[Cite as *State v. Beaver*, 2012-Ohio-871.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-T-0037**
- vs -	:	
OMEARO L. BEAVER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 10 CR 106.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos,* Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Omearo L. Beaver, after trial by jury, was convicted of kidnapping and burglary. He now appeals the Trumbull County Court of Common Pleas' judgment overruling his motion to suppress evidence, as well as its judgment entered on conviction. We affirm the judgments of the trial court.

{¶2} At approximately 2:30 p.m., on January 27, 2010, 12-year-old N.S. had just arrived home from school. His mother had recently left for work as a school

crossing guard. As N.S. was in the bathroom, he heard loud pounding on the home's back door. He left the bathroom, looked out and saw two young African-American males, one wearing a red hoodie, the other wearing a green hoodie. N.S. also noticed an older-model, metallic red vehicle in front of his house occupied by a third individual.

{¶3} Concerned that the individuals would harm him if he did not respond, N.S. cracked the door slightly and the man in the red hoodie asked to use the phone. As N.S. opened the door, the man in the red hoodie entered the home and walked to the bathroom. The individual in green followed and, without saying a word, walked directly toward N.S.' sister's room. N.S. subsequently noticed that a third intruder, wearing a blue hoodie, had entered the residence.

{¶4} Initially, the men were silent. N.S., nervous but calm, told the men to "take what you want, just don't kill me." The man in red told N.S. that as long as he cooperated, he would not be hurt. N.S. first led the men downstairs where various electronics were stored. The men then took a large flat-screen television, a Nintendo Wii videogame system, a Playstation 2 videogame system, as well as videogames with storage racks. The items were wrapped in a green blanket.

{¶5} Next, the man in red told N.S. to take the trio to the home's upstairs. After reaching the upstairs entryway, the man in red told N.S. to get on the floor. N.S. complied by crouching down on his knees and placing his head on the floor. As the men left, N.S. was able to see the man in green one last time, noticing the hoodie he was wearing had a "New York Jets" emblem on it. Still upstairs, N.S. heard the sound of a car peeling its tires and driving away. N.S. leapt to his feet quickly and locked the back door. After speaking with his mother, N.S. phoned 911.

{¶6} N.S. placed the call at approximately 2:55 p.m. The boy reported he had just been robbed by three African-American males who left in a metallic red car. N.S.' mother was at the residence when officers arrived at the scene. N.S. spoke with Patrolman David Weber and described the suspects for the officer. N.S. reported that one suspect was wearing a red hoodie and one was wearing a blue hoodie; N.S. provided a bit more detail as to the third suspect; he stated that individual was wearing a green hoodie or jacket with a New York Jets logo on it. He also noted the individual in green wore baggy jeans with distinctive green striping around the pockets and on other areas of the pants. Patrolman Weber relayed the information to dispatch, which broadcasted the descriptions to other officers.

{¶7} At the time of the dispatch, Detective Seargent Jeffrey Cole was at his desk. Because shift changes were in progress, he was worried that too few cruisers would be on patrol. Det. Cole consequently took an unmarked vehicle in the direction of the reported crime. As he drove, he stopped into Hampshire House Apartments on a hunch that the suspects may either live or drop off the stolen items in the complex. With respect to his thought process, Detective Cole testified:

> **{¶8}** The reason I did that, I work off duty security at Hampshire House and during that time last year we were having a lot of crimes in the City of Warren in general, and a couple of suspects had been targeted - - that we had targeted, we're looking at residents in the Hampshire House or frequented the Hampshire House Apartments. We had done an investigation which had led us to the Hamps [sic]

and so just acting on a hunch that this car could be headed down there, I proceeded down to that area.

