

[Cite as *State v. Cameron*, 2010-Ohio-6042.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 10AP-240
v.	:	(C.P.C. No. 08CR-04-3163)
	:	
Christopher Cameron,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 9, 2010

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

Giorgianni Law LLC, and *Paul Giorgianni*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Christopher Cameron, appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of aggravated robbery with a firearm specification. For the following reasons, we affirm.

{¶2} Appellant was indicted on charges of (1) aggravated robbery for a January 15, 2007 incident at Steak 'n Shake, and (2) aggravated murder and

aggravated robbery for an incident that same day at Stylish Beauty Plus, where its owner, Abdel Shalash, was killed. Each charge contained a firearm specification. Appellant pleaded not guilty, and a jury trial ensued. The jury was unable to reach a verdict on the Stylish Beauty Plus incident, but it found appellant guilty of the Steak 'n Shake aggravated robbery. This court affirmed that conviction in *State v. Cameron*, 10th Dist. No. 09AP-56, 2009-Ohio-6479.

{¶3} Another jury trial was held for the Stylish Beauty Plus incident. In that retrial, appellant was prosecuted for aggravated murder and aggravated robbery, as originally charged, and murder as a lesser-included offense of aggravated murder. Appellant filed a motion in limine to bar evidence of the Steak 'n Shake incident during the new trial, and the trial court denied the motion. Appellant also objected when the prosecution subsequently introduced evidence of the Steak 'n Shake incident at trial, and the trial court overruled the objections.

{¶4} Ronald Smith was involved in the crimes at Steak 'n Shake and Stylish Beauty Plus and testified as follows. He robbed Steak 'n Shake with appellant and a man named "Bones" during the early morning hours on January 15, 2007. Appellant was using a 9mm gun. After the robbery, the men split up the money they had taken, and Smith went home to bed.

{¶5} Appellant went to Smith's house later that day, and they met up with Darnell Nelson. Afterward, Nelson bought a car from a neighborhood friend, Kenny Howell, and the men drove to an auto parts store. Smith drove Nelson's newly purchased car, and appellant drove his car with Nelson as a passenger. The newly

purchased car broke down near Stylish Beauty Plus. Smith went into the store to buy cigarettes and to try to sell Shalash a cell phone he had stolen during the Steak 'n Shake robbery.

{¶6} Smith left the store and got in appellant's car. One of the other men asked if there was any money in the store, but Smith could not remember which one asked the question. Although Smith said that there was probably not much money in the store, the other men decided to rob it anyway. Appellant and Nelson went in the store, with bandanas covering their faces below the eyes, and appellant still had his 9mm gun. Smith did not go in the store for fear that Shalash would be able to identify him because he was a regular customer. Instead, he was the get-away driver. Appellant and Nelson returned three minutes later, and Smith drove them to his mother's house, where the men discussed the robbery. Smith's sister, JosaLyne, was present for this conversation. Nelson indicated that appellant shot Shalash, and appellant admitted that "he had to" shoot Shalash. (Vol. II Tr. 120.) Smith acknowledged testifying in the previous trial that appellant did not respond when Nelson accused him of shooting Shalash. Appellant and Nelson gave Smith a gun they stole from Shalash, and Smith sold it to Howell.

{¶7} On cross-examination, Smith said that, after he was arrested, he told police that he was not involved in the crimes at Steak 'n Shake or Stylish Beauty Plus, and he also refused to implicate appellant. He later changed his story and told police that he was an innocent bystander during the Stylish Beauty Plus incident. Smith admitted that he was lying to police, and he claimed that he was willing to lie to police,

even if it would get another person in trouble. Smith did not tell the truth about his involvement in the crimes until he talked to the prosecution.

{¶8} After Smith was arrested for the Steak 'n Shake and Stylish Beauty Plus incidents, police told him that he could receive the death penalty or life imprisonment. He entered a plea bargain with the prosecution, however, and received 20 years imprisonment for pleading guilty to three counts of aggravated robbery and a lesser charge of involuntary manslaughter in exchange for testifying against appellant. He had to testify truthfully in order to uphold his part of the agreement.

