

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 09AP-365
Plaintiff-Appellee,	:	(C.P.C. No. 07CR-12-8859)
	:	and
v.	:	No. 09AP-366
	:	(C.P.C. No. 08CR-05-3596)
James R. Dutton, II,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 19, 2009

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

W. Joseph Edwards, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} James R. Dutton, II, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a jury verdict, of aggravated burglary with specification, in violation of R.C. 2911.11, a first-degree felony; kidnapping with specification, in violation of R.C. 2905.01, a first-degree felony; aggravated robbery with specification, in violation of R.C. 2911.01, a first-degree felony; robbery with specification, in violation of R.C. 2911.02, a second-degree

felony; and robbery with specification, in violation of R.C. 2911.02, a third-degree felony. Appellant was also found guilty, pursuant to a bench trial, of having a weapon while under disability, in violation of R.C. 2923.13, a third-degree felony.

{¶2} On November 13, 2007, a woman, Christina Rosenberry, came to the residence of the victim, Stephen Carrico, and asked to use his telephone. Rosenberry was a "customer" of Carrico's, and would buy drugs from him. Rosenberry used the telephone and then left. Ten minutes later, a man knocked on Carrico's door and asked for Rosenberry. At that time a second man, appellant, barged into Carrico's home and struck Carrico in the face with a pistol. Carrico and appellant had been friends, but he did not initially know it was appellant, who was wearing all black and a toboggan hat. Also, because he was hit so fast, Carrico did not know whether the hat was pulled over appellant's face or just sitting on his head. Carrico fell to the ground, and appellant yelled at Carrico "[t]ell me where the dope and the money is at, Steve, or I'm going to kill you. Do you want to die?" Carrico recognized appellant's voice. Appellant continued to strike Carrico in the head with the pistol during this time and kept saying, "I'm going to kill you if you don't tell me where the money and the dope's at." The men then bound Carrico's hands with shoelaces. As the men were tying up Carrico, he saw appellant's face and recognized him. After the men left, Carrico was able to call police. When police arrived, it was discovered that the men had stolen over \$1,000 from Carrico's wallet. Carrico identified appellant as the man who had hit him with the pistol.

{¶3} Appellant was indicted on multiple counts. A jury trial was held, after which the jury found appellant guilty of aggravated burglary with specification; kidnapping with specification; aggravated robbery with specification; and two counts of robbery with

specification. The jury found appellant not guilty of felonious assault. Appellant was also found guilty, pursuant to a bench trial, of having a weapon while under disability. The court sentenced appellant to five-year sentences on each of the five counts tried to the jury, and a two-year sentence for the count tried to the bench, all to be served concurrently. The court also ordered additional three-year sentences for the gun specifications, which merged, and ordered that three-year sentence to be served consecutively to the five-year concurrent sentences, for a total prison sentence of eight years. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

I. THE VERDICT WAS SUPPORTED BY INSUFFICIENT EVIDENCE AS TO THE SPECIFICATION THAT THE APPELLANT HAD A FIREARM ON OR ABOUT HIS PERSON OR UNDER HIS CONTROL WHILE COMMITTING THE OFFENSE AND DISPLAYED THE FIREARM, BRANDISHED THE FIREARM, INDICATED THAT THE OFFENDER POSSESSED THE FIREARM, OR USED IT TO FACILITATE THE OFFENSE[.]

{¶4} Appellant argues in his assignment of error that the verdict regarding the firearm specifications was not supported by sufficient evidence. In reviewing a sufficiency of the evidence claim, the relevant inquiry is whether any rational fact finder, viewing the evidence in a light most favorable to the state, could have found all of the essential elements of the crime proven beyond a reasonable doubt. *State v. Jones*, 90 Ohio St.3d 403, 417, 2003-Ohio-187, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, and *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. On review for sufficiency, courts do

not assess whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* at 390. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* at 319, 99 S.Ct. 2789. Consequently, a verdict will not be disturbed based upon insufficient evidence unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* at 273.

{¶5} R.C. 2941.145(A) provides, in pertinent part:

Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.

{¶6} R.C. 2923.11(B)(1) provides:

"Firearm" means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. "Firearm" includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.

{¶7} Here, appellant argues that the state failed to demonstrate that he had an operable firearm. We disagree. R.C. 2923.11(B)(2) provides:

When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely

upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm.

