[Cite as *State v. Poulson*, 2010-Ohio-3574.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-778 (C.P.C. No. 08CR-12-8853)
Lowell P. Poulson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 3, 2010

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

Tracy A. Younkin, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Lowell P. Poulson ("appellant"), appeals from the judgment of conviction entered by the Franklin County Court of Common Pleas. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} Appellant was indicted for four first-degree felony counts of kidnapping, with gun and repeat-offender specifications, in violation of R.C. 2905.01, three first-degree felony counts of aggravated robbery, with gun and repeat-offender specifications, in violation of R.C. 2911.01, three second-degree felony counts of robbery, with gun and repeat-offender specifications, in violation of R.C. 2911.02, three third-degree felony

counts of robbery, in violation of R.C. 2911.02, and one third-degree felony count of having a weapon while under disability, in violation of R.C. 2923.13. The state requested and was granted nolle prosequi for 12 of the 14 counts, and proceeded only on Count 5, aggravated robbery with a three-year firearm specification, and Count 14, having a weapon while under disability. The count of aggravated robbery with a three-year firearm specification was tried to a jury, while the count of having a weapon while under disability was tried to the court.

{¶3} A jury trial commenced on June 18, 2009, and the following facts were adduced. On the evening of December 10, 2008, Mark Kipple ("Kipple"), was on his way out of a Donatos Pizza, located at 2922 Noe-Bixby Road, in the city of Columbus, to deliver pizzas when he encountered two men. Kipple later testified that one of the men had a gun, and it was this man that pushed him and Mary Call ("Call"), also a Donatos' employee, into the back room and searched him. This man was later identified as appellant.

{¶4} During his testimony, Kipple described the man who forced him into the back room as a tall, older white gentleman with a blue bandanna and a scruffy beard, but later described him as "the whiter gentleman." (Tr. 43.) Kipple testified that the man had a gun pointed at him and he "felt threatened." (Tr. 39.) The second man, Kipple testified, was a "colored gentleman" around the age of 59. (Tr. 40.)

{¶5} Call testified that two men came in with guns and someone said "this is a robbery, no joking." (Tr. 58.) Then she was pushed into the back room and searched by a man wearing a blue and white mask, whose skin was "not white." (Tr. 60.) When

asked, Call could not swear that his skin was real dark, just that "it was not white like my skin." (Tr. 60.)

{¶6} Michael Dean Harrison ("Harrison"), another employee of Donatos, was also ordered to the back room by a man with a gun, but Harrison walked into the back room and exited the building out of a back door, ran to a nearby home and called 911 to report the robbery. The 911 call was received at 8:25 p.m. Harrison testified that, after making the call, he walked back to the store and saw two men carrying a pizza bag run out of Donatos, get into a white pickup truck, and head north on Noe-Bixby Road without turning on the headlights. He testified that he was scared and that he would not be able to make an identification since he did not get a good look at either of the men.

{¶7} Donatos' employee Courtney Gomez ("Gomez"), was not initially taken into the back room with the others but was first asked to get the money out of the registers. She testified that both men had guns, and that, while both men appeared to be black males, the man who went into the back room with the other employees had lighter skin than the man who stayed up front with her.

{¶8} Keri Richardson ("Richardson"), another employee of Donatos, testified that she was taken into the back room with a gun to her head where she, Kipple, and Call were all searched. She further testified that the two men were masked, but she got a good look at the suspect who took her into the back room. Richardson testified that, while Kipple and Call had their heads down, she looked him straight in the eyes. Richardson testified that she was able to see the area under his eyes and above his eyebrows and that "he was light-skinned, at least mixed * * * like light black" with a little bit of gray in his eyebrows. (Tr. 113.) Richardson also testified that the man was pointing a gun at her

and said "I'm not gonna shoot you," to which she replied, "You need to quit pointing the gun at us." (Tr. 99.)

{¶9} Richardson testified that she spoke to Detective Michael Longworth ("Detective Longworth") right after the incident and told him that the suspect in the back room was light-skinned and that she would be able to recognize him. She spoke to Detective Longworth again a few days later when he came to Donatos to show her a photo array. Richardson testified that Detective Longworth never suggested to her that she was required to pick someone from the photo array, but she recognized appellant immediately and identified his photo with 100 percent certainty.

