

[Cite as *State v. Williams*, 2011-Ohio-4760.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-779 (C.P.C. No. 09CR-3012)
Anthony N. Williams,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 20, 2011

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

Blaise G. Baker, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Anthony N. Williams, from a judgment of sentence and conviction entered by the Franklin County Court of Common Pleas following a jury trial in which appellant was found guilty of kidnapping, aggravated robbery, and robbery. During a separate bench trial, the court found appellant guilty of a charge of having a weapon while under disability.

{¶2} On May 19, 2009, appellant was indicted on four counts of kidnapping, in violation of R.C. 2905.01, three counts of aggravated robbery, in violation of R.C. 2911.01, six counts of robbery, in violation of R.C. 2911.02, and one count of having a weapon while under disability, in violation of R.C. 2923.13. The matter came for trial before a jury beginning June 16, 2010. The indictment arose out of the robbery of a Donato's Pizza store located at 2922 Noe Bixby Road, Columbus, on December 10, 2008.

{¶3} The first witness for the state was Keri Richardson, an employee of Donato's. On the evening of December 10, 2008, Richardson was working at the Donato's on Noe Bixby Road when two men entered the store carrying guns. The men were wearing gloves, dark clothing and hoods, and had coverings on their faces; Richardson noted that one of the men was shorter than the other.

{¶4} Mark Kipple, a Donato's delivery driver, was getting ready to leave the store to make a delivery when the two men entered the store. The shorter man held a gun to Kipple, while the taller man held a gun to the back of Richardson's head. The men ordered Kipple, Richardson, and another employee, Mary Call, to go to the back of the store. The shorter man began to search Kipple and Call. According to Richardson, the shorter man told the store employees that he "wasn't going to shoot us." (Tr. 46.) After waiting for several minutes, the employees walked out toward the front of the store and discovered the men had left; the workers immediately placed a call to the police.

{¶5} Richardson testified that the shorter man reminded her of a customer who had been in the store earlier that day. Specifically, Richardson thought the man's eyes looked familiar. Several days after the incident, a detective showed Richardson a photo

array. Richardson selected the individual depicted in position No. 2 of the photo array as the shorter of the two men who robbed the store. Richardson indicated to the detective that she was 100 percent positive that this individual was "the guy that held us in the back of the store." (Tr. 53.) At trial, the state introduced a surveillance video from the store taken on the night of the incident. Richardson identified an individual on the video as the shorter of the two men who robbed the store.

{¶6} Michael Harrison, a Donato's delivery driver, was standing behind the counter emptying a trash can when he noticed a man enter the store. The man "was detaining the other driver [Kipple] as he was going out the door." (Tr. 83.) The man pointed a gun at Harrison and ordered him to the back room. Harrison walked to the back of the store and "just kept on going out the backdoor." (Tr. 83.) Harrison then jumped a fence, went to a nearby apartment complex and asked a resident to dial 911. After the call was made, Harrison went out to the street and observed two men running. Harrison heard one of the men say "hurry up, let's get out of here." (Tr. 84.) One man was holding a pizza bag in his hand, and Harrison then realized "that's the robbers." (Tr. 84.) The man threw the bag in the back of a white Ford pickup truck, and the two individuals jumped inside the truck and drove away without turning the headlights on.

{¶7} Harrison described the man who held him at gunpoint as a black male, "all dressed in black," with a stocking over his face. (Tr. 88.) Harrison did not observe the other man involved in the robbery until the two men were getting inside the truck; he described this man as appearing to be "really light skinned." (Tr. 88.) Harrison was unable to make a positive identification of anyone involved in the incident. At trial, Harrison identified State's Exhibit No. 5 as a picture of the truck involved in the incident.

{¶8} Mary Call testified she was washing dishes at the Donato's store on the night of the incident when two men walked in and yelled "this is no joke, this is a hold up." (Tr. 98.) One of the men pushed her "up against something," and Call received bruises on her back. (Tr. 98.) The men held a gun on two other employees (Richardson and Kipple); they then pushed the three employees to the back room against a wall. A short time later, the men were "yelling where did the other guy go." (Tr. 99.) One of the men then asked where the safe was located. Call testified that the two men were wearing dark clothing, and one of them had something across his face. Call told a police officer that the individual who ordered them to the back room was approximately 5'10" in height, with gray sideburns. Call was not able to give a description of the other individual.

