[Cite as *State v. Erks*, 2016-Ohio-2739.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA3611
vs.	:	
CHRISTOPHER R. ERKS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Bryan Scott Hicks, Lebanon, Ohio for appellant.[1]

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Shane Tieman & Jay S. Willis, Scioto County Assistant Prosecuting Attorneys, Portsmouth, Ohio for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 4-12-16
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. A jury found Christopher R. Erks, defendant below and appellant herein, guilty of (1) aggravated robbery in violation of R.C. 2911.01(A)(3)/(C); (2) robbery in violation of R.C. 2911.02(A)(2); and (3) assault in violation of R.C. 2903.11(A)(1)/(D)(1). Appellant assigns the following errors for review:[2]

FIRST ASSIGNMENT OF ERROR:

[1]Different counsel represented appellant during the trial court proceedings.

[2] Appellant did not include in his brief a separate statement of the assignments of error. See App.R. 16(A)(3). We take the assignments of error from the "table of contents."

"THE COURT ABUSED ITS DISCRETION IN ALLOWING JOSHUA MOORE TO TESTIFY."

SECOND ASSIGNMENT OF ERROR:

"THE VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE AS WELL AS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 2} In the early evening of July 6, 2013, Bruce Blanton was walking home from his mother's house when appellant approached him and asked for money. After Blanton informed appellant that he would not give him any money, appellant struck him, kicked him, grabbed his wallet and ran off. Blanton suffered severe injuries that resulted in two visits to the Southern Ohio Medical Center (SOMC) for treatment.

{¶ 3} Subsequently, the Scioto County Grand Jury returned an indictment that charged appellant with the aforementioned offenses. At the jury trial, Blanton identified appellant as the assailant. Also, both Blanton and Dr. Ron Miller, an emergency medicine physician at SOMC, testified about the injuries inflicted during the attack.

{¶ 4} Portsmouth Police Officer Troy Edelman also testified at trial that, after he arrived at the crime scene, Blanton identified appellant as the attacker. Officer Aaron Cooper testified that he has known appellant since childhood, and when he arrived on the scene of appellant's arrest, appellant admitted that he assaulted Blanton, although he denied stealing his wallet.

{¶ 5} The gist of the defense case was that Blanton was left dazed and confused after an attack by a "black man," whom appellant described as a "big fellow" and "probably 5'10", 5'11", about 200 pounds." Appellant and his girlfriend, Brandi Potter, both testified that they came upon Blanton during the assault by this "black man," and that appellant leaped to the victim's

rescue and beat away the assailant. Appellant later denied that he and his girlfriend "concocted [the] whole story" about the "black man."

{¶ 6} On rebuttal, the State introduced the testimony of Joshua Moore, who temporarily resided next to appellant in an adjoining cell at the Scioto County Jail. The witness related that he overheard appellant admit to his girlfriend that he assaulted, and took the wallet from, someone from whom he had previously been "[pan-handling]." Moore also heard appellant and Potter going over the story that they intended to tell the jury about a "black man" being the perpetrator.

{¶ 7} In the end, after hearing all of the evidence, the jury returned guilty verdicts on all three charges. The trial court determined, inter alia, that the charges should merge and the State elected to proceed to sentencing solely on the aggravated robbery charge. The court thereupon sentenced appellant to serve ten years in prison. This appeal followed.

I

{¶ 8} In his first assignment of error, appellant asserts that the trial court erred by allowing Moore to testify for the State as a rebuttal witness.

{¶ 9} Crim.R. 16(I) requires the parties to a criminal proceeding to "provide to opposing counsel [with] a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal" "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 the court may 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." (Emphasis added.) Id. at (L).

{¶ 10} It is undisputed that Moore's name did not appear on the State's witness list prior to the trial. However, it is also undisputed that the State did not know of that witness's existence until the trial was under way.[3] We do not believe that this amounted to a failure to comply with Crim.R. 16, such that Moore's testimony should have been excluded under subsection (L) of that rule. Rather, the State disclosed the existence of this witness at its earliest possible opportunity. Appellant cites no authority to cover this factual scenario, and we are aware of none from our own research.

