

[Cite as *State v. Lowery*, 2007-Ohio-6608.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 21879
vs. : T.C. CASE NO. 06CR159
CHARLES B. LOWERY : (Criminal Appeal from
Common Pleas Court)
Defendant-Appellant :

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O P I N I O N

Rendered on the 7th day of December, 2007.

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Mathias H. Heck, Jr., Pros. Attorney; Johnna M. Shia, Asst.
Pros. Attorney, Atty. Reg. No. 0067685, P.O. Box 972, Dayton,
OH 45422

Attorney for Plaintiff-Appellee

Marshall G. Lachman, Atty. Reg. No. 0076791, 75 North Pioneer
Boulevard, Springboro, OH 45066

Attorney for Defendant-Appellant

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GRADY, J.:

{¶ 1} Defendant, Charles Lowery, appeals from his
conviction

{¶ 2} and sentence for aggravated robbery and having
weapons under disability.

{¶ 3} Defendant was indicted on two counts of aggravated

robbery, R.C. 2911.01(A)(2), each with a three year firearm specification, R.C. 2941.145, one count of unlawful possession of a dangerous ordnance, R.C. 2923.17(A), and one count of having weapons while under a disability, R.C. 2923.13(A)(2). The robbery charges and the weapons charges arise out of different incidents and were severed for purposes of trial.

{¶ 4} Following a jury trial Defendant was found guilty of both aggravated robbery charges and the firearm specifications. Defendant subsequently entered a plea of guilty to the weapons under disability charge in exchange for dismissal of the dangerous ordnance charge. The trial court sentenced Defendant to consecutive four year prison terms on the robbery charges. The court merged the two gun specifications and imposed one additional and consecutive three year prison term. The court also imposed a concurrent one year prison term on the weapons under disability charge, for a total sentence of eleven years.

{¶ 5} Defendant timely appealed to this court from his convictions and sentences.

{¶ 6} With respect to the aggravated robbery charges, the evidence presented at trial demonstrates that on the evening of December 31, 2005, Timothy Rodgers and Wayne Vince were at Rodgers' sister's home located at 905 Troy Street in Dayton

for a New Year's Eve party. At some point that evening Rodgers and Vince walked to the United Dairy Farmers (UDF) store that is just two or three blocks up the street to get more food and drink for the party. As Rodgers and Vince entered the UDF store, Defendant was leaving.

{¶ 7} After Rodgers and Vince made their purchases and left the store, Defendant called out to them from across the street. They went over and spoke to Defendant, who asked if they wanted to buy some marijuana. All three men went back to 905 Troy Street where they sat out on the front porch and passed around a marijuana blunt and drank alcohol. Rodgers briefly went inside the house, and when he came back outside Defendant pulled out a sawed-off shotgun from underneath his coat, pointed it at Rodgers and Vince, and told them he had one more thing he wanted them to do, "break yourself." Rodgers and Vince surrendered their valuables to Defendant, including wallets containing a total of one hundred twenty dollars, and then Defendant took off running. Vince briefly chased Defendant until Defendant fired a shot in Vince's direction. Vince then returned to 905 Troy Street and police were called.

{¶ 8} Dayton police officers arrived on the scene and obtained statements from Rodgers and Vince and a description

of the suspect; a light skinned African-American male, six feet tall, one hundred eighty pounds, wearing a black three quarter length leather coat and a toboggan. When investigating Detective Douglas Baker spoke with Rodgers and Vince on January 9, 2006, he learned that Defendant had been inside the UDF store and he subsequently obtained that store's surveillance videotape, which shows both victims and the suspect.

{¶ 9} On January 15, 2006, Defendant was arrested on unrelated weapons charges. Police recovered Defendant's long black leather jacket and a shotgun from underneath the passenger seat of Defendant's vehicle. Defendant was photographed, and after Detective Baker saw that photo he recognized Defendant as the man in the UDF surveillance videotape. Detective Baker then prepared a photospread using Defendant's photograph and showed that photospread on separate days to Rodgers and Vince, who both identified Defendant as the robber.

FIRST ASSIGNMENT OF ERROR

{¶ 10} "THE JURY'S VERDICTS SHOULD BE REVERSED AS THEY WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 11} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing

inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563, unreported. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 12} "[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 lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins, supra*.

{¶ 13} In order to find that a manifest miscarriage of justice occurred, an appellate court must conclude that a guilty verdict is "against," that is, contrary to, the manifest weight of the evidence presented. See, *State v. McDaniel* (May 1, 1998), Montgomery App. No. 16221. The fact that the evidence is subject to different interpretations on the matter of guilt or innocence does not rise to that level.

{¶ 14} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (August 22, 1997), Montgomery App.No.

16288, we observed:

{¶ 15} "[b]ecause the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *Id.*, at p. 4.

{¶ 16} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 17} As support for his claim that his aggravated robbery convictions are against the manifest weight of the evidence, Defendant points to several inconsistencies in the testimony of the two victims, Rodgers and Vince. These inconsistencies are largely immaterial and go to the credibility of the witnesses, rather than the elements of the offenses of which Defendant was convicted.