{¶9} Courtney Gomez, an employee of Donato's, was also working at the restaurant on the date of the incident. Gomez was standing near the drive-thru window when two men wearing black clothing, with masks on their faces and carrying guns, came inside the store and pushed everyone to the back of the building. One of the men asked Gomez for money, and Gomez gave the man cash from the drive-thru window register. The man directed Gomez to the front register, and the man also took money out of that register. He then ordered Gomez to go to the back of the store with the other employees.

{¶10} Gomez stated that the two men were both black males, similar in height. One of the men had a lighter skin color and was wearing black pants and a black hoodie. The darker-skinned man was wearing a black hoodie, black pants, and a dark blue scarf. Several days after the incident, detectives showed Gomez a photo array. Gomez chose the individual depicted in position No. 2 of the array as the man who held the other employees at gunpoint. Gomez was later shown another array, and she told detectives

that the individuals depicted in positions No. 3 and 5 looked similar to the other robber who had been wearing the dark blue scarf/mask on his face; Gomez indicated that the individual in position No. 3 looked the most similar. At trial, Gomez identified State's Exhibit No. 25 as the "scarf-like mask the robber * * * had on his face." (Tr. 141.)

{¶11} On December 10, 2008, Columbus Police Officer Dan Edelsburg was on duty in the 14th precinct with his partner, Officer Jeff Jones. The officers received a dispatch at approximately 9:00 p.m. regarding a robbery at a Donato's store on Noe Bixby Road. The officers were given a description of a silver or gray Ford Ranger pickup truck. While en route to the pizza store, the officers observed a vehicle matching that description near Livingston Avenue and Woodcrest Road. The officers pursued the vehicle, activating the cruiser's overhead beacons and red and blue lights. The truck came to a stop near an intersection, and the officers exited their cruiser, ordering the driver to put the truck in park. There were two individuals inside the truck; the driver appeared to be a light-skinned black male, and the passenger was a black male. The passenger's window was down, and Officer Jones approached the passenger side of the vehicle. As Officer Edelsburg approached the driver's side of the vehicle, "the car takes off." (Tr. 171.) Fearing that his partner was being dragged by the vehicle, Officer Edelsburg took his flashlight and hit the driver's side window, attempting to break the window or get the driver's attention.

{¶12} The officers then returned to their cruiser and engaged in pursuit of the vehicle. The officers drove westbound on Livingston Avenue and followed the vehicle through a residential area. Officer Edelsburg momentarily lost control of his cruiser because of snow on the road, delaying pursuit of the truck. The officers lost sight of the

truck, but were able to report the license number. At trial, Officer Edelsburg identified pictures taken of the vehicle, including a picture depicting damage to the driver's side window.

{¶13} Columbus Police Officer Jason Burkey and his partner also pursued the suspect's vehicle on the evening of December 10, 2008. Officer Burkey placed a computer search of the license plate number and determined the vehicle was registered to an individual named Lowell Poulson. The officers drove to an address on Venice Drive, and observed a vehicle matching the description with the same license number. The driver's side window of the vehicle was broken, with glass inside the car, including glass on the driver's seat. The officers noticed "pizza stuff" inside the vehicle. (Tr. 188.) The officers discovered a blue toboggan-type hat in the back of the truck, and they also collected a pair of gloves from the vehicle. The truck was impounded, and the officers turned the items collected over to the property room.

{¶14} At trial, a stipulation was entered that, on December 11, 2008, police officers found pieces of broken glass in Lowell Poulson's shirt pocket, consistent with broken glass from the truck window. Columbus Police Detective Michael Longworth conducted an investigation of the robbery. As part of the investigation, he prepared a photo array, admitted at trial as State's Exhibit No. 21, which included a photograph of Lowell Poulson in the No. 2 position. The detective showed the array to Keri Richardson, and she identified Poulson's photograph from the array and signed a statement indicating: "I am one hundred percent positive that number two is the guy that held us in the back of the store." (Tr. 232.)

{¶15} Another photo array was also prepared that included appellant's picture in position No. 3, and the array was shown to Courtney Gomez, who stated that the person in position No. 3 "looks similar because of the shape of his head." (Tr. 235.) Gomez stated that the person in position No. 5 "looked similar," but "she selected number three" as the one that "looks the most like him, one of the suspects." (Tr. 236.)

