

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-L-111
KENNETH S. MILLER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 11 CR 000116.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Matthew C. Bangerter, 1360 West 9th Street, Suite 200, Cleveland, OH 44113 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Kenneth S. Miller appeals from a judgment of the Lake County Court of Common Pleas which convicted him of two counts of robbery and sentenced him to 16 years in prison. The convictions stem from his involvement in two robberies which occurred within 72 hours at a Subway shop and a Clark gas station in Lake County. On appeal, Mr. Miller claims that his convictions are not supported by sufficient evidence

and are against the manifest of the evidence, and that his sentence is contrary to law. After a thorough review of the record, we affirm the judgment of the trial court.

Substantive Facts and Procedural History

{¶2} On February 23, 2011, two men robbed a Subway shop in Willoughby by displaying a gun. Two days later, a man robbed a Clark gas station in Mentor, also by displaying a gun. On May 20, 2011, a grand jury indicted Mr. Miller for four counts of robbery for his involvement in these two robberies: counts one and three charged with him with robbery, a second degree felony, in violation of R.C. 2911.02(A)(2); counts two and four charged him with robbery, a third degree felony, in violation of R.C. 2911.02(A)(3).

{¶3} The matter was tried to a jury. At trial, the state presented testimony from 19 witnesses, and the defense presented one witness.

The Willoughby Subway Robbery

{¶4} Heather Vasilko, an employee of the Willoughby Subway shop on Euclid Avenue was working on the evening of February 23, 2011. Around 8 p.m., two men, one in red hat and black jacket and one in a gray hooded jacket, came in and ordered sandwiches. When they approached the register, the man in the red hat pulled a gun out of his waistband and demanded all the money from the cash register. A video from the store's security camera captured the incident, and the video was played for the jury. Ms. Vasilko testified that she handed all the cash from the register, about \$400, to the men, and then laid down on the ground as ordered.

{¶5} Willoughby Police Officer Davis responded to the dispatch regarding the Willoughby Subway robbery that evening. He arrived at the scene and interviewed Ms.

Vasilko, who was visibly shaken. Fellow Officer Begovic attempted to retrieve fingerprints from the items collected at the crime scene without success.

{¶6} A few days after the Willoughby Subway robbery, the police showed Ms. Vasilko some photograph lineups, but she was unable to identify either man involved in the robbery.

{¶7} Willoughby Detective Knack was also involved in the investigation of the Subway robbery and testified in great detail regarding the procedure employed in the photograph lineups. He explained that he compiled six photos, placed each in a separate folder, and gave these folders to a “blind” administrator not involved in the investigation. The blind administrator gave the witness one folder at a time, and noted any comment made by the witness when viewing a photo. Detective Knack used pictures from Ohio BMV to compile the two photograph lineups – one lineup contained a BMV picture of the second suspect, Bret Dixon, the other Mr. Miller. No witnesses, however, identified either man from the photograph lineups.

The Other Subway Robbery Suspect Testifies for the State

{¶8} After reaching an agreement with the prosecutor, Bret Dixon, one of the two suspects in the Subway robbery, testified against Mr. Miller, and later pled to a lesser charge for his involvement in the Subway robbery. Mr. Dixon described the events surrounding the robbery. He and Mr. Miller had taken heroin and then drove around in a green Durango belonging to Mr. Miller’s mother. Mr. Miller wanted to “hit a lick” together and gave Mr. Dixon a fake gun to use. They parked at a Chick-fil-A and walked to a Subway shop. After ordering a sandwich, Mr. Dixon displayed the fake gun and demanded money from the employee. According to Mr. Dixon, Mr. Miller also had

a gun in his waistband, but did not display it. After the robbery, they drove to Cleveland and used the money to buy more heroin, and Mr. Dixon returned the gun to Mr. Miller. Shortly afterwards, he went to California with his father, a truck driver, and he claimed that while in California he talked to Mr. Miller over the telephone and Mr. Miller told him about “another lick he hit” at a gas station in Mentor. He also testified that when he saw Mr. Miller in the county jail for the first time after the incident, Mr. Miller held up his finger to his lips, signaling “shhh.”