{¶10} Columbus Police Officer Dan Edelsberg ("Officer Edelsberg"), and his partner, Officer Jeff Jones ("Officer Jones"), were on patrol nearby when they received a report on their radio of a robbery at Donatos. The description of the suspect vehicle was a gray Ford pickup truck, and the descriptions of the suspects were a male black and a male white and/or hispanic. Heading toward Donatos, Officers Edelsberg and Jones noticed a truck matching the description traveling in the opposite direction with two males inside. Officer Jones aired the license plate number over the radio, while Officer Edelsberg turned and pulled the cruiser around behind the truck and activated his beacons. Officers Edelsberg and Jones exited the cruiser and approached the vehicle with guns drawn; Officer Edelsberg on the driver's side, where the window was rolled up, and Officer Jones on the passenger's side, where the window was open. Officer Jones ordered the men to "show [him their] hands" and "place the vehicle in park." (Tr. 123.) As Officer Edelsberg felt the truck start to pull away, he struck the driver's side window with his flashlight in an attempt to make the driver stop. The truck, however, pulled away.

Officers Edelsberg and Jones pursued the truck, but lost track of it. City of Whitehall police officers took over the pursuit, but they ultimately lost the truck as well.

{¶11} Officer Edelsberg testified that the driver's skin was light, based on seeing the person's hands on the steering wheel. Officer Jones testified that the driver was light-skinned and that the passenger was dark-skinned based on glancing at their faces through the open window on the passenger side.

{¶12} Based on the license plate number, it was later learned that the vehicle was registered to appellant. Around midnight, Officer Howard Brenner ("Officer Brenner"), went to the address where the vehicle was registered, but the truck was not there. The individual that answered the door identified herself as "Brenda" and gave Officer Brenner information that led him to another address on Venice Drive. At that address, Officer Brenner found the truck registered to appellant, but he did not locate appellant.

{¶13} Officer Anthony Klette ("Officer Klette"), testified that, at the Venice Drive address, he observed a busted-out window on the driver's side of the vehicle. Through the window, he also observed pizza sauce, pizza cheese, and toppings inside the vehicle, as well as glass on the seat and floorboard. In the truck, Officer Klette and his partner also found a toboggan mask ("mask"), a pair of work gloves, and tools. At that point they had the vehicle impounded.

{¶14} Officer Kevin Myers ("Officer Myers"), testified that he checked the vehicle for fingerprints, but found none. He further testified that he did not swab the gloves for DNA at that time, but such was later performed.

{¶15} Officer William Kiser ("Officer Kiser"), testified that he drove to the Venice Drive address to pick up appellant and bring him into police headquarters for an interview.

Officer Kiser testified that, before he allowed appellant into the cruiser, he patted him down and, in appellant's pocket, found broken glass that appeared to be from a car window. According to Officer Kiser, appellant denied knowing what it was that was found in his pocket. Officer Kiser also testified that he later informed the interviewing detective that appellant had window glass in his back pockets, and, at the detective's request, Officer Kiser removed more of the glass from appellant's pockets and handed it over to the detective. Officer Arthur Hughes testified that he swabbed appellant for DNA.

{¶16} Detective Longworth testified that he met with Richardson on December 15, 2008 and presented her with a photo array of six photos. He testified that he followed correct photo array procedures and had Richardson sign the photo array procedure form. Detective Longworth testified that he did not suggest to her in any way who to pick, nor did he tell her that she was required to pick anyone out of the array. Detective Longworth further testified that Richardson picked the photograph of appellant and made a signed handwritten statement attesting to the fact that she was "100 percent positive number two [was] the guy that held us in the back of the store." (Tr. 232.) On cross-examination, Detective Longworth acknowledged that appellant was the lightest skin-toned individual in the photo array and that he had discretion as to which photos were placed in the array, but that everyone in the photo array had been randomly suggested by the computer as possible matches to the suspect's descriptors. Detective Longworth testified that he presented the same photo array to Call and Harrison, but neither of them were able to make an identification.