{¶16} Dr. Ramen Tejwani, a forensic scientist with the Columbus Police Department's crime lab, testified that DNA analysis was conducted on the items collected by police. Specifically, DNA testing was performed on a pair of gloves recovered from the vehicle, as well as a blue knit hat, and samples of DNA from Poulson and appellant were taken for comparison. Tejwani testified that the DNA obtained from the gloves matched the DNA type obtained from Poulson, and that the DNA types collected from the knit hat matched DNA types obtained from the oral swab of appellant.

{¶17} Following the presentation of evidence, the jury returned verdicts finding appellant guilty of four counts of kidnapping, one count of aggravated robbery, and two counts of robbery. Additionally, the trial court found appellant guilty of one count of having a weapon while under disability. The trial court sentenced appellant by entry filed July 16, 2010.

{¶18} On appeal, appellant sets forth the following two assignments of error for this court's review:

Assignment of Error No.1: The trial court erred in that Appellant's conviction was against the manifest weight of the evidence in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and Article 1, Sections 1, 10, and 16 of the Ohio Constitution.

Assignment of Error No. 2: The trial court erred when it improperly exposed the jury to inadmissible hearsay in violation of the Ohio Rules of Evidence.

{¶19} Under the first assignment of error, appellant contends that his conviction was against the manifest weight of the evidence because the state failed to prove his identity as one of the robbers.¹ Appellant argues there are several important conflicts in the testimony presented at trial with respect to the issue of identity. He further asserts that the state presented no direct evidence proving that he was present at the Donato's Pizza store on the night of the robbery, arguing that none of the state's witnesses positively identified him as one of the robbers. Appellant maintains that, because of the lack of testimony positively identifying him as the robber, conflicts of evidence in this case caused the jury to lose its way and create a manifest miscarriage of justice requiring reversal of the conviction and ordering a new trial.

{¶20} In considering a defendant's claim that a jury verdict is against the manifest weight of the evidence, "[t]he court, 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. Martin* (1983), 20 Ohio App.3d 172, 175. Further, "[t]he discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.*

¹ We note that, apart from the issue of identity, appellant's assignment of error does not challenge whether all of the particular elements of the crimes were proven beyond a reasonable doubt.

{¶21} Unlike the standard of review for sufficiency of the evidence, "a reviewing court does not construe the evidence most strongly in favor of the prosecution when using a manifest-weight standard of review." *State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, ¶81. A manifest weight of the evidence challenge "questions the believability of the evidence and asks a reviewing court to determine which of the competing inferences is more believable." *Id.* However, an appellate court "may not substitute its judgment for that of the trier of fact on the issue of the credibility of the witnesses unless it is patently apparent that the factfinder lost its way." *Id.*

{¶22} With respect to the issue of identity, the state presented evidence that one of the robbers wore a blue "scarf-like mask." (Tr. 141.) The state also presented testimony identifying the blue mask used in the robbery, as well as evidence that the mask was discovered in the back of the vehicle used by the two men in fleeing the scene of the robbery. During the testimony of Gomez, the state played a video surveillance tape taken during the incident, and Gomez identified on the tape the individual wearing a "dark blue" scarf. (Tr. 136.) The mask was discovered in the back of a Ford pickup truck registered to Lowell Poulson, whose truck was identified by witnesses as the vehicle leaving the scene of the robbery. Pizza items were also found inside the truck. The driver's side window was broken, and window glass was discovered inside the vehicle. At trial, a stipulation was entered that police officers discovered glass in the pocket of Poulson's shirt. DNA testing was conducted on a pair of gloves found inside the truck, and the DNA of Poulson was found on those gloves. Gomez positively identified Poulson from a photo array, and she chose a picture of appellant from an array as looking the most like one of the suspects. The blue mask recovered from Poulson's truck was also

tested for DNA, and only appellant's DNA was present on the mask. Upon review of the record, we find that the state provided sufficient competent, credible evidence to establish the identity of appellant as one of the individuals involved in the robbery, and all other essential elements of the crimes charged, to entitle a reasonable jury to conclude appellant was guilty beyond a reasonable doubt.