{¶9} Mr. Dixon admitted he had served six months in prison for breaking and entering, and had also committed three theft offenses.

{¶10} Detective Knack interviewed Mr. Dixon in jail, and Mr. Dixon told him about his involvement in the Subway robbery and also implicated Mr. Miller. In addition, Detective Knack, a range instructor, testified the gun in the state’s exhibit was a fake gun, but more advanced than a typical toy gun.

{¶11} On cross-examination, Detective Knack admitted the jail’s phone monitor system never registered the phone call allegedly placed by Mr. Miller to Mr. Dixon, even though Mr. Dixon testified Mr. Miller called him a month after the robbery incidents, at a time when Mr. Miller was in the county jail.

The Ring Finger Tattoo

{¶12} Mr. Miller has a tattoo on his left ring finger that became the focus of testimony presented by Willoughby Detective Trem. Detective Trem explained that he used a computer program to create still photographs from the Subway surveillance video which captured the robbery. He magnified the portion depicting the suspect’s left ring finger, which showed a narrow dark area where a ring would be, and created an

exhibit by putting the photographs side by side for a comparison with the photographs of Mr. Miller's left hand with the tattooed ring finger. The exhibit was shown to the jury. Mentor Detective Collins offered additional testimony regarding the surveillance videos taken from both robbery locations. When he viewed the video of the Subway robbery he noticed one of the suspects had on his left ring finger what appeared to be a black ring tattoo.

{¶13} Rich Kish, a tattoo parlor owner, was the sole defense witness. He testified he had personally performed 28 ring finger tattoos, and estimated his establishment performed between 100 and 120 such tattoos in the past year alone. He also testified that he could not tell whether the dark shadow in the ring finger captured in the Willoughby Subway and Mentor Clark gas station surveillance videos were tattoos.

The Mentor Clark Gas Station Robbery

{¶14} Two days after the Willoughby Subway robbery, Suzanne Miranda, a clerk at a Clark gas station in Mentor, was outside the station smoking a cigarette around 1:20 p.m. A man, who had been pacing in front of a FedEx box, approached her and tried to strike a conversation with her, saying he worked at the nearby sub shop and was on break. When she went back to the gas station, he followed her inside. As soon as she got to the register, he pulled his turtleneck over his face and put a gun on the counter pointing at her, demanding all the money from the drawer. She gave him all the money, about \$275. He left the store immediately, and she saw him running passing the sub shop.

{¶15} At the lunch hour on the day of the gas station robbery, Christopher Maio, a manager of a nearby sub shop was serving a frequent customer when he noticed a

man, who had moments earlier asked if the store was hiring, lingering in a corner of the store. Later, he saw a man who appeared to be the same individual running past the store's window.

{¶16} That frequent customer, bank manager Chientai Ranallo, described a “strange gentleman” who walked into the store and she looked right at him. He asked for an employment application, but left before getting the application. She saw him again standing outside the shop when she walked to her car. After eating lunch, she noticed the police cars arriving at the gas station. She immediately went to the sub shop to talk to Mr. Maio. She then saw Officer Grecco and described to him what she had seen at the sub shop earlier.

{¶17} The robbery was also captured on the surveillance camera, and was played for the jury. The video showed a man wearing a hat, a two-toned blue-and-gray jacket, and jeans. When the police arrived, the station clerk, Ms. Miranda, described the suspect as red-haired and wearing a hat, jacket, and jeans. Mentor Detective Collins came to the gas station and showed her two photo lineups; she identified an individual from the second lineup as resembling the suspect, but she was not “one hundred percent sure.” When the police showed Mr. Maio two photograph lineups hours later, he, too, was unable to identify with certainty the man he had seen in his shop.