{¶ 18} Both victims testified at trial that they first

encountered Defendant on the way home from the UDF store, but they told police investigators that they met Defendant on the way to the UDF. The victims also differed in their estimates as to the time the robbery occurred. And, while Rodgers testified that he lived at 905 Troy Street, Vince testified that Rodger's sister lived at 905 Troy Street and that Rodgers lived at 909 Troy Street. Rodgers denied smoking marijuana on an occasional basis, Vince admitted he did so, and further testified that Rodgers also occasionally smokes marijuana.

{¶ 19} Rodgers and Vince both testified that at one point Rodgers went inside the house, leaving Vince alone with Defendant on the front porch. But Rodgers testified that he went inside the house to get cigarettes while Vince testified that Rodgers went inside to get a pen and paper to record Defendant's phone number for possible future drug dealings.

{¶ 20} Rodgers testified that no one else came out onto the porch while Defendant was robbing him and Vince. Vince testified that another man named Brandon came out onto the porch while Defendant was holding the gun on them.

{¶ 21} Rodgers testified that as Defendant fled following the robbery, he turned and fired the gun at Rodgers and Vince. Rodgers had not said that in his earlier statements to

police. Vince testified that he chased Defendant until Defendant stopped to reload his gun, but in his earlier statements to police Vince said he chased Defendant but lost him on Leo Street.

{¶ 22} These inconsistencies implicate only the credibility of the witnesses, not the conduct of Defendant relative to the essential elements of this aggravated robbery offense. On that point the testimony of the two victims is consistent. The credibility of the witnesses and the weight to be given to their testimony was for the trier of facts to decide, and they were free to believe all, part or none of the testimony of each witness. *DeHass*.

{¶ 23} Defendant testified in his own defense and admitted being at the crime scene at 905 Troy Street with Rodgers and Vince for the purpose of collecting a debt for another man, Anthony Ellison. Defendant further admitted asking Vince for money, but denied demanding it or any other valuables at gunpoint. The jury did not lose its way simply because it chose to believe the State's witnesses rather than Defendant's version of the events. The guilty verdicts are not contrary to the testimony of the two victims, Rodgers and Vince.

{¶ 24} Defendant also complains about the lack of physical evidence to support his aggravated robbery convictions, such

as fingerprints on the shotgun that was used. Detective Baker explained that he did not request that the shotgun be fingerprinted because it was not recovered until weeks after this robbery occurred. Furthermore, Chris Monturo, of the Miami Valley Regional Crime Lab, testified that there was only about a one in twenty chance that any identifiable prints would be located on the gun.

{¶ 25} With respect to that sawed-off shotgun that was used during this robbery, the State contended that Defendant had that weapon concealed inside his three quarter length coat while he was inside the UDF and during the thirty minutes he was with Rodgers and Vince on the front porch at 905 Troy Street. Defendant claims that it was not reasonable for the jury to believe that, because the gun recovered from Defendant's car was twenty inches long and weighed between five and eight pounds. Defendant also claims that the UDF surveillance video and the testimony of UDF store clerk, Trisha Pultz, does not support the claim that Defendant had the shotgun concealed on his person while he was inside the store. Detective Baker explained to the jury, however, exactly how Defendant could have concealed that shotgun inside his long coat, and Baker opined that the UDF video depicts body language by Defendant consistent with concealing a weapon

inside his coat on his left side. Once, again, the credibility of the witnesses and the weight to be given to their testimony was for the trier of facts (jury) to determine. *DeHass*.

{¶ 26} Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the jury lost its way in choosing to believe the State's witnesses rather than Defendant or his witnesses, or that a manifest miscarriage of justice has occurred. Defendant's convictions are not against the manifest weight of the evidence.

{¶ 27} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 28} "THE COURT'S IMPOSITION OF NON-MINIMUM, CONSECUTIVE SENTENCES IS UNCONSTITUTIONAL AND MUST BE REVERSED."

{¶ 29} Citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, Defendant argues that the trial court violated the rule of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, and his Sixth Amendment right to a jury trial when it relied upon judicial findings of fact required by R.C. 2929.14(B) and (E)(4), in order to justify imposing greater than minimum and consecutive sentences in this case.

{¶ 30} Defendant was sentenced in this case several months after the decision in *Foster* and years after the decision in

Blakely. A review of the sentencing hearing discloses that Defendant failed to raise his *Blakely* objection in the trial court. Therefore, he has forfeited his right to argue that issue on appeal. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642. In any event, the trial court's sentence in this case is not based upon any of the findings that the court is mandated by R.C. 2929.14(B) or (E)(4) to make, and therefore *Foster* and *Blakely* are inapplicable. No plain error is demonstrated. *Payne*.

{¶ 31} Defendant' second assignment of error is overruled.

The judgment of the trial court will be affirmed.

BROGAN, J. And DONOVAN, J., concur.

Copies mailed to:

Johnna M. Shia, Esq.
Marshall G. Lachman, Esq.
Hon. Dennis J. Langer