{¶23} Appellant points to the lack of positive identification by the witnesses, and argues that many of the witnesses could not give a physical description of the perpetrators. However, "[t]he identity of the accused may be established by direct or circumstantial evidence." *State v. Harris*, 12th Dist. No. CA2007-11-280, 2008-Ohio-4504, ¶12. See also *State v. Liggins*, 9th Dist. No. 24220, 2009-Ohio-1764, ¶11 ("Circumstantial and direct evidence have equal probative values [and] [c]ircumstantial evidence alone can be used to establish the identity of a perpetrator"). At trial, while the evidence indicated that the perpetrators covered their faces during the incident, several of the witnesses testified as to physical characteristics of the two men, including height, weight, and skin tone. Further, while Gomez was not 100 percent certain of any of the six photographs in the array, she narrowed down her choices to two, one of which depicted appellant (in the third position), and she told the detective that the individual in position No. 3 "looks the most like * * * one of the suspects." (Tr. 236.)

{¶24} Here, the jury was free to consider the testimony of Gomez, as well as other evidence which included testimony that the blue mask used in the robbery and found in the vehicle pursued by police moments after the robbery contained the DNA of appellant. The lack of a "positive identification" was a matter for the trier of fact to weigh but, in light of the evidence presented, a reasonable jury could have concluded that appellant was

one of the perpetrators of the crime. After reviewing the entire record, we conclude that the jury did not lose its way and create such a manifest miscarriage of justice that the convictions must be reversed.

{¶25} Accordingly, finding that the convictions are not against the manifest weight of the evidence, appellant's first assignment of error is overruled.

{¶26} Under the second assignment of error, appellant argues that the trial court erred in exposing the jury to inadmissible hearsay evidence. Appellant points to the testimony of Detective Longworth regarding statements made to him by Donato's employee Richardson regarding the suspect's eyes. Specifically, at trial, the prosecutor asked the detective whether Richardson said "anything about one of the suspects' eyes reminding her of somebody?" (Tr. 225.) Over an objection, the detective responded: "Yes. She said that one of the suspects' eyes reminded her of a customer that came in the store." (Tr. 226.) Richardson further stated that she gave the detective the name of an individual (Rogers), but that the detective did not follow-up with that information because of information pursued with respect to Poulson. Appellant argues that the testimony regarding Richardson's statements constituted inadmissible hearsay, asserted to show the truth of Richardson's identifying statements.

{¶27} At the time of the objection, the trial court determined that the statement was "not being offered for the truth of the matter asserted." (Tr. 226.) Rather, the court agreed with the prosecutor's contention that the statement was being offered for purposes of investigation. In conjunction with its ruling, the court instructed the jury that "you should not consider what * * * Keri Richardson said that it's true, only to explain what actions this

officer may have taken based upon that, but you may not consider it for any other purpose in this case." (Tr. 226.)

{¶28} Evid.R. 801(C) defines "hearsay" as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." However, "[w]here an out-of-court statement is offered without reference to its truth, it is not hearsay." *State v. Price* (1992), 80 Ohio App.3d 108, 110, citing *State v. Lewis* (1970), 22 Ohio St.2d 125, 132-33. Further, "[s]tatements which are offered to explain a police officer's conduct while investigating a crime are likewise not hearsay." *Price* at 110, citing *State v. Blevins* (1987), 36 Ohio App.3d 147, 149; *Fairfield v. Tillett* (Apr. 23, 1990), 12th Dist. No. CA89-05-073.

{¶29} In the present case, we find no error with the trial court's determination that the statement at issue was not being offered for its truth, but rather to explain the course of the investigation and why the detective did not pursue a particular individual as a suspect. Further, as noted above, the court gave a cautionary instruction to the jury to "not consider" what Richardson told the detective as true, but rather "only to explain what actions this officer may have taken" and not for any other purpose. A jury is presumed to follow instructions provided by the court. *State v. Williams*, 10th Dist. No. 02AP-730, 2003-Ohio-5204, ¶49. Upon review, we agree with the trial court's determination that the statement was not hearsay, and we conclude that the trial court did not abuse its discretion in allowing its admission. Appellant's second assignment of error is without merit and is overruled.

{¶30} Based upon the foregoing, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.