{¶9} Nelson testified as follows. On January 15, 2007, Nelson was at Smith's house with appellant. Nelson drove there in a car he had bought from Howell a week before. The men left Smith's house to go to Stylish Beauty Plus, and they used appellant's car and Nelson's car to get there. Nelson's car broke down on the way, however, and everyone went to the store in appellant's car. Smith suggested that they rob the store, noting that Shalash would have money there, and the others agreed to participate. Nelson and appellant went in the store with ski masks covering their faces. Nelson had a .380 gun, but it was not loaded, and appellant had a 9mm gun. Shalash reached for a gun, and he and Nelson started wrestling over it. Shalash's gun fired, and appellant shot him. Appellant and Nelson left the store, with appellant taking money from the cash register, and Nelson taking Shalash's gun. Nelson admitted that, although he testified that his gun was not loaded, he told police, after he was arrested, that "for a while I wasn't sure if I was the one that shot" Shalash. (Vol. III Tr. 289.)

{¶10} After Nelson was arrested for the Stylish Beauty Plus incident, police told him that, although his being a juvenile precluded him from getting the death penalty, he could receive life imprisonment. He entered a plea bargain with the prosecution and received 20 years imprisonment for pleading guilty to aggravated robbery and a lesser charge of involuntary manslaughter in exchange for testifying against appellant. He had to testify truthfully to uphold his part of the agreement.

{¶11} JosaLyne Smith confirmed that she was present when Nelson indicated at her house that appellant shot Shalash during the incident at Stylish Beauty Plus. She testified that appellant had no reaction to Nelson's statement, however. She also said that she did not talk to police until after meeting with her brother's lawyer, but the lawyer did not tell her what she should say. And she noted that her brother did not talk to her about the incident. Lastly, she testified that she is close to her brother and a good friend of Nelson.

{¶12} Andrew Yuricic testified about the Stylish Beauty Plus incident as follows. He was leaving that store around 2 p.m. on January 15, 2007, when he saw a man wearing a mask that exposed his eyes and the area around his eyes. The man was peeking around the corner of the store, and he made a signal to another man. The two men entered the store, and Yuricic heard gunshots. After the men fled, Yuricic went in the store and found that Shalash had been shot. The prosecution asked Yuricic to identify whether one of the robbers was in the courtroom, and Yuricic said, "[a]s far as I can tell from the gator mask, it looks to be this gentleman over here. (Indicating [appellant])." (Vol. I Tr. 110.) The prosecution asked the trial court to declare on the

record that Yuricic identified appellant. Although appellant's defense attorneys did not object to the admissibility of the identification, they objected to the court declaring that Yuricic identified appellant, claiming that the declaration improperly "bolsters an identification that is, at best, equivocal." (Vol. I Tr. 112.) The court overruled the objection and noted the identification for the record.

{¶13} On cross-examination, Yuricic admitted that, at the previous trial, he testified that the only thing he could tell about the men who entered Stylish Beauty Plus was that they were black. He also said that if he had recognized any of their facial features, he would have mentioned it at the previous trial. But, on re-direct examination, he confirmed that, during the previous trial, nobody asked him "to look around the courtroom and see if you can identify" one of the Stylish Beauty Plus robbers. (Vol. I Tr. 144.)

{¶14} Nathaniel Doyle lived near appellant and testified as follows. In January 2007, Doyle found a gun in his house, and he had previously seen appellant with that gun. Afterward, appellant indicated that he wanted his gun back, but Doyle had given it to the police. Doyle identified Exhibit G as appellant's gun, and he described the gun as a "9." (Vol. III Tr. 325.)

{¶15} Mark Paessun was at Steak 'n Shake during the January 15, 2007 incident. He testified that the robbery occurred around 5:30 a.m. There were three robbers, and they each carried guns and had the hoods from their sweatshirts up around their heads. Two of the robbers ordered the cash register opened. The third

robber approached him, pointing a semi-automatic handgun, and took his money. Paessun identified Exhibit G as the gun that was pointed at him.

{¶16} Columbus Police Officer David Sicilian responded to the incident at Stylish Beauty Plus, and Columbus Police Officer Aaron Dennis responded to the Steak 'n Shake incident. Both officers testified that they worked in precinct 14 on the east side of Columbus on January 15, 2007. Dennis testified that he was dispatched to Steak 'n Shake between 5:30 and 6:00 a.m., and Sicilian testified that he was dispatched to Stylish Beauty Plus around 2 p.m.