{¶18} Ms. Ranallo described the man as blue-eyed and red-haired, but she also was unable to identify him from two photograph lineups shown to her by the police. A few days later, however, when she read a News-Herald article online regarding the Clark gas station robbery, she recognized the man whose photograph appeared in the

article as the same individual she had seen in the Subway shop. She informed the police of her recollection.

{¶19} At the Mentor police station next day, Ms. Miranda, the gas station clerk, was shown a hat and a black turtleneck. She recognized the turtleneck, which the robber had pulled over his face, as similar to that worn by the robber. When Detective Collins showed her a photograph taken at Mr. Miller's booking which depicted him in the two-toned blue-and-gray fleece jacket, she broke down; she "began to hyperventilate and started to cry uncontrollably," identifying Mr. Miller as the robber.

{¶20} These clothing items, which Mr. Miller wore when he was taken into custody, were introduced as exhibits, and Ms. Miranda identified them in court as those items worn by the robber. She also recognized an air pistol shown to her by the officers at the police station as very similar to the gun used in the robbery, based on a distinctive white spot on the top of the gun.

Phone Calls Led to Mr. Miller

{¶21} A series of phone calls led to the discovery of a weapon and Mr. Miller. Bruce Bishop, who lived with Vanessa Santini, an acquaintance of Mr. Miller, described a series of phone calls Ms. Santini received the day after the robberies. Based on the information revealed in the phone calls, he followed the tracks in the snow and found a gun buried in the snow behind his trailer. He contacted the police.

{¶22} Mentor Patrolman Danzey described that contact from Mr. Bishop, through which the police were alerted that a gun had been left at the Mentor Avenue trailer park.

{¶23} Patrolman Danzey, along with two other officers, went to the trailer park. While the police were there, Mr. Miller telephoned Ms. Santini, and the police recorded

the telephone call that originated from Mr. Miller's phone number confirmed by the caller ID. During the telephone conversation, Mr. Miller was heard asking Ms. Santini if she had read the day's News Herald.

{¶24} Patrolman O'Brien also responded to Mr. Bishop's telephone call and went to the trailer park. The gun found there "looked to be the same gun" he had seen on the store surveillance video.

{¶25} Wickliffe Detective Dondrea described how Mr. Miller was apprehended. He had heard on a police radio about a search by the Mentor police for a Kenneth Miller, who was on a pay phone in the area of Lakeland Road and Route 305. He ran a search on the name and printed a picture of him, and then drove to the area. A dispatch, based on the call the suspect made from a pay phone, informed Detective Dondrea that the suspect, driving a green Dodge Durango, was outside a cash-for-gold store around 200th and Euclid Avenue. Knowing the area well, Detective Dondrea drove to Gold Works on 200th Street, and found the green Durango parked outside a convenience store, several blocks north of Gold Works,

{¶26} Among the items found inside the vehicle was a copy of the day's News-Herald, which had the gas station robbery as its cover story.

{¶27} When Patrolman Danzey returned to the police station, Officer Bruening had already arrived with Mr. Miller in custody. Both officers testified Mr. Miller wore a dark or black turtleneck and a blue-and-gray fleece jacket. During booking, Mr. Miller was asked to remove his clothing. When putting his clothes back on, he claimed the black turtleneck did not belong to him. Patrolman O'Brien took photographs of Mr. Miller during his booking. He identified the state's exhibit 7, which was the two-toned

blue-and-gray fleece jacket, as the jacket Mr. Miller wore when he was taken into custody.

A Jailhouse Phone Call

{¶28} Mr. Miller called his mother from the Lake County jail. Lake County Detective Seamon recorded Mr. Miller's jailhouse phone conversations, specifically, the May 13, 2011 call, which was transcribed. During the phone call, Mr. Miller told his mother that the police only had witnesses on the Mentor case but not the Willoughby case, and therefore it was important for her to call a certain individual and tell him to "lawyer the f--up" if arrested. Mr. Miller was also heard saying that the police had a picture of his hand with a tattoo on his ring finger, but "there's f--ing 100,000 people in a f--ing ten mile square radius that have ring finger tattoos. There is thirty people in the jail right now that have them * * *."

