[Cite as *State v. Sharp*, 2009-Ohio-6847.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-408 (C.P.C. No. 09CR01-47)
Ryan H. Sharp,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 24, 2009

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

Toki M. Clark, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Ryan H. Sharp, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} The morning of December 26, 2008, roommates David Bauer and Joe Held were asleep in their apartment located at 262 E.12th Avenue, Columbus, Ohio. A loud

noise woke them both. Held immediately called 911 from his bedroom. Bauer left his bedroom and saw a man in the living room. Two lights in the living room were on, and the man was less than ten feet away. Bauer yelled at the man to get out of the apartment, and the man walked out of the apartment.

{¶3} Within minutes, officers from the Columbus Police Department arrived at the apartment. Bauer and Held provided the police with a description of the man who broke into their apartment. Officer Charles Radich repeated that description over the police radio. Shortly thereafter, police located a possible suspect less than 100 yards away from the apartment. Officer Radich separately brought Bauer and Held to that location to identify whether or not the suspect was the man who broke into their apartment. Both men identified the man, later identified as appellant, as the man who broke into their apartment.

{¶4} As a result, a Franklin County Grand Jury indicted appellant with one count of burglary in violation of R.C. 2911.12. Appellant entered a not guilty plea to the charge and proceeded to a jury trial.

{¶5} Before trial, appellant sought to suppress, among other things, Bauer's and Held's pre-trial identification of him as the man they saw in their apartment. The trial court held a hearing at which Held and Officer Radich described the identification procedure utilized the night of the offense. Held explained that the police drove him to a location shortly after the break-in. The police spotlighted a man about 15-20 feet away. Held had "no doubt" that the man was the person who broke into his apartment. Radich testified that within 20 minutes of the offense, he separately brought Held and Bauer to the location and asked if they could identify appellant. Radich stated that both Bauer and

Held positively identified appellant as the person who broke into their apartment. The trial court denied appellant's motion to suppress the pre-trial identifications.

{¶6} At trial, Bauer and Held again identified appellant as the person who broke into their apartment. Although appellant did not testify, the state played a portion of a police interview with him in which he denied being in the apartment. The jury found appellant guilty as charged, and the trial court sentenced him accordingly.

{¶7} Appellant appeals and assigns the following errors:

> [1.] A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL ARE VIOLATED WHERE HE REFUSES TO WAIVE HIS RIGHT TO COUNSEL AND HE REFUSES TO SIGN A RIGHTS WAIVER, YET LAW ENFORCEMENT COERCE HIM TO BE INTERVIEWED WITHOUT COUNSEL PRESENT AND THAT INTERVIEW IS THEN SHOWN TO THE JURY WHEN HE ASSERTS HIS RIGHTS TO REMAIN SILENT.
>
> [2.] THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL ERROR BY ADMITTING EVIDENCE ON AN UNRELIABLE IDENTIFICATION.
>
> [3.] THE CONVICTION OF APPELLANT FOR RAPE AND KIDNAPPING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶8} In appellant's first assignment of error, he contends that the state and the trial court violated Crim.R. 44, which addresses a criminal defendant's right to counsel after being charged with a crime. The rule provides that a defendant may waive the right to counsel, but in certain cases, such waiver must be in writing. Crim.R. 44(C). This rule has no applicability in this case, because appellant was represented by counsel at all times after he was charged.

{¶9} Even if we interpret appellant's argument as going beyond Crim.R. 44, we fail to find error. Appellant contends he did not validly waive his right to counsel before

speaking to the police because he did not sign a waiver of rights. We disagree. The failure to sign a rights waiver is not dispositive of whether a defendant validly waived his rights. A rights waiver is valid even without a signed waiver form, if the waiver is knowing and voluntary. *State v. Underdown*, 10th Dist. No. 06AP-676, 2007-Ohio-1814, ¶24 (citing *State v. Streeter,* 162 Ohio App.3d 748, 2005-Ohio-4000, ¶29; *State v. Llanderal-Raya,* 9th Dist. No. 04CA0079-M, 2005-Ohio-3306, ¶30 (express written waiver not required for valid waiver); *State v. Henricksen* (Feb. 19, 1987), 8th Dist. No. 51496 (finding waiver without signed waiver form).

{¶10} Here, the detective interviewing appellant read him a waiver of rights form. Appellant stated that he understood those rights, including his right to counsel, and then proceeded to talk about the night's events without signing the rights waiver. "Where a suspect speaks freely to police after acknowledging that he understand his rights, a court may infer that the suspect implicitly waived his rights." *State v. Murphy*, 91 Ohio St.3d 516, 519, 2001-Ohio-112 (finding valid waiver of rights even without signed waiver form). Although appellant claims that he was impaired during the questioning, the videotaped interview reflects that appellant was alert and engaged during the questioning. If appellant was impaired, the impairment was not significant enough to prevent him from voluntarily speaking with police, and thereby waiving his right to counsel.