{¶9} The detective saw nothing as he made an initial pass through the complex. As he was leaving, however, an older-model metallic red car entered Hampshire House Apartments. He observed the driver of the vehicle wearing a red hoodie and the passenger wearing green. The detective re-entered the complex and radioed for back up. Detective Cole watched the vehicle as it parked and observed the two suspects exit and open the trunk. Even though back up had not arrived, the detective left his unmarked vehicle, drew his service weapon, and ordered the two men to put their hands on the car and drop to their knees. The men complied.

{¶10} Two additional officers subsequently arrived and assisted Detective Cole in securing the scene. With the trunk of the vehicle open, a Nintendo Wii, a Playstation 2, a rack full of games, and a green blanket were in plain view. As Sergeant Greg Hoso patted down the suspect wearing green, later identified as appellant, he felt strange bulges in the man's pants and jacket pockets. In these pockets, the officer found jewelry, wires for a game system, a watch box, watches, and a driver's license belonging to N.S.' mother. Appellant also had his social security card on his person.

{¶11} Approximately 20 minutes after the initial dispatch, police escorted the two suspects back to the scene of the crime. The men were removed from the police cruiser and placed in the front yard of N.S.' home. From a front window, N.S. identified the men as two of the three intruders.

{¶12} Appellant was subsequently taken to the police station where he was photographed, and the green, New York Jets jacket he was wearing was inventoried.

After the jacket was removed, at least one photograph depicts appellant wearing a black, hoodie sweatshirt.

{¶13} Appellant was indicted on March 18, 2010 on one count of kidnapping, a felony of the first degree, in violation of R.C. 2905.01(A)(2) and (C)(1); and one count of burglary, a felony of the second degree, in violation R.C. 2911.12(A)(1) and (C). Appellant entered a plea of not guilty and filed a motion to suppress. A hearing was held on the motion and, on August 11, 2010, the trial court overruled the motion. The matter subsequently proceeded to trial.

{¶14} At trial, the aforementioned facts were adduced during the state's case-in-chief. Furthermore, appellant took the stand in his own defense. Appellant testified he did not enter N.S.' home and was never near the residence on the date in question. Rather, he testified he had the property in his pockets because his friend, Shon Thompson, the man in the red hoodie, had just picked him up on Tod Avenue, Warren, Ohio. According to appellant, when he entered the vehicle, he noticed various electronic items and miscellaneous pieces of jewelry. Appellant testified Thompson told him he could have whatever he wanted. Thus, appellant testified, "I started taking all of the stuff that I wanted and putting it in my pockets. * * * A watch, MP3 player, couple of bracelets." Although Officer Hoso testified he found N.S.' mother's driver's license in appellant's pocket, appellant denied this and claimed the officer was lying. Moreover, appellant vehemently denied that the sweatshirt he was wearing under his jacket had a hood.

{¶15} To rebut appellant's testimony, the state submitted appellant's booking photograph, which was admitted into evidence over objection. The photo shows appellant wearing a black sweatshirt with a hood and eyelets for drawstrings.

{¶16} After hearing the evidence, the jury found appellant guilty on both counts and the trial court sentenced appellant to a term of ten years on count one and eight years on count two. The court ran the sentences concurrently to one another. This appeal follows.

{¶17} Appellant's first assignment of error provides:

{¶18} "The trial court erred by denying appellant's motion to suppress on the basis of the unconstitutional show-up identification."

{¶19} Appellate review of a trial court's judgment on a motion to suppress evidence presents mixed questions of law and fact. *Kirtland Hills v. Rinkes*, 11th Dist. Nos. 2010-L-078 and 2010-L-079, 2011-Ohio-2713, ¶13. An appellate court is bound to accept the trial court's factual findings if they are supported by competent, credible evidence. *State v. Urso*, 11th Dist. No. 2010-T-0042, 2010-Ohio-2151, ¶46. If these findings are so supported, the appellate court reviews the trial court's legal determinations de novo. *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, ¶19.

{¶20} Under his first assignment of error, appellant contends the trial court erred when it failed to suppress the results of N.S.' overly suggestive and unreliable show-up identification. We do not agree.