{¶17} Detective Longworth also testified that appellant had signed a constitutional rights waiver and agreed to speak to him. The redacted audio tape of appellant's

interview, which took place the day after the robbery, was played for the jury. During the interview, appellant stated that he knew nothing about the robbery. He said that he was at Dwayne Garnes's house on Quaker Road with Edward Oaks, Eric Garnes ("Garnes"), and Marian Babbs the entire evening of the robbery. Appellant stated that he left his truck in front of his mother's house on Venice Drive and walked over to Dwayne Garnes's house at 5:30 or 6:00 p.m. Appellant stated that he stayed at Dwayne Garnes's house until 5:30 a.m. the next morning when he walked back to his mother's home and found his truck missing. Appellant said that he saw glass in the street in front of his mother's house, which he picked up and put in his pocket. Appellant stated that he called Brenda, and she informed him that the police told her the truck had been involved in a robbery. Appellant alleged that he lost his car keys the day prior to the robbery, and that his friend, Mark Robinson, took him to get the extra key from his girlfriend, Brenda Knight, at her place of employment. Appellant also stated that the last time he saw his truck was in front of his mother's home when he left to go to Dwayne Garnes's house, and, at that time, it had no damage. Detective Longworth testified that he did not make contact with the individuals that appellant named as alibi witnesses.

{¶18} Jamie Armstrong ("Armstrong"), a forensic scientist with the Columbus Police Department, testified that the pair of work gloves and blue knit mask were tested for DNA. Armstrong testified that appellant was a "major contributor" of the DNA found in the gloves, though the gloves also contained some DNA from one other "unknown contributor." (Tr. 279.) She also testified that appellant was excluded as a contributor of DNA for the mask, but the sole contributor of DNA on the mask was revealed to be that of Anthony Williams ("Williams"). Later, Mark Robinson ("Robinson"), appellant's friend,

would identify a photo of Williams and testify that Williams and appellant were good friends. Williams' photo matched the description of the second robber, who was described as being a taller and darker man.

{¶19} Counsel for appellant moved for a Crim.R. 29 dismissal, arguing that the state had not met its burden and that there was nothing in the record indicating that the alleged suspects had used an operable firearm. The court overruled the motion stating that it believed there was sufficient evidence on each and every element of aggravated robbery with a firearm specification which, if believed by the jury, would sustain a conviction. Robinson further testified that appellant did lose his truck key and that he had taken him to his girlfriend's place of employment to pick up a key. Ergie Campbell, appellant's mother, testified that she saw her son pick up glass from in front of her house. Garnes testified that it was not uncommon for appellant to spend the night at his home and that when Garnes returned home at 6:00 p.m. on the night of the robbery, appellant was already there and he remained there until about 5:00 a.m. the next morning. Garnes testified that the police never contacted him. The court proceeded to properly instruct the jury, which included instructions on evaluating the credibility of witnesses and their identification testimony.

{¶20} On June 24, 2009, the jury found appellant guilty of aggravated robbery while having a firearm on or about his person or under his control, and also found that appellant displayed the firearm to facilitate the robbery. On June 24, 2009, the court found appellant guilty of having a weapon while under disability. The trial court sentenced appellant to the Ohio Department of Rehabilitation and Corrections for nine years on the

aggravated robbery, two years on the having a weapon while under disability, and three years on the gun specification, all sentences to run consecutively.

{¶21} Appellant timely appealed and set forth the following two assignments of error for this court's review:

> **FIRST ASSIGNMENT OF ERROR**
>
> The trial court committed reversible error and deprived Defendant-Appellant of due process of law by entering a judgment of conviction against the manifest weight of the evidence and contrary to law.
>
> **SECOND ASSIGNMENT OF ERROR**
>
> The trial court abused its discretion and committed prejudicial error by admitting evidence of an unreliable identification based upon an unnecessarily suggestive method of presenting a photo array.

{¶22} In his first assignment of error, appellant asserts his conviction is against the manifest weight of the evidence. Appellant contends that the evidence did not prove beyond a reasonable doubt that appellant was the individual who entered Donatos Pizza shop with a second individual on December 10, 2008, brandished a gun, and left with money. To this end, appellant asserts that there was no physical forensic evidence placing appellant inside the pizza shop, that none of the witnesses could have gotten a good look at either of the alleged gunmen because they wore masks over their faces, and that although one of the witnesses identified appellant, there is reason to suspect the photo array was unduly suggestive. Appellant also contends that the state failed to offer any evidence that the alleged gun was operable. We disagree.

{¶23} In determining whether a verdict is against the manifest weight of the evidence, we sit as a "thirteenth juror." *State v. Thompkins*, 78 Ohio St.3d 380, 387,

1997-Ohio-52. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we determine " '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.' " Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶24} In the present case, there was sufficient physical evidence for a reasonable juror to believe that appellant had been in the pizza shop. First, a vehicle matching the description of appellant's truck was seen at Donatos at the time of the robbery and was the same truck that Harrison saw the two suspects get into and flee the scene. A truck of the same description was spotted heading away from Donatos by police officers and, based on the license plate number, was later determined to be registered to appellant.