{¶17} The defense drafted a limiting instruction for the evidence about the Steak 'n Shake incident, and the trial court provided that instruction, as follows: "You have been presented with evidence regarding a robbery at Steak 'n Shake. This information was presented to provide context within which you may consider and evaluate whether the State of Ohio has met its burden of proof regarding the * * * charge relating to Mr. Shalash. [Appellant's] innocence or guilt regarding the Steak 'n Shake robbery is not for your consideration and must not influence your deliberations." (Vol. III Tr. 578.) The jury found appellant not guilty of murder and aggravated murder, but guilty of aggravated robbery and the accompanying firearm specification.

{¶18} Appellant appeals, raising the following assignments of error:

1. The trial court erred by admitting evidence of the Steak 'n Shake robbery.
2. The trial court erred in overruling Christopher's objection to Mr. Yuricic's speculation that Christopher was one of the perpetrators.

3. If any aspect of Assignment of Error 2 was not preserved for appellate review, then Christopher was deprived of effective assistance of counsel.
4. The cumulative effect of the errors cited in Assignments of Error 1, 2, and 3 was to deprive Christopher of a fair trial.
5. The conviction is contrary to the manifest weight of the evidence.

{¶19} In his first assignment of error, appellant argues that the trial court erred by admitting evidence of the Steak 'n Shake incident. We disagree.

{¶20} Pursuant to Evid.R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But evidence of "other crimes, wrongs or acts" is admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

{¶21} Exceptions in Evid.R. 404(B) "must be construed against admissibility, and the standard for determining admissibility * * * is strict." *State v. Broom* (1988), 40 Ohio St.3d 277, paragraph one of the syllabus. The admission of evidence ultimately lies within the broad discretion of the trial court, however. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶62. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶22} Appellant's identity as a perpetrator in the aggravated robbery at Stylish Beauty Plus was at issue at trial. Evidence of crimes may be introduced to establish the identity of a perpetrator by showing that he has committed similar crimes within a period

of time reasonably near to the offense on trial, and that a similar scheme, plan or system was used to commit both the offense being tried and the other crimes. *State v. Tipton*, 10th Dist. No. 04AP-1314, 2006-Ohio-2066, ¶28. See also *State v. Lowe*, 69 Ohio St.3d 527, 1994-Ohio-345, paragraph one of the syllabus (stating that "[t]o be admissible to prove identity * * *, other-acts evidence must be related to and share common features with the crime in question").

{¶23} In *Cameron*, appellant argued that the Stylish Beauty Plus and Steak 'n Shake incidents could not be jointly tried because Evid.R. 404(B) barred the jury from considering evidence of the Stylish Beauty Plus incident to determine appellant's guilt in the Steak 'n Shake incident. *Id.* at ¶38-39. Appellant claimed that the incidents did not show a similar scheme, plan or system. *Id.* at ¶39. This court rejected that argument, however. *Id.* We now determine whether the evidence admitted during retrial also established that the Stylish Beauty Plus and Steak 'n Shake incidents were committed under a similar scheme, plan or system.

{¶24} Appellant highlights differences between the incidents to counteract Evid.R. 404(B). Admissibility under that rule, however, "is not adversely affected simply because the other [crimes] differed in some details." *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, ¶72, quoting *State v. Jamison* (1990), 49 Ohio St.3d 182, 187. (Bracketed material sic.) Alternatively, appellant argues that the incidents lacked sufficient connection to demonstrate a similar scheme, plan or system. But there were adequate links between the Steak 'n Shake and Stylish Beauty Plus incidents to show a similar scheme, plan or system. Sicilian and Dennis, both of precinct 14 on the east

side of Columbus, established that the incidents are geographically linked, and there was a temporal connection between the incidents, given that they occurred within hours of each other. The incidents involved multiple perpetrators targeting businesses, and the perpetrators tried to disguise themselves when they entered the businesses. A 9mm handgun was used during both incidents, and the prosecution linked appellant to that gun. Accordingly, it was within the discretion of the trial court to admit evidence of the Steak 'n Shake incident under Evid.R. 404(B) to establish appellant's identity as a perpetrator in the Stylish Beauty Plus incident.