{¶ 11} We also hasten to add that appellant was present, in the court room, when the parties discussed this matter before the second day of trial. Although appellant's girlfriend had already testified that Blanton's assailant was a "black man," appellant had not. Appellant nevertheless chose to offer testimony about the mystery assailant, even though he knew that the State had a rebuttal witness from an adjoining jail cell. We acknowledge the defense did not know precisely what Moore would say if called as a witness, but had the opportunity to interview Moore prior to his testimony. Appellant admits in his brief that the trial court gave trial counsel the opportunity to conduct, what he characterizes as a "hallway interview" with Moore, before he testified. Thus appellant had the opportunity, albeit brief, to speak with Moore and to learn about the substance of his testimony. Thus, defense counsel and appellant were aware before appellant testified that Moore could be called as a rebuttal witness. However, appellant's choice

[3] Indeed, appellant candidly concedes in his brief "there is no allegation that the failure to disclose was willful. Although the State disclosed the name in the middle of the trial, the State was not aware of the witness prior to the start of trial." (Emphasis added). The trial transcript also indicates that, during the first day of trial, Moore contacted the Scioto County Prosecutor's office with information concerning appellant. Larry Gray, an investigator for the Prosecutor's office, was dispatched to speak with Moore, but Gray had not returned from that meeting by the time the prosecution had to return to trial after a lunch break. At the end of the first day of trial, those assistants returned to find Gray's summary of his meeting with Moore. Thus, the first opportunity the State could have informed the defense about Moore was the morning of the second day of trial. Apparently, they did just that.

to testify, despite his knowledge of this new, "surprise" witness, further opened the door for the State to call the witness in rebuttal.

{¶ 12} In any event, even if we assume arguendo that the State's actions violated Crim.R. 16, prosecutorial violations of this rule are generally reversible, inter alia, when the "failure to disclose was a willful violation." *State v. Joseph*, 73 Ohio St.3d 450, 458, 653 N.E.2d 285 (1995); also see *State v. Huff*, 4th Dist. Scioto No. 14CA3596, 2015-Ohio-5589, at ¶22. Here, appellant has conceded that these unusual circumstances are not indicative of a willful violation. Thus, we would find no reversible error.

{¶ 13} Ohio courts have held that the decision to apply penalties for violations of Crim.R. 16 lie in a trial court's sound discretion, and that its decision should not be reversed absent an abuse of that discretion. See *State v. Diamond*, 135 Ohio St.3d 343, 986 N.E.2d 971, 2013- Ohio-966, at ¶19; *State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689 (1983) at the syllabus. An abuse of discretion is more than an error of law or judgment; it implies that a court's attitude is unreasonable, arbitrary or unconscionable. *State v. Herring*, 94 Ohio St.3d 246, 255, 762 N.E.2d 940 (2002); *State v. Clark*, 71 Ohio St.3d 466, 470, 644 N.E.2d 331 (1994). Appellate courts should not merely substitute their judgment for the trial court on discretionary matters. *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 732, 654 N.E.2d 1254 (1995); *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

{¶ 14} For all these reasons, we find no abuse of discretion in the trial court's decision to allow Moore to testify as a rebuttal witness. Accordingly, we hereby overrule appellant's first assignment of error.

II

{¶ 15} In his second assignment of error, appellant asserts that his conviction is against both the sufficiency of the evidence and the manifest weight of the evidence. The underlying premise for these arguments is that because the victim was left dazed and confused from the attack, his identification of appellant as his attacker is questionable. Appellant also calls into question Officer Cooper's testimony that appellant admitted to the attack, but denied the robbery.

{¶ 16} Our analysis of these two arguments begins with the proposition that although related, the sufficiency of the evidence and the manifest weight of the evidence are conceptually different legal issues. See e.g. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012– Ohio–2179, 972 N.E.2d 517, ¶23 (sufficiency of evidence is quantitatively and qualitatively different from the weight of the evidence); *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), syllabus.

{¶ 17} When reviewing for the sufficiency of the evidence, an appellate court's inquiry focuses primarily on adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *Thompkins*, 78 Ohio St.3d at 386; *State v. Jenks*, 61 Ohio St.3d 259, 274, 574 N.E.2d 492 (1991). The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in a light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense beyond a reasonable doubt. *