{¶8} It is not necessary to admit the firearm used during the crime in evidence in order to establish a firearm specification. *State v. Murphy* (1990), 49 Ohio St.3d 206; *State v. Knight*, 2d Dist. No. 2003 CA 14, 2004-Ohio-1941. Both a firearm's existence and its operability may be inferred from the surrounding facts and circumstances. See *State v. Jeffers* (2001), 143 Ohio App.3d 91, 94-95. Circumstantial evidence can support a finding that a firearm was operable, including explicit or implicit threats made by the person in control of the firearm. *State v. Thomas*, 2d Dist. No. 19435, 2003-Ohio-5746, ¶46, citing *Thompkins*, paragraph one of the syllabus. A victim's belief that the weapon is a gun, together with the intent on the part of the accused to create and exploit that belief for his own criminal purposes, is sufficient to prove a firearm specification. *State v. Greathouse*, 2d Dist. No. 21536, 2007-Ohio-2136 (sufficient evidence supported a firearm specification even though the victim never saw the gun, when the defendant told the victim that he had a gun and that he would kill her and dump her body if she did not comply). See also *State v. Nicholson*, 6th Dist. No. L-08-1136, 2009-Ohio-518, ¶48-49 (that defendant came toward victim with the barrel of a gun exposed and demanded that she surrender her purse, then moved closer and exposed more of the gun's barrel, and then pointed it more toward the victim and said more forcefully, "I said give me your purse," was sufficient to establish the operability of the weapon); *In re Wallace*, 5th Dist. No. 2007CA00156, 2008-Ohio-1389, ¶37 (finding that the operability of the firearm could be inferred from the appellant's actions of sticking a gun in the victim's face and demanding "I want your purse, bitch.").

{¶9} Even actions alone, without verbal threats, may constitute sufficient circumstances to establish the operability of a firearm. For example, evidence has been found to be sufficient to prove a firearm specification when masked men waived their guns and announced "this is a robbery." *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304, fn. 3. See also *Thompkins* (the defendant pointed a gun directly at the robbery victim and told her it was a holdup and to be quick, in response to which she handed over money from the cash register). In *State v. Melton*, 2d Dist. No. 22591, 2009-Ohio-535, the defendant forced his way into the victim's home, told her to "shush," then pulled out a gun and proceeded to steal jewelry from the bedroom. Because the victim believed the gun was real, she feared for her safety and complied with the defendant's demands. The court found the evidence was sufficient to support the firearm specification. *Id.* at ¶18, 36. See also *State v. Sanders* (1998), 130 Ohio App.3d 92, 101 (the gun was pointed at a victim when she was ordered out of her car and the defendant cocked the gun and pointed it at another victim when taking that victim's money); *State v. McElrath* (1996), 114 Ohio App.3d 516, 520 (defendant pointed gun at customers and bartender while another man took cash from the register); *State v. Pierce*, 10th Dist. No. 02AP-1133, 2003-Ohio-4179, ¶20 (defendant pointed gun at victim through a car window while demanding money); *State v. Jackson*, 10th Dist. No. 02AP-468, 2003-Ohio-1653, ¶44-45 (defendant pulled gun and held it to the victim's head while demanding money); *State v. Macias*, 2d Dist. No. 1562, 2003-Ohio-1565, ¶15 (defendant pointed what appeared to be a real gun at the victim while demanding money); *State v. Robinson*, 8th Dist. No. 80718, 2003-Ohio-156 (defendant shoved a rifle barrel into the victim's back when the victim did not respond to another gunman's orders).

{¶10} Here, Carrico testified he met appellant in September 2006 when he had a heroin problem, and they became good friends, although they had not seen each other for about three months before the incident. Carrico stated that appellant barged into his house, pointed a gun at him, and then began hitting him with the gun. Appellant then yelled at Carrico "[t]ell me where the dope and the money is at, Steve, or I'm going to kill you. Do you want to die?" Appellant continued to strike Carrico in the head with the pistol during this time and kept saying, "I'm going to kill you if you don't tell me where the money and the dope's at." Appellant repeatedly called Carrico "Steve." In his 911 call, Carrico identified appellant by name and said appellant put a gun in his face and held the gun to his head.

{¶11} It is clear from surrounding circumstances testified to at trial that there was sufficient evidence, if believed, to demonstrate the operability of the gun. Here, there were explicit threats of violence when appellant pointed the gun at Carrico and beat him with it, and, implicit in those threats was that the gun would be used to inflict the violence if Carrico did not comply with appellant's wishes. Thus, appellant used the gun in such a manner so as to create a belief in Carrico that the gun was operable and could be used to kill him, including the specific threats, "I'm going to kill you" and "[d]o you want to die?" Carrico had no reason to believe the weapon was inoperable.

{¶12} The circumstances in this case are not like those in *State v. Johnson*, 8th Dist. No. 90449, 2008-Ohio-4451, in which the court found the evidence was insufficient to find the defendant guilty of the firearm specifications when the testimony revealed that the defendant used a gun only as a bludgeon, not as a firearm, to strike the victim; made no threats or statements to indicate that the gun was operable; and never waved it at the

victim. To the contrary, in the present case, Carrico testified appellant threatened to kill him and also pointed the gun in his face and toward his head. Thus, although the gun here was similarly used as a bludgeon to beat Carrico, it was also handled in such a manner that implied it could be used to shoot and kill Carrico. We also note that, despite the fact that the record is unclear as to whether the threats of violence occurred concurrently with the pointing of the gun at Carrico, the gun was displayed at all times, and Carrico could have reasonably inferred that such violence would be inflicted by the firing of the weapon. For the foregoing reasons, we find the jury could have found, beyond a reasonable doubt, that appellant brandished a deadly weapon capable of expelling one or more projectiles by the action of an explosive propellant. Therefore, appellant's assignment of error is overruled.

{¶13} Accordingly, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.