{¶25} Appellant also argues that evidence of the Steak 'n Shake incident was inadmissible under R.C. 2945.59, which states:

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

{¶26} "There is little difference between Evid.R. 404(B) and R.C. 2945.59." *State v. Horsley*, 10th Dist. No. 05AP-350, 2006-Ohio-1208, ¶22. Thus, we reject appellant's argument under R.C. 2945.59 for the reasons we stated in our Evid.R. 404(B) analysis.

{¶27} Next, appellant asserts that evidence of the Steak 'n Shake incident is barred by Evid.R. 403(A), which states that "evidence is not admissible if its probative

value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." The admission or exclusion of evidence, pursuant to Evid.R. 403(A), is within the sound discretion of the court. *State v. Stewart*, 10th Dist. No. 08AP-33, 2009-Ohio-1547, ¶40. Appellant claims that the evidence on the Steak 'n Shake incident allowed the jury to improperly infer that he had a propensity to commit crimes and to convict him of the Stylish Beauty Plus incident as retribution for the Steak 'n Shake incident. But the trial court gave an instruction, proposed by the defense, to ensure that the jury used the evidence of the Steak 'n Shake incident for its proper limited use.

{¶28} For all these reasons, we conclude that the trial court did not abuse its discretion by admitting evidence of the Steak 'n Shake incident. Thus, we overrule appellant's first assignment of error.

{¶29} In his second assignment of error, appellant argues that the trial court erred by admitting into evidence Yuricic's testimony identifying him as a perpetrator in the Stylish Beauty Plus incident. We disagree.

{¶30} Appellant contends that the identification was inadmissible because Yuricic was not certain about it. Typically, we would determine whether the trial court abused its discretion in allowing the identification into evidence. See *State v. Cook*, 10th Dist. No. 09AP-316, 2010-Ohio-2726, ¶32-33. But plaintiff-appellee, the state of Ohio, claims that appellant forfeited all but plain error because his attorneys did not object to the admissibility of the identification at trial. In any event, appellant cannot prevail under either standard.

{¶31} A witness need not be free from doubt when identifying the perpetrator of a crime. *State v. Canady* (Feb. 5, 1991), 10th Dist. No. 89AP-715. Instead, a witness's "degree of certainty in identification are matters affecting the weight of the evidence." *State v. Reed*, 10th Dist. No. 08AP-20, 2008-Ohio-6082, ¶48. See also *State v. Coleman* (Nov. 21, 2000), 10th Dist. No. 99AP-1387, quoting *Manson v. Brathwaite* (1977), 432 U.S. 98, 116, 97 S.Ct. 2243, 2254 (stating that "[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature"). Thus, Yuricic's identification is not rendered inadmissible due to any doubts he may have expressed about it. Accordingly, we conclude that the trial court did not abuse its discretion (or commit plain error) by admitting the identification into evidence, and we overrule appellant's second assignment of error.

{¶32} In his third assignment of error, appellant argues that his defense attorneys rendered ineffective assistance by not objecting to the admissibility of Yuricic's identification. But we reviewed appellant's challenge to the identification, and we rejected that challenge. Therefore, appellant's third assignment of error is moot, and we need not address it. App.R. 12(A)(1)(c).

{¶33} In his fourth assignment of error, appellant argues that we must reverse his conviction due to the cumulative effect of errors he claims stemmed from the trial court admitting evidence on the Steak 'n Shake incident and Yuricic identifying him as a perpetrator in the Stylish Beauty Plus incident. "[A] conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to

a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168. The doctrine of cumulative error is not applicable here because we have rejected appellant's claims of trial error. See *State v. Harris*, 10th Dist. No. 04AP-612, 2005-Ohio-4676, ¶¶38-39. Therefore, we overrule appellant's fourth assignment of error.

{¶34} In his fifth assignment of error, appellant argues that his conviction for aggravated robbery is against the manifest weight of the evidence. We disagree.

{¶35} 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.

{¶36} Appellant notes that no forensic evidence placed him at Stylish Beauty Plus during the time of the aggravated robbery. But the prosecution relied on testimony to prove appellant's guilt, and testimonial evidence has the same probative value as physical evidence. *State v. Jordan*, 10th Dist. No. 05AP-1330, 2006-Ohio-5208, ¶27. In addition, although appellant did not leave physical evidence at the scene, the 9mm gun used during the aggravated robbery was admitted into evidence, and the prosecution linked appellant to that gun.

