while investigating the crime. Appellee additionally asserts that the statements were contextual because without the introduction of the statements, the jury would have been left to speculate as to why appellant first claimed he had an alibi, but then explained to Junk that he had engaged in a transaction for narcotics with Koonts. Finally, appellee argues that the trial court cured any error by giving a lengthy instruction to the jury explaining how the statements could be used.

{¶23} The United States Supreme Court held in *Crawford*, supra, that out-of-court testimonial hearsay statements by a witness who does not testify at trial are inadmissible against the defendant unless the witness is unavailable to testify at trial and the defendant previously had an opportunity to cross-examine the witness. *Crawford*, at 68. In so holding, the court overruled its previous decision in *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531, 17 O.O.3d 240, 65 L.Ed.2d 597, which permitted the admission of

statements of unavailable witnesses against criminal defendants if the statements bore "adequate 'indicia of reliability.' " *Crawford*, supra, at 40. The Supreme Court concluded that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one that the Constitution actually prescribes: confrontation." Id. at 68-69. However, the court specifically noted that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 36, fn. 9, citing *Tennessee v. Street* (1985), 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425.

{¶24} As we recently stated in *State v. Banks*, 10th Dist. No. 03AP-1286, 2004-Ohio-6522:

> The holding in *Crawford* only applies to statements that are, in fact, hearsay * * *. Evid.R. 801(C) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Statements that are not intended to prove the truth of what was said are not hearsay. *State v. Davis* (1991), 62 Ohio St.3d 326, at 343, 581 N.E.2d 1362. * * *

Id. at ¶18.

{¶25} Ohio courts have previously held that recordings that were not introduced to prove the matter asserted are not hearsay, and thus are admissible and do not violate a defendant's rights under the Confrontation Clause. *State v. Nabozny* (1978), 54 Ohio St.2d 195, 209-210, 8 O.O.3d 181, 375 N.E.2d 784 (tape recorded statement of a victim made by the defendant was not hearsay as it was only offered to prove that the victim was alive on a date certain); *State v. Smith* (2005), 162 Ohio App.3d 208, 2005-Ohio-

3579, 832 N.E.2d 1286 (audiotape of a drug deal between the defendant and a confidential informant who did not testify at trial was admissible and did not violate the Confrontation Clause as it was not hearsay and only offered to provide context to defendant's other admissible statements).

{¶26} The Sixth Circuit in *United States v. Sexton* (C.A.6, 2005), 119 Fed.Appx. 735, faced a very similar issue to the one at bar. In *Sexton*, police used surveillance and undercover operations to uncover a conspiracy to distribute cocaine. A confidential informant and undercover police officers were used to purchase cocaine on several occasions in which the transaction was audiotaped. Several defendants were arrested for conspiracy to distribute cocaine. The prosecution introduced the audiotapes and the statements of the informant through the testimony of the participating police officers, questioning them regarding the circumstances surrounding the audiotapes. The audiotapes were admitted at trial over the objections of the defendants, even though the informant did not testify at trial. The trial court instructed the jury that the informant's statements could not be used as evidence. The defendants were subsequently convicted.

{¶27} On appeal, the Sixth Circuit determined that the taped statements were not hearsay because they were not introduced to prove the truth of the matter asserted. Instead, the court found that the statements of the informant were properly admitted because it gave "meaning to the admissible responses" of the police officers. *Sexton*, supra, at 743. The Sixth Circuit also rejected the defendants' Confrontation Clause challenge, determining that:

> When an out-of-court statement is not offered to prove the truth of the matter asserted, as with [the informant's] statements, the Confrontation Clause is not implicated. *Tennessee v. Street*, 471 U.S. 409, 413 85 L.Ed.2d 425, 105 S.Ct. 2078 (1985); *United States v. Martin*, 987 F.2d at 1372.
>
> The statements were clearly admissible under the Supreme Court's recent decision in *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 177, 124 S.Ct. 1354 (Mar. 8, 2004). * * *

Sexton, supra, at 743.

{¶28} Applying the foregoing authority to the case at bar, we determine that the testimony of Junk about Dickson's statement regarding appellant's location on the morning of the robbery and the videotape of Junk relaying Dickson's statement to appellant during the interview, were not hearsay as they were not offered for the truth of the matter asserted. Instead, they were offered to explain the context behind why appellant first claimed to Junk that he had an alibi, but later recanted his story and offered to "let it all out," and tell Junk that Koonts allegedly gave him money to purchase cocaine. We therefore conclude the statement was admissible under *Crawford*, supra, and did not violate appellant's Sixth Amendment rights under the Confrontation Clause.

{¶29} Additionally, the trial court avoided any misuse by the jury of Dickson's statement by providing a lengthy curative instruction explaining that the statements could not be used as evidence. *Street*, supra, at 414. For the above-stated reasons, we determine that the trial court did not abuse its discretion in admitting Dickson's statement. Therefore, appellant's first assignment of error is overruled.

{¶30} Appellant's second assignment of error asserts that his conviction was against the manifest weight of the evidence. Appellant argues that the appellee's case

was entirely based on the testimony of Koonts as no physical evidence was introduced. Additionally, appellant asserts that the conviction is against the manifest weight of the evidence as Koonts gave different descriptions of the firearm used by appellant and of the amount of money stolen. In response, appellee asserts that Koonts did not contradict himself regarding the gun as he first testified that it was a revolver, but later corrected himself and referred to it simply as a small handgun. Appellee also asserts that Koonts did not contradict himself regarding the amount of money stolen, and explained the discrepancy by testifying that he told the police officer the exact amount of money stolen as well as the average amount of money he kept in his pick-up truck.

{¶31} We note that appellant has not asserted that his conviction is not supported by sufficient evidence, but only that his conviction is against the manifest weight of the evidence. In reviewing a manifest weight challenge, 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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 485 N.E.2d 717. See, also, *Columbus v. Henry* (1995), 105 Ohio App.3d 545, 547-548, 664 N.E.2d 622. 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." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

{¶32} When considering a manifest weight challenge, we are mindful that determinations of the weight to be given to evidence and the credibility of witnesses remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus. Thus, the jury is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and to determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, at ¶58. Furthermore, a defendant is not entitled to a reversal based on a manifest weight challenge merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958. "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." *State v. Lakes* (1964), 120 Ohio App. 213, 217, 29 O.O.2d 12, 201 N.E.2d 809.

{¶33} Here, the prosecution presented direct evidence by means of the testimony of Koonts that on November 16, 2004, appellant pointed a firearm at appellant and robbed him of $1,850 owned by Roberts Transfer as well as $250 of Koonts' own money. The prosecution additionally presented the testimony of Junk as well as the videotape of Junk's interview of appellant that demonstrated that appellant could not account for his location on the morning of November 16, 2004. The weight to be accorded the evidence and determinations as to the credibility of witnesses were within the province of the jury. *DeHass*, supra, at paragraph one of the syllabus. Thus, the jury was in the best position to assess the credibility of Koonts and resolve any conflicts in Koonts' testimony. Here, it was within the province of the jury to determine what weight to give to Koonts' varying

descriptions of the firearm and what weight to give to Koonts' explanation regarding the amount of money stolen.

{¶34} After reviewing the entire record, we cannot say that the evidence weighs heavily against the convictions, or that the jury clearly lost its way resulting in a miscarriage of justice as to require a new trial. Accordingly, we determine that appellant's conviction is not against the manifest weight of the evidence. Appellant's second assignment of error is overruled.

{¶35} Having overruled both of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and FRENCH, JJ., concur.

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