{¶21} [F]or identification testimony to be inadmissible as violative of due process two elements must be present: (1) unnecessarily

> suggestive confrontation and (2) unreliable identification. * * * See *State v. Davis* (1996), 76 Ohio St.3d 107, 1996-Ohio-414. Second, the determination must be made looking at the totality of the circumstances *Neil v. Biggers* (1972), 409 U.S. 188, 196-197, * * *; [*State v.*] *Waddy*, 63 Ohio St.3d [424,] at 439 [(1992)]. The factors to be considered in determining the reliability of the identification are the witness's opportunity to view the defendant, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the witness's certainty, and the time elapsed between the crime and the identification. *Biggers* and *Waddy*. The goal of this inquiry is to determine whether the suggestive procedures used by law enforcement, if any, created a "very substantial likelihood of irreparable misidentification." *State v. Johnson* (1991), 77 Ohio App.3d 212, 217, quoting *Simmons v. United States* (1968), 390 U.S. 377. (Footnote omitted.) *State v. Combs,* 11th Dist. No. 97-L-049, 1998 Ohio App. LEXIS 4525, *10-*11 (Sep. 25, 1998).

{¶22} At the suppression hearing, N.S. testified the thieves were in his home for between seven and ten minutes. He observed all three African-American males, and the evidence indicated N.S. was able to provide a general description of their attire: one wore a red hoodie with baggy jeans; one wore a green hoodie with a "New York Jets" emblem on it, and donned baggy jeans with green stripes; and, finally, one wore a blue hoodie. N.S. also testified that, at the time of the robbery, his home was well-lit and he

had a “good view” of the green-clad man’s face. When asked whether the man in green spoke, N.S. responded in the affirmative, testifying he asked the boy where the Nintendo Wii was located.

{¶23} Approximately 30-40 minutes after the robbery, N.S. testified that officers asked him if he could visually identify “possible suspects.” N.S. agreed and two African-American males, one in a red sweatshirt, one in a green sweatshirt, were taken to N.S.’ residence for a show-up. According to N.S., he peered at the men through his window and was able to identify them by their clothing and faces.

{¶24} Appellant contends N.S.’ testimony relating to the details of his identification at the suppression hearing was significantly different from his testimony at the preliminary hearing. In particular, at the preliminary hearing, N.S. testified he did not get a really good look at the men’s faces; also, in contrast to his suppression hearing testimony, N.S. stated that the individual in green did not speak during the robbery. He further testified that, while he had the best look at the man in red, he observed the face of the man in green for “about two or three seconds” as he walked in the home and also when, later in the robbery, the man in green came “downstairs [to] help with the TV and all my games.” And, at the preliminary hearing, N.S. did not state the police had “possible suspects” for him to identify; rather, he testified “the first Officer * * * said that they had found them and they were bringing them back for me to identify them.”

{¶25} Although there are certain differences between N.S.’ testimony at the two hearings, a comparison of N.S.’ testimony does not reveal deviations that would indicate the show-up was overly suggestive. It is undisputed that N.S. was able to view appellant’s face and clothing during the home invasion and provide a clear and fairly

detailed description of his clothing. Moreover, the identification occurred a reasonably short time after the crimes were committed; at most, 40 minutes. Even if police told N.S. that they caught the actual perpetrators rather than apprehended "possible suspects," the other factors surrounding the show-up demonstrate the identification was not so suggestive that due process was violated.

{¶26} Furthermore, the details surrounding the arrest demonstrate that any error in the show-up was harmless beyond a reasonable doubt. When appellant was apprehended, he had exited a metallic red, older vehicle; he was wearing a green New York Jets jacket and his companion was in a red hoodie. Each of these details matched N.S.' description. And, most significantly, the items recovered from the vehicle and appellant's person were items stolen from N.S.' home, including N.S.' mother's driver's license. We therefore hold that even if the identification could be viewed as suggestive, it was not unduly suggestive; and, regardless of the procedures used by police during the show-up, given the additional circumstances surrounding the arrest, there was no likelihood of misidentification in this case.