{¶29} After trial, the jury found Mr. Miller guilty of all four counts. The trial court sentenced him to eight years in prison each for counts one and three; count two was merged with one and count four merged with three. The two eight-year terms are to be served consecutively, for a total of 16 years.

{¶30} Mr. Miller now appeals his convictions and sentence, raising the following assignments of error:

{¶31} "[1.] Defendant-appellant was denied effective assistance of counsel, in violation of the Sixth Amendment of the United States Constitution."

{¶32} "[2.] The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶33} “[3.] The trial court erred to the prejudice of the defendant-appellant in denying his motion for acquittal made pursuant to Crim.R.29(A).”

{¶34} “[4.] The trial court erred when it imposed a prison term where its findings under R.C. 2929.12 were not supported by the record and where it failed to give careful and substantial deliberation to the relevant statutory factors.”

Identification Evidence

{¶35} Under the first assignment of error, Mr. Miller argues his trial counsel provided ineffective assistance because counsel failed to attempt to suppress the photographic identification of him by Ms. Miranda and Ms. Ranallo. Mr. Miller claims the photographic identification in these instances does not comport with R.C. 2933.83, and therefore is unreliable. He contends his trial counsel was ineffective for failing to file a motion to suppress the evidence.

{¶36} R.C. 2933.83, effective July 6, 2010, provides specific procedural guidelines for law enforcement agencies regarding eyewitness identification procedures in photo lineups and live lineups. Here, Detective Knack testified at great length regarding the photo lineup identification procedure employed in this case. Further, no witnesses had been able to identify Mr. Miller from the photo lineups. Therefore, Mr. Miller does not challenge the photo lineups employed in this case. Rather, he complains that the single photo identification by the gas station robbery victim does not comport with R.C. 2933.83, and therefore, his trial counsel should have filed a motion to suppress the evidence.

{¶37} Because R.C. 2933.83 governs photograph and live lineup procedures but not single photograph identification, we look to the case law for a proper analysis.

{¶38} Showing a witness a single photograph of the defendant is highly suggestive and gives rise to a “very substantial likelihood of irreparable misidentification.” *State v. Battee*, 72 Ohio App.3d 660, 662 (11th Dist.1991), citing *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). However, a suggestive or improper identification would be admissible if it is found reliable after consideration of the totality of circumstances. *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). “The test for determining the admissibility of a photographic identification is ‘whether under the “totality of the circumstances” the identification was reliable even though the confrontation procedure was suggestive.’” (Citation omitted.) *Id.*

{¶39} In *Biggers*, which involved a “showup” identification, the court adopted a totality-of-the-circumstances test for determining whether the identification was reliable, and therefore, admissible, despite the suggestiveness of the identification procedure. Factors bearing on the reliability of identification evidence include “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the 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.” *Biggers* at 199-200.

The Single Photo Identification by Ms. Miranda

{¶40} Here, Detective Collins testified that after Mr. Miller was taken into custody, he went to see Ms. Miranda, the gas station victim, and showed her a booking photograph of Mr. Miller wearing the clothing he was found in, as well as photographs of the various individual clothing items. When Ms. Miranda was shown the photograph of

Mr. Miller, she “began to hyperventilate and started to cry uncontrollably.” She then indicated to the police “she was a hundred and fifty percent sure that that was him.” This last statement by Detective Collins was objected to by the defense and the trial court sustained the objection.

{¶41} On direct examination, the prosecutor did not elicit testimony from Ms. Miranda regarding the photograph shown to her by Detective Collins. Instead, the prosecutor showed her the two-toned jacket worn by Mr. Miller when he was found by the police, and she testified that the jacket was the same as one worn by the robber. Under cross-examination, Ms. Miranda testified she wrote a statement after viewing the photos shown to her by the police, stating that she recognized the jacket. She admitted she did not state specifically that she recognized Mr. Miller, only that she recognized the jacket.