{¶25} Officers were able to stop the truck, and before it fled again, Officer Edelsberg struck the driver's side window with his flashlight. Later, when appellant's truck was found in front of his mother's house, the driver's side window was broken, and shards of window glass were found in the truck, as well as in appellant's pockets. It is

reasonable to believe that the glass found in his pockets was from the window broken just moments after the robbery.

{¶26} The contents of what was found in appellant's truck is also significant. Found therein were pizza sauce, cheese, and toppings. The two robbery suspects had been seen leaving Donatos carrying a pizza bag when they climbed into the truck. Furthermore, a mask matching the description of the masks used by the suspects in commission of the robbery was discovered in appellant's truck. The DNA of appellant's good friend, Anthony Williams, who matched the description of the second perpetrator, was found on the mask. Also found in the truck was a pair of work gloves, for which appellant was found to be the "major contributor" of DNA. (Tr. 279.)

{¶27} Note that, even if appellant's assertion that he lost his truck key the day prior to the robbery is believed, he admitted to having obtained another key to the truck on that same day. Thus, appellant could reasonably be believed to have been the driver of the truck on the night of the robbery.

{¶28} All of the above evidence, which was heard by the jury, could reasonably connect appellant and his truck to the robbery of the Donatos Pizza on the night of December 10, 2008.

{¶29} We also disagree with appellant's contention that none of the witnesses who testified could have gotten a good look at either of the two gunmen because they wore masks. The witnesses could have reasonably assessed such things as height and weight, as well as skin tone, since their hands and portions of the suspects' faces were still exposed. In fact, Richardson testified that she had gotten a good look at the gunman holding her in the back room because, while the other witnesses had their heads down,

she looked him straight in the eyes. Richardson was also able to later identify appellant out of a photo array with 100 percent certainty and without hesitation. Appellant claims that the photo array presented to Richardson was unduly suggestive, but we disagree and will discuss this issue under appellant's second assignment of error.

{¶30} The jury was free to believe all, part, or none of the testimony of each witness. See *State v. Wiley*, 10th Dist. No. 03AP-340, 2004-Ohio-1008, ¶48. Proper jury instructions were given on evaluating the credibility of witness identification testimony, and it is presumed that a jury follows the trial court's instructions. *State v. Jones*, 90 Ohio St.3d 403, 414, 2000-Ohio-187. We disagree with appellant and deem the jury could reasonably believe that a witness at the pizza shop got a good look at the gunmen, despite the fact that they wore masks.

{¶31} In addition to the witnesses at the pizza shop, Officers Edelsberg and Jones were able to assess the skin tones of the two men in the truck when they stopped appellant's vehicle. Officer Edelsberg saw their hands, and Officer Jones was able to glance at their faces. Their testimony affirmed that the driver had a lighter skin tone than did the passenger. And, in fact, appellant's skin tone is on the lighter side, and Anthony Williams is darker.

{¶32} Appellant also contends that the state failed to offer any evidence that the alleged gun was operable.

{¶33} 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.

{¶34} 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.

{¶35} The Ohio Supreme Court has noted:

> In determining whether an individual was in possession of a firearm and whether the firearm was operable or capable of being readily rendered operable at the time of the offense, the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm.

Thompkins at 385. Similarly, as stated by this court, "proof of operability may be established through the testimony of lay witnesses who were in a position to observe the weapon and the surrounding circumstances." *State v. Whiteside*, 10th Dist. No. 07AP-951, 2008-Ohio-3591, ¶17.

{¶36} Here, the gunman, identified as appellant, pointed the gun at the Donatos employees and ordered them into the back room. The implicit threat in this conduct was that the gunman would use the weapon if the employees did not comply with his demand. The gunman's statement to Richardson "I'm not going to shoot you" implied that the gun was real and that he had the ability to shoot if he so desired. (Tr. 99.) In addition, appellant's act of pointing the gun right at the employees frightened them. In this regard, Kipple testified that he felt threatened, Harrison testified he felt scared, and Richardson testified that a gun was put to the back of her head.

{¶37} This court recently addressed this issue in *State v. Dutton*, 10th Dist. No. 09AP-365, 2009-Ohio-6120. In that case we explained:

> 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). * * *
>
> 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.

Id. at ¶8-9.