{¶27} Appellant's first assignment of error is without merit.

{¶28} Appellant's second assignment of error provides:

{¶29} "The trial court erred by denying appellant's motion to suppress on the basis of the unconstitutional stop and search."

{¶30} Appellant contends Detective Cole's stop was unconstitutional because it was not based upon a reasonable suspicion because there was no evidence that appellant had engaged in or was about to engage in illegal activity. We do not agree.

{¶31} A police officer is entitled to detain a party for investigative purposes so long as he or she has a reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The investigatory detention, however, must be limited in duration and scope and can last only as long as is necessary for an officer to confirm or dispel his or her suspicion of criminal activity. *State v. Holnappy*, 194 Ohio App.3d 444, 2011-Ohio-2995, ¶34 (11th Dist.). It is well-settled that reasonable suspicion requires a minimal level of objective justification, i.e., "something more than an inchoate and unparticularized suspicion or 'hunch.'" *State v. Jones*, 70 Ohio App.3d 554, 556 (2d Dist.1990), citing *Terry*, at 27.

{¶32} In this case, although Detective Cole pulled into Hampshire House Apartments on a hunch, his ultimate seizure of appellant and his companion was premised upon objective facts justifying a reasonable suspicion. As detailed above, the detective knew that the individuals involved in the robbery were African-American males driving an older, metallic red car and the men were wearing a red hoodie, a green hoodie, and a blue hoodie, respectively. As the detective was leaving the apartment complex, he observed such a vehicle moving toward him at a higher rate of speed than permitted in the complex; the detective observed that the vehicle was driven by an African-American male wearing a red hoodie, accompanied by an African-American male in green. After the men exited the vehicle and opened the trunk, the detective confirmed appellant was wearing a green jacket and his companion was wearing a red hooded sweatshirt. These details, coupled with the description of the vehicle, were legally sufficient for the officer to initiate an investigative stop to confirm or dispel his suspicion that the men were involved in the home invasion and theft. Upon doing so, he

discovered many of the items stolen from N.S.' residence situated in plain view inside the vehicle's trunk.

{¶33} As the detective's actions were premised upon a reasonable, articulable suspicion that the individuals in question were participants in a recent crime, the seizure at issue was permissible under *Terry.* Appellant's second assignment of error is without merit.

{¶34} Appellant's third assignment of error asserts:

{¶35} "The trial court erred by failing to grant appellant's motion for a mistrial."

{¶36} Appellant contends the trial court committed error by failing to grant his motion for a mistrial where: (1) the state's witnesses maintained the perpetrator of a burglary and kidnapping was wearing a green hoodie at the time of the crime; (2) the state was in possession of appellant's booking photo showing him in a black shirt; and (3) the state failed to provide appellant the photograph for purposes of preparing his defense.

{¶37} "The declaration of a mistrial is an extreme remedy. 'Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible.'" *State v. Kitcey*, 11th Dist. No. 2007-A-0014, 2007-Ohio-7124, ¶59, citing *State v. Franklin*, 62 Ohio St.3d 118, 127 (1991). Moreover, "[t]he decision whether to grant or deny a mistrial under Crim.R. 33 rests within the sound discretion of the trial court." *State v. Patterson*, 11th Dist. No. 96-T-5439, 1998 Ohio App. LEXIS 2289, *19 (May 22, 1998), citing *Franklin*, *supra*, at 127. A trial court abuses its discretion when its judgment comports with neither reason nor the record. *State v. Tate*, 11th Dist. No. 2010-L-145, 2011-Ohio-6848, ¶21.