{¶37} Appellant also challenges the credibility of Yuricic's testimony identifying him as a perpetrator in the Stylish Beauty Plus incident. Appellant notes that Yuricic testified at the previous trial that, if he had recognized any of the perpetrators' facial features, he would have mentioned it. But Yuricic said that, during the previous trial, no one asked him to identify appellant as one of the perpetrators. Appellant also claims that Yuricic expressed uncertainty about the identification when he said, "[a]s far as I can tell from the gator mask, it looks to be this gentleman over here. (Indicating [appellant])." (Vol. I Tr. 110.) Yuricic clarified that he could still see the perpetrator's eyes and the area around his eyes. And, Yuricic's contact with the perpetrator was not fleeting; he saw him peek around the corner of the store, wave at an accomplice before entering the store, and flee after the incident. Yuricic's status as an unbiased witness also provides weight to the identification. Consequently, it was within the province of the jury to accept Yuricic's testimony identifying appellant as a perpetrator in the Stylish Beauty Plus incident.

{¶38} Next, according to appellant, the record indicates that only Smith and Nelson were involved in the Stylish Beauty Plus incident, based on Smith's confession to police. But Smith did not assert this during his confession to police. At most, he told police that he was an innocent bystander when the incident occurred, and he admitted at trial that the statement was a lie. Appellant also argues that Smith and Nelson's credibility are dubious, due to their favorable plea bargains. Smith and Nelson would lose their plea bargains if they lied at trial, however, and it was within the jury's province to conclude that their plea bargains did not diminish their credibility. See *State v. Womack*, 10th Dist. No. 06AP-322, 2006-Ohio-6785, ¶14.

{¶39} Appellant argues that the jury's decision to acquit him of murdering Shalash demonstrated that it did not believe the bulk of Smith and Nelson's testimony. This court does not speculate on why a jury rendered its verdict, however. *State v. Trewartha*, 165 Ohio App.3d 91, 2005-Ohio-5697, ¶15-16. In any event, even if appellant's contention is true, it was within the province of the jury to believe Smith and Nelson's testimony establishing that appellant committed aggravated robbery at Stylish Beauty Plus even if it discounted other portions of their testimony. *Stewart* at ¶23.

{¶40} Appellant raises additional challenges to Smith and Nelson's credibility, noting conflicts in their testimony and Smith's admission that he lied to police and that he was willing to lie even if it got another person in trouble. But Smith and Nelson both testified that appellant was involved in the Stylish Beauty Plus aggravated robbery, and it was reasonable for the jury to believe their corroborating testimony, which was also supported by Yuricic's identification.

{¶41} In fact, JosaLyne also testified that Nelson identified appellant as a perpetrator in the Stylish Beauty Plus crime. Appellant contends that JosaLyne was coached into duplicating her testimony to help Smith, her brother, and Nelson, her friend. To support this claim, appellant notes that JosaLyne did not talk to police until after meeting with her brother's lawyer. JosaLyne testified that her brother's lawyer did not coach her, however. And she indicated that her brother did not talk to her about the incident, either. Thus, it was reasonable for the jury to conclude that JosaLyne was telling the truth when she corroborated other testimony establishing appellant's involvement in the Stylish Beauty Plus incident.

{¶42} Also bolstering the corroborated testimony is that the prosecution linked appellant to the 9mm gun used during the Stylish Beauty Plus crime. In addition, the jury could properly infer that appellant placed that gun in Doyle's house to avoid detection, and that behavior indicates furtive conduct reflective of a consciousness of guilt. See *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶86.

{¶43} In the final analysis, the trier of fact is in the best position to determine witness credibility. *State v. Carson*, 10th Dist. No. 05AP-13, 2006-Ohio-2440, ¶15. The jury accepted corroborating evidence proving that appellant committed aggravated robbery at Stylish Beauty Plus, and appellant has not demonstrated a basis for disturbing the jury's conclusion. Accordingly, we hold that appellant's conviction for aggravated robbery is not against the manifest weight of the evidence, and we overrule his fifth assignment of error.

{¶44} To conclude, we overrule appellant's first, second, fourth, and fifth assignments of error and render moot his third assignment of error. Consequently, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

McGRATH and CONNOR, JJ., concur.