{¶42} We applied the *Biggers* two-part test to identification evidence in a recent decision, *State v. Stetz*, 11th Dist. No. 2011-A-0008, 2011-Ohio-6516. There, a witness saw the back of a man in red shorts and red t-shirt walking near the scene of a reported car theft. The police later encountered the defendant walking near the scene, in gray shorts and shirtless, while carrying a red t-shirt. The gray shorts were reversible, with the red on the inside. The police asked the defendant to reverse his shorts and put on the red t-shirt for a showup identification by the witness.

{¶43} Affirming the trial court’s suppression of the identification evidence, we determined that the “showup” identification employed in that case, where the suspect was made to conform his clothing to the witness’ description, was inherently and impermissibly suggestive. We then applied the totality-of-the-circumstances test and

noted the witness observed the suspect from 40 feet away and only saw the back of the man, which all pointed to the unreliability of the identification.

{¶44} In this case, although the facts are dissimilar – Mr. Miller was not “dressed” for the booking photo to be subsequently used for a showup while the defendant in *Stetz* was made to conform his clothing to the witness’s description, we reiterate that showing a witness a single photograph of the defendant is highly suggestive and gives rise to a “very substantial likelihood of irreparable misidentification.”

{¶45} Applying the *Biggers* analysis, we find that the identification evidence in the present case should have similarly been excluded as unreliable, because Ms. Miranda’s own testimony appeared to indicate that she recognized Mr. Miller’s clothing rather than his face. Although her recognition of the clothing is circumstantial evidence establishing the similarity of the clothing worn by the robber and Mr. Miller when he was found, we find it to be unreliable identification evidence under the *Biggers* test, as the level of certainty in Ms. Miranda’s identification of Mr. Miller being the individual wearing the clothing she did identify has not been demonstrated.

{¶46} Therefore, the single photograph identification evidence is not admissible and Mr. Miller’s trial counsel should have filed a motion to suppress the evidence.

{¶47} However, to establish his claim that his counsel provided ineffective assistance, Mr. Miller must show that there is a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). As we explain in the following, there is an overwhelming amount of circumstantial evidence presented by the state in this case,

and Mr. Miller fails to demonstrate that were it not for his counsel's failure to file a motion to suppress the evidence, the result of the trial would have been different.

The Single Photo Identification by Ms. Ranallo

{¶48} As to Mr. Miller's contention that Ms. Ranallo's identification of him was inadmissible because the identification was not in compliance with R.C. 2933.83, we note that Ms. Ranallo recognized the individual whose picture accompanied an online News-Herald article about the Clark gas station robbery as the man she had seen in the nearby sub shop shortly before the robbery. She was not an eyewitness to the robbery; her recognition of Mr. Miller was not as a result of law enforcement involvement and there was no "suggestive" procedure employed requiring a determination of whether the identification was unreliable and inadmissible. Rather, her identification of Mr. Miller as the man she saw in the sub shop was circumstantial evidence only, and the assessment of the credibility of that evidence was solely within the province of the jury, who heard the testimony that she was unable to pick out Mr. Miller from photograph lineups, as well as the testimony regarding her two encounters with the defendant – inside the sub shop and again in the parking lot as she walked to her vehicle – shortly before the Clark gas station robbery. Therefore, Mr. Miller's ineffective assistance of counsel claim regarding Mrs. Ranallo's identification of him is without merit for failing to demonstrate the threshold showing that his counsel's performance was deficient for failing to file a motion to suppress. *Strickland*.

{¶49} Next, under the second and third assignments of error, Mr. Miller claims his convictions are not supported by sufficient evidence and are against manifest weight of the evidence.