{¶38} It is well established that the prosecution has a duty to disclose evidence in its possession which is favorable to the defendant and material either to guilt or to punishment. See Crim.R. 16(B)(5). Here, appellant asserts the state "withheld" his booking photo, evidence appellant argues is exculpatory, depicting him wearing a black hooded sweatshirt. As a result, appellant, citing *Brady v. Maryland,* 373 U.S. 83, 87 (1963), contends the trial court abused its discretion in failing to grant a mistrial. We do not agree.

{¶39} Evidence is "exculpatory" if it is favorable to the accused and, used effectively, could be the difference between conviction and acquittal. *United States v. Bagley*, 473 U.S. 667, 676 (1985). In this case, N.S. consistently claimed each of the intruders was wearing a hoodie. And, germane to this case, N.S. asserted that one intruder was wearing a green New York Jets jacket, which the boy referred to as a green hoodie. Appellant argues the photograph is exculpatory because it shows the hoodie appellant was wearing is black, not green. Appellant is correct that the photograph depicts him wearing a black, rather than green, hoodie. He testified at trial, however, he was wearing no hoodie at all. Given appellant's testimony, it is unclear how a photograph of appellant *wearing* a hoodie, irrespective of its color, would be exculpatory.

{¶40} Regardless of this point, the state introduced two pre-booking photos depicting appellant wearing a green New York Jets jacket over a black sweatshirt; one taken from the front and one from the back. The photo from the front shows appellant, with the Jets coat unzipped, wearing a black sweatshirt that had eyelets, drawstrings, and what appears to be a hood tucked into the green overcoat. The other photo shows

the green coat with what appears to be a hood tucked into the collar. Even though appellant testified that he was not wearing a hooded sweatshirt under his green coat, these pictures independently rebut, if not refute, appellant's contention. We acknowledge the booking photo offered a clearer view of appellant's black hoodie. Still, given the other photos, it was not the only evidence tending to undermine appellant's testimony. In this respect, the admission of the photo could be reasonably deemed cumulative to the previously admitted pre-booking photos.

{¶41} In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. This standard of materiality applies regardless of whether the evidence is specifically, generally or not at all requested by the defense. (*United States v. Bagley* * * *[1985], 473 U.S. 667, followed.) *State v. Johnston*, 39 Ohio St.3d 48 (1988), paragraph five of the syllabus.

{¶42} The photo, which only served to emphasize what two other photos strongly suggested, was ultimately published to the jury and the jury, upon consideration of the evidence in its entirety, found appellant guilty. As a result, we hold the photograph was not specifically material to appellant's guilt or innocence. Thus, the state's failure to disclose it to the defense prior to trial was not improper.

{¶43} Assuming, however, arguendo, that the state should have disclosed the photograph prior to trial, the state's failure to do so did not, in this case, necessitate a mistrial.

{¶44} In *Brady*, *supra* , the United States Supreme Court determined that "[t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilty or to punishment, irrespective of the good faith or bad faith of the prosecution."

{¶45} A *Brady* violation, however, involves the *post-trial* discovery of information that was known to the prosecution, but unknown to the defense. *State v. Wickline,* 50 Ohio St.3d 114, 116 (1990), citing *United States v. Agurs*, 427 U.S. 97, 103 (1976). Because the photo was presented during trial, there could be no *Brady* violation in this case. Appellant's suggestion that the rule in *Brady* requires a mistrial is therefore misplaced.

{¶46} Moreover, Crim.R. 16 not only defines the contours of discovery in the context of a criminal proceeding, it also regulates discovery. As such, Crim.R. 16(L)(1) provides:

> **{¶47}** The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from

introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

{¶48} In this case, the trial judge offered defense counsel the opportunity to seek a continuance to reassess or reconsider appellant's defense strategy; counsel declined. The trial judge further afforded defense counsel the opportunity to call additional witnesses in light of the admission of the photograph; he again declined. Faced with a similar fact pattern, the Court in *Wickline* stated:

> **{¶49}** We find that there were means available to appellant which were less drastic than the panel ordering a new trial. Pursuant to [former] Crim R. 16(E)(3), the panel's discretion to make just orders under the circumstances and the power to order a continuance, were remedies that could have been sought by appellant, but he apparently declined to do so. These remedial powers were sufficient under the circumstances to ensure appellant was fairly tried." *Wickline*, *supra*; *see also State v. Wiles*, 59 Ohio St.3d 71, 80 (1991) ("no prejudice to a criminal defendant results where an objection is made at trial to the admission of undisclosed discoverable evidence on the basis of surprise but no motion for a continuance is advanced at that time.")