{¶11} Additionally, we note that the playing of the videotape arguably benefited appellant. In the only portion of the interview actually played to the jury, appellant denied that he was in Bauer and Held's apartment. Therefore, appellant was able to deny the allegations without having to testify.

{¶12} We overrule appellant's first assignment of error.

{¶13} Appellant contends in his second assignment of error that the trial court improperly admitted Bauer's and Held's pre-trial identification of appellant as the person who broke into their apartment. We disagree.

{¶14} When considering whether to admit identification evidence, the trial court utilizes a two-step analysis. *Neil v. Biggers* (1972), 409 U.S. 188, 199-200, 93 S.Ct. 375, 382. The trial court initially determines whether the identification procedure was impermissibly suggestive. Id. at 196-97. If the procedure was impermissibly suggestive, the trial court next must determine if the identification was reliable despite its suggestive character. Id. at 199. Generally, a defendant has the burden of proving both an identification procedure was impermissibly suggestive and the identification was unreliable. See *State v. Albert,* 10th Dist. No. 06AP-439, 2006-Ohio-6902, ¶45 (citing *State v. Merriman,* 10th Dist. No. 04AP-463, 2005-Ohio-3376, ¶16).

{¶15} Bauer and Held identified appellant in a one-person "show up," an identification procedure where the victim, in a relatively short time after the incident, is shown only one person and is asked whether the victim can identify the perpetrator of the crime. See *State v. Tanksley*, 10th Dist. No. 07AP-262, 2007-Ohio-6596, ¶9 (citing *State v. Patton,* 8th Dist. No. 88199, 2007-Ohio-990, ¶17). Although a one-person "show up" identification procedure is in general "inherently suggestive," identification from such a "show up" is admissible if the identification is reliable. Id.; *State v. Sutton*, 10th Dist. No. 06AP-708, 2007-Ohio-3792, ¶38.

{¶16} In determining the reliability of the identification, a court considers factors such as "the opportunity of the witness to view the criminal at the time of the crime, the

witness' degree of attention, the accuracy of witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil* at 199-200; *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243, 2245. "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Id.

{¶17} Here, the reliability factors weigh in favor of the trial court's decision to admit the identification testimony. Bauer testified at the suppression hearing that he encountered appellant in his living room. The lights in the room were on and appellant was not very far away, so Bauer was able to get a good look at appellant. Bauer testified that he saw appellant for approximately 30 seconds. No more than 15 or 20 minutes later, the police drove Bauer to a nearby location to see if he could identify the man they apprehended. Bauer testified that he was "positive" and had "no doubt" that appellant was the man who broke into his apartment. (Mar. 25, 2009 Tr. 8-9.) Held's trial testimony was consistent with Bauer's hearing testimony. Held testified that he was "100% sure" that appellant was the man that broke into his apartment. (Id. at 24.)

{¶18} Even though their identifications were arguably inconsistent in their descriptions of appellant's jacket,[1] the totality of the circumstances indicates that Bauer's and Held's pre-trial identification of appellant were reliable. Accordingly, the trial court did not err in admitting the identifications. We overrule appellant's second assignment of error.

[1] In his 911 call, Held told the operator that the man wore a black jacket. Bauer told the police that it was a dark colored jacket. The jacket appellant wore that night was blue.

{¶19} Finally, appellant contends in his third assignment of error that his conviction is against the manifest weight of the evidence.[2] We disagree.

{¶20} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley,* 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a challenge to the manifest weight of the evidence, an appellate court, 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 [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. Thompkins* (1997), 78 Ohio St.3d 380, 387 (quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175). An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.

{¶21} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No.

[2] Appellant's assignment of error refers to convictions for rape and kidnapping. Appellant, however, was

01AP-194. Consequently, an appellate court must ordinarily give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston,* 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶74.

{¶22} Appellant argues that his conviction is against the manifest weight of the evidence because Bauer's and Held's pre-trial identifications of appellant were unreliable. However, we have already concluded that Bauer's and Held's pre-trial identifications were reliable. *State v. Sherls* (Feb. 22, 2002), 2d Dist. No. 18599. To the extent that their identifications were arguably inconsistent in their descriptions of appellant's jacket, such inconsistencies do not render appellant's conviction against the manifest weight of the evidence. *Raver*. The jury was aware of the arguably inconsistent descriptions and could take those inconsistencies into account when determining witness credibility. Given the slight inconsistencies in the witnesses' descriptions, the jury did not lose its way by relying on Bauer's and Held's identifications in finding appellant guilty. Accordingly, his conviction is not against the manifest weight of the evidence. We overrule appellant's third assignment of error.

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

Judgment affirmed.

FRENCH, P.J., and BRYANT, J., concur.

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only convicted of one count of burglary.