Sufficiency of Evidence

{¶50} A trial court shall grant a motion for acquittal when there is insufficient evidence to sustain a conviction. Crim.R. 29(A). When reviewing a challenge of the sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), at paragraph two of the syllabus. "The pertinent inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶51} A sufficiency challenge requires this court to review the record to determine whether the state presented evidence on each of the elements of the offense. This test involves a question of law and does not permit us to weigh the evidence. *State v. Martin*, 20 Ohio App.3d 172, 175 (1983).

{¶52} It is undisputed a robbery occurred in the Willoughby Subway and Mentor Clark gas station. The only issue in this case is the identify of the offender(s). In order to warrant a conviction, the evidence must establish beyond a reasonable doubt the identity of the accused as the person who committed the crime. *State v. Scott*, 3 Ohio App.2d 239, 244 (1965).

{¶53} We recognize that none of the witnesses were able to identify Mr. Miller from the photograph lineups, and further that the evidence the state used to prove the identity of the suspect involved in the robberies is mostly circumstantial evidence. However, there is no general requirement that the defendant must be identified in photograph lineups. Instead, "direct or circumstantial evidence is sufficient to establish

the identity of the accused as the person who committed the crime.” *State v. Lawwill*, 12th Dist. No. 2007-01-014, 2008-Ohio-3592, ¶11, citing *State v. Irby*, 7th Dist. No. 03 MA 54, 2004-Ohio-5929, ¶16-21. “[T]here is but one standard of proof in a criminal case, and that is proof of guilt beyond a reasonable doubt. This tenet of the criminal law remains true, whether the evidence against a defendant is circumstantial or direct.” *Garr v. Warden, Madison Corr. Inst.*, 126 Ohio St.3d 334, 2010-Ohio-2449, ¶27, quoting *State v. Jenks*, 61 Ohio St.3d 259, 272-273 (1991).

{¶54} The courts have always recognized that “circumstantial evidence is sufficient to sustain a conviction if that evidence would convince the average mind of the defendant’s guilt beyond a reasonable doubt.” *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶75, quoting *State v. Heinisch*, 50 Ohio St.3d 231, 238 (1990). Circumstantial evidence may be sufficient to establish the identity of the accused. *Lawwill, supra*. See also *State v. Brown*, 10th Dist. No. 07AP-244, 2007-Ohio-6542, ¶19; *State v. Kiley*, 8th Dist. Nos. 86726 and 86727, 2006-Ohio-2469, ¶9. Circumstantial evidence is “the proof of facts by direct evidence from which the trier of fact may infer or derive by reasoning other facts.” (Citations omitted.) *Lawwill* at ¶12

{¶55} Here, the state presented ample evidence, although mostly circumstantial, linking Mr. Miller to both robberies. For the Willoughby Subway robbery, the evidence included the surveillance video showing one of the robbers had a dark area in his left ring finger resembling Mr. Miller’s ring finger tattoo, and Mr. Dixon’s testimony that Mr. Miller was his accomplice in the robbery. For the Clark gas station robbery, the surveillance video showed the robber wearing a two-toned blue and gray fleece jacket very similar to what Mr. Miller wore when he was found by the police three days later.

Ms. Miranda recognized the jacket worn by Mr. Miller as similar to one worn by the robber and also recognized the gun retrieved by the police as similar to the one used in the robbery. Ms. Ranallo recognized Mr. Miller as the individual she had seen near the Clark gas station before the robbery incident. Finally, the dark mark on the robber's left ring finger captured in the Willoughby Subway video resembled Mr. Miller's left ring finger tattoo. We conclude that the evidence presented by the state, if believed, would convince the average mind of Mr. Miller's guilt beyond a reasonable doubt.

{¶56} The third assignment of error is not well taken.

Manifest Weight

{¶57} “Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. ‘The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1987).

{¶58} “The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1983).

{¶59} “[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. When examining witness credibility, “the choice

between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.” *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). A fact finder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29.