{¶50} In light of the foregoing authority, we hold the trial court acted within its sound discretion when it overruled appellant's motion for a mistrial. Appellant's third assignment of error is without merit.

{¶51} Appellant's fourth assignment of error provides:

{¶52} "The trial court abused its discretion by admitting, over the objection of appellant, State's Exhibit 19."

{¶53} A trial judge possesses the discretion to admit and exclude evidence and a reviewing court will reverse an evidentiary ruling only when the trial court abuses its discretion. See, e.g., *State v. Sage*, 31 Ohio St.3d 173 (1987).

{¶54} As discussed *supra*, under appellant's third assigned error, the photo designated as State's Exhibit 19, was not, given appellant's testimony, exculpatory. Moreover, the photo merely buttressed pre-existing evidence that depicted appellant wearing a hoodie. Accordingly, the photo was not material to appellant's guilt or innocence. We therefore hold the trial court acted within its discretion in admitting the photo into evidence.

{¶55} Appellant's fourth assignment of error is without merit.

{¶56} Appellant's fifth assignment of error provides:

{¶57} "The appellant's convictions are against the manifest weight of the evidence."

{¶58} A manifest weight challenge concerns:

{¶59} "[t]he inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible* evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in*

inducing belief." (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting Black's Law Dictionary (6th Ed. 1990), 1594.

{¶60} An appellate court must bear in mind the trier of fact's superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass,* 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should be utilized only in exceptional circumstances, when "the evidence weighs heavily against the conviction." *Thompkins*, *supra*. Hence, a reviewing court will not reverse a conviction if there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Johnson*, 58 Ohio St.3d 40, 42 (1991).

{¶61} Appellant asserts the jury lost its way in convicting him because the state's evidence was inherently unreliable. Appellant contends N.S.' ever-changing description of the individuals that entered his home failed to provide a credible basis to convict him beyond a reasonable doubt on the charges. We do not agree.

{¶62} Even though N.S. routinely stated the perpetrator in green was wearing a green New York Jets hoodie, and the evidence unequivocally demonstrated appellant was wearing a green New York Jets jacket over a black hoodie, the jury was free to draw the inference that N.S. mistakenly believed the hood and the coat to be a single article of clothing. Because the Jets coat was almost entirely green, it would not be unreasonable, especially under the stressful circumstances of a home invasion, for the 12-year-old to describe the attire at issue simply as a green hoodie.

{¶63} Furthermore, as discussed above, N.S. identified appellant and his co-defendant Shon Thompson only 40 minutes after the burglary took place in the course of a valid show-up identification. Appellant and Thompson were arrested after exiting a vehicle matching the description given by N.S. And, after the men were arrested, police recovered the property taken from N.S.' residence, some in the trunk of the metallic red vehicle and some on appellant's person.

{¶64} We acknowledge that appellant's rendition of events differed completely from the state's theory of the case. The jury, however, as the arbiter of witness credibility, was entitled to discount appellant's testimony. Given the circumstances surrounding appellant's arrest, as well as the testimony advanced by N.S., we hold the jury did not lose its way in convicting appellant of burglary and kidnapping.

{¶65} Appellant's fifth assignment of error is therefore without merit.

{¶66} Appellant's sixth and final assignment of error provides:

{¶67} "The trial court abused its discretion by sentencing appellant to a disproportionately long term of incarceration, in violation of his constitutional rights to due process and equal protection."