{¶38} Here, appellant's actions in ordering the employees to the back of the store at gunpoint, announcing "this is a robbery, no joking," and searching them made the employees feel threatened, thus supporting the finding of the operability of a firearm and, consequently, guilt on the firearm specification. (Tr. 58.) The trial court properly found that the same evidence supported a weapon under disability charge.

{¶39} After carefully reviewing the trial court's record in its entirety, we cannot say that the trier of fact clearly lost its way or that any miscarriage of justice resulted. Therefore, we cannot say appellant's conviction is against the manifest weight of the evidence. Appellant's first assignment of error is overruled.

{¶40} In his second assignment of error, appellant asserts that the trial court abused its discretion and committed prejudicial error by admitting evidence of an unreliable identification based upon an unnecessarily suggestive method of presenting a photo array. We disagree.

{¶41} The admission or exclusion of evidence is generally left to the discretion of the trial court. *State v. Maurer* (1984), 15 Ohio St.3d 239. Unreliable identification testimony is excludable under the Due Process Clause of the United States Constitution. In the context of eyewitness identification testimony, "it is the likelihood of misidentification which violates a defendant's right to due process." *Neil v. Biggers* (1972), 409 U.S. 188, 198, 93 S.Ct. 375, 382. The critical inquiry is "whether under the 'totality of the circumstances' the identification was reliable." Id. The factors to be considered in determining whether identification testimony is reliable are set out by the United States Supreme Court in *Neil*. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. The corrupting effect of any suggestive identification procedure must then be weighed against these factors. *Manson v. Brathwaite* (1977), 432 U.S. 98, 114-16, 97 S.Ct. 2243, 2253-54.

{¶42} We now apply the foregoing to the facts of our case. Regarding the opportunity of the witness to view the criminal at the time of the crime, Richardson was taken by one of the robbers into the back room where they were in close proximity of each other for an extended period of time. In 2003, this court found that the three or four minutes that robbers were in a floral shop was considered an extended period of time, adequate enough for the shop owner to view and later identify the robbers. *State v. Payne*, 10th Dist. No. 02AP-723, 2003-Ohio-4891. Here, the robbers were in the store and in the back room for at least that amount of time since one of the Donatos employees had time to escape out the back door to call 911 from a nearby home and walk back to the store to see the two men leaving the store.

{¶43} Regarding the witness's degree of attention, Richardson testified that she got a good look at the robber, who took her at gunpoint to the back of the room. She testified that she looked directly into the robber's eyes and was able to see areas of his face and skin tone despite the mask he wore.

{¶44} With respect to the accuracy of her prior description of the criminal, Richardson testified that she spoke to Detective Longworth right after the incident and told him that the robber in the back room was light-skinned and that she would be able to recognize him by his eyes. Appellant, a black male, is of lighter skin than the second robber.

{¶45} As for the level of certainty demonstrated at the confrontation, Richardson testified that, when presented with the photo array, she immediately recognized appellant in the photo array with 100 percent certainty and made a signed handwritten statement to that effect.

{¶46} Regarding the time between the crime and the confrontation, immediately after the crime, Richardson made a statement to police as to appellant's appearance and that she would be able to recognize him. Five days later, on December 15, 2008, Richardson identified appellant in the photo array. In *State v. Horton*, 10th Dist. No. 06AP-311, 2007-Ohio-4309, this court did not find a photo array identification made almost two months after the crime to be unreliable. Thus, in our case, five days is more than adequate.

{¶47} Finally, the corrupting effect of any suggestive identification procedure must then be weighed against these factors. We find that the identification procedure in this case was not suggestive. The photo array was computer-generated, where the six photos were randomly suggested as possible matches to the suspect's descriptors. Although Detective Longworth acknowledged that appellant was the lightest skin-toned individual in the array, the other five photographs were all reasonably close in appearance to appellant's photograph. The photo of appellant did not stand out from all of the photos so as to be unnecessarily suggestive. Additionally, Detective Longworth followed correct photo array procedures. The photos were arranged in no particular order of importance, and it was never suggested to Richardson that she was required to pick someone from the photo array. Further, Richardson filled out the procedure forms and signed a handwritten statement identifying appellant's photo.

{¶48} Because neither the photo array itself, nor the procedure used by the police detective were impermissibly suggestive and because, under the totality of the circumstances, Richardson's identification testimony was reliable, we find that the trial

court did not abuse its discretion and commit prejudicial error by admitting the evidence of the photo array identification. Appellant's second assignment of error is overruled.

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

Judgment affirmed.

BRYANT and KLATT, JJ., concur.

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