{¶60} “When reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. * * * This presumption arises because the trial judge had an opportunity to view the witnesses and observe their demeanor in weighing the credibility of the witnesses.” *State v. Reeves*, 11th Dist. No. 2006-T-0099, 2007-Ohio-4765, ¶14, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 79-81 (1984).

{¶61} Here, the state presented a significant amount of circumstantial evidence linking Mr. Miller to both robberies. Circumstantial evidence and direct evidence inherently possess the same probative value. *State v. Treesh*, 90 Ohio St. 3d 460, 485 (2001), citing *Jenks, supra*, at paragraph one of the syllabus. There is a significant amount of circumstantial evidence in this case.

{¶62} For the Willoughby Subway robbery, the evidence included the surveillance video showing Mr. Dixon’s accomplice had a dark area in his left ring finger, which resembled Mr. Miller’s ring finger tattoo on his left hand; Mr. Dixon’s testimony regarding Mr. Miller’s role in the robbery; and Mr. Miller’s telephone call to his mother from the jail referencing the subway robbery.

{¶63} For the Mentor Clark gas station robbery, the surveillance video showed the suspect wore the same two-toned blue and gray fleece jacket Mr. Miller wore when

he was apprehended. Ms. Ranallo recognized Mr. Miller, whose picture appeared in an article reporting the gas station robbery, as the individual she had seen asking for an application in a nearby sub shop shortly before the robbery. Her testimony was corroborated by Mr. Maio, who recalled an individual asking for an application around the time Ms. Ranallo, a frequent customer, placed her order. Based on the telephone calls Ms. Santini received from Mr. Miller, Mr. Bishop discovered a gun buried in the snow at the back of their trailer, a fake gun which Ms. Miranda recognized as resembling the gun used in the gas station robbery, which had a distinctive white mark on its top. Mr. Miller also referenced the Clark gas station robbery on his telephone call to his mother.

{¶64} Mr. Miller maintains the only evidence linking him to the crimes is the clothing and the finger ring tattoo, and he claims none of it is unique. It is conceivable that Mr. Miller happened to wear the same two-toned blue-and-gray fleece jacket worn by the Clark gas station robber, and the subway robber happened to have a dark mark in his left ring finger which resembled the tattoo on Mr. Miller's left ring finger. However, the other evidence presented by the state lead these circumstances beyond mere coincidences to the establishment of circumstantial evidence. As to Mr. Miller's claim that Mr. Dixon's testimony about Mr. Miller's telephone call to him a month after the incidents where he implicated himself in the Willoughby Subway robbery is contradicted by a lack of jail record, we note that a fact finder is free to believe all, some, or none of the testimony of each witness appearing before it.

{¶65} The weight to be given the evidence presented by the state in this case, whether direct or circumstantial, as well as the credibility of the witnesses, were exclusively for the jury to determine, sitting as the trier of fact.

{¶66} After reviewing the entire record, weighing the direct and circumstantial evidence before the jury, and all reasonable inferences to be drawn therefrom, we are not persuaded that in resolving potential conflicts and limitations in the testimony, the jury clearly lost its way and created such a manifest miscarriage of justice that Mr. Miller's conviction must be reversed and a new trial ordered. Given the strength of both direct and circumstantial evidence, this case does not fall into the category of the "exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins, supra*, at 387. The second assignment of error is without merit.

Reviewing Sentences Post *Foster*

{¶67} In the fourth assignment of error, Mr. Miller claims the court erred by sentencing him to maximum and consecutive terms of imprisonment.

{¶68} The Supreme Court of Ohio, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, provided a two-step analysis for an appellate court to apply when reviewing felony sentences.

{¶69} First, the reviewing court must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the appellate court then reviews the trial court's decision under an abuse-of-discretion standard. *Id.* at ¶4. The first prong of the analysis instructs that "the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in

imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G).” *Id.* at ¶14. The *Kalish* court explained that the applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and R.C. 2929.12, which are not fact-finding statutes like R.C. 2929.14. *Id.* at ¶17. As part of its analysis of whether the sentence is “clearly and convincing contrary to law,” an appellate court must be satisfied that the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12.