{¶68} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio established a two-prong analysis for an appellate court reviewing a felony sentence. In the first step, we analyze whether the trial court "adhered to all applicable rules and statutes in imposing the sentence." *Id*. at ¶14. Next, we consider, with reference to the guidelines set forth under R.C. 2929.11 and R.C. 2929.12, whether the trial court abused its discretion in imposing an appellant's sentence. See *Kalish*, *supra*, at ¶19.

{¶69} Appellant does not argue his sentence was contrary to law; rather, he asserts the trial court abused its discretion because the sentence he received for his convictions of kidnapping and burglary was disproportionately severe when compared with similar crimes committed by similar offenders. We do not agree.

{¶70} Appellant was sentenced to a ten-year term of imprisonment on the kidnapping charge and an eight-year term on the burglary charge. The trial court ordered the sentences to run concurrently for an aggregate term of ten years. Appellant claims that, because he received a longer sentence than his co-defendant Thompson, who apparently pleaded guilty, he was penalized for exercising his right to go to trial. We do not agree.

{¶71} At sentencing, the trial court made the following statement on record:

{¶72} All right, I have reviewed the presentence investigation and I am keenly aware of the relative lack of prior record on this and I am also aware that one of the other individual's had a more extensive record and worked out a plea agreement in his case. But I am also keenly aware that when somebody is involved and commits a crime, going through the ordeal of the trial over again is a second bite at the apple of experiencing the situation they were involved with to begin with. Looking at the facts of the case as the Court listened to the testimony and the jury so found, it's one of these situations where it's very difficult for a person who is involved as a victim in this kind of crime to be able to sleep at night not knowing at any given time if they hear some noise whether somebody is

> going to be coming into their house. I know with respect to the first count, which is the Kidnapping, that he was pretty much commandeered from room to room looking for things to steal; taken down to the basement and told to stay there while they stole some additional property, and then told to lay down on the floor where I remember the victim indicated he didn't know if he was going to live or die when he crouched down and put his hands over his head. And as aptly put by the prosecution in this case, took the stand under oath and told a complete fabrication to what the jury found.

{¶73} The tenor and content of the trial court's remarks make it clear that it was not penalizing appellant for exercising his rights. Rather, the trial court selected the underlying sentence based upon multiple factors, not the least of which was appellant's apparent testimonial prevarications. In further support of its sentence, the court identified the emotional trauma the young victim suffered as a result of appellant's criminal behavior, as well as the trauma and fear the victim will likely continue to experience from appellant's actions. And, even though the court highlighted the turmoil and distress N.S. likely experienced in recounting the events at trial, this comment, read in context, served to emphasize the continuing impact of appellant's actions on the young victim. Contrary to appellant's argument, however, the court's monologue did not suggest it was motivated to punish appellant for exercising his right to a jury trial.

{¶74} Appellant could have been sentenced to an aggregate term of 20 years. The court's sentence, therefore, was far less than the maximum. Simply because appellant did not receive the same term or a lesser term than that of his co-defendant

does not demonstrate he was a victim of invidious treatment in violation of his constitutional rights. Rather, this court has held that "[t]here is no requirement that co-defendants receive equal sentences. A trial court has wide discretion to sentence felony offenders, provided it is within the purview of R.C. 2929.11(B)." *State v. Lloyd*, 11th Dist. No. 2002-L-069, 2003-Ohio-6417, ¶21. Appellant's sentence was not identical to his co-defendant's sentence; this does not, however, imply the two terms were necessarily inconsistent. Given the trial court's explanation and the fact that appellant received only one-half the prison time he could have been given under the law, we find no abuse of discretion.

{¶75} Appellant's sixth assignment of error is without merit.

{¶76} For the reasons discussed in this opinion, the appealed judgments entered by the Trumbull County Court of Common Pleas are hereby affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.