{¶70} If the first prong is satisfied, that is, the sentence is not “clearly and convincingly contrary to law,” the appellate court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. *Id.* at ¶17. The *Kalish* court explained the effect of R.C. 2929.11 and 2929.12.

{¶71} “R.C. 2929.11 and 2929.12 * * * are not fact-finding statutes like R.C. 2929.14. Instead, they serve as an overarching guide for [a] trial judge to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio’s sentencing structure. Moreover, R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion.” *Id.* at ¶17.

{¶72} Here, Mr. Miller claims his sentence is contrary to law because the trial court failed to consider the seriousness and recidivism factors set forth in R.C. 2929.12,

in particular, section (C)(3), which states that the court is to consider whether “[i]n committing the offense, the offender did not cause or expect to cause physical harm to any person or property.” Mr. Miller refers us to the trial court’s remark at sentencing that “there are no factors which would make the offense less serious.” He maintains this remark reflects a lack of consideration of that particular statutory factor by the trial court, because a consideration of the factor would have led to the inevitable determination that he, by brandishing a fake gun, did not cause or expect to cause physical harm to any victim.

{¶73} The record shows that at sentencing, his counsel stated that Mr. Miller has always maintained his innocence and noted the lack of physical harm to the victims. The prosecutor, on the other hand, noted the psychological harm the victims suffered, the short span of time the two robberies occurred in, and his prior conviction of bank robbery in the federal court for which he served 63 months, as well as multiple convictions in the state courts.

{¶74} The trial court stated it had reviewed a presentence report, which was incomplete due to Mr. Miller’s lack of cooperation, and an old presentence report dated September of 1993 covering Mr. Miller’s criminal activities from July 1993 to September 1993. The court had also reviewed a victim impact statement from Ms. Miranda. Prior to sentencing Mr. Miller, it stated it considered the purposes of felony sentencing set forth in R.C. 2929.11 and “all relevant factors including the seriousness and the recidivism factors set forth in Revised Code 2929.12.” It then stated the following:

{¶75} “In this case the Court finds that the victims suffered serious psychological harm. That there are no factors which would make the offense less serious. The

Defendant has an extensive criminal history, including the robbery that [the prosecutor] spoke of, the 1997 bank robbery by force and violence, or by intimidation, where he served a little over 5 years in prison. He has been sent to prison by this Court in 1993 on multiple cases. Again 1993, again in 1994 on multiple cases. In 1996. * * * Sent to prison in 2005 by Cuyahoga County Common Pleas Court. He's got juvenile offenses going back to 1985. And despite all of this prison term, the Defendant went out and committed 2 more robberies. It's obvious to this Court that consecutive sentences here are necessary to protect the public and to punish this offender. Consecutive sentences would be not disproportionate to the conduct and the danger that this offender poses to society. The harm committed here was so great or unusual that a single term does not adequately reflect the seriousness of his conduct, and his criminal history shows that consecutive terms are needed to protect the public. This Defendant does pose the greatest likelihood of recidivism. And he committed great harm in both of these robberies."

{¶76} Having reviewed the record, we are satisfied that the trial court considered the R.C. 2929.12 principles and R.C. 2929.11 factors, as it was required, before fashioning the appropriate punishment for Mr. Miller's offenses. The trial court is presumed to have considered the fact that a fake gun was used in the commission of the robberies, a fact that does not necessarily preclude the possibility of potential physical harm to the victim during the robbery. Thus, the court's determination that "there are no factors which would make the offense less serious" by no means reflects a lack of consideration of R.C. 2929.12 (C)(3), as Mr. Miller claims.

{¶77} Our review of the record indicates the trial court's sentence is not clearly and convincingly contrary to law. The fourth assignment of error is without merit.

{¶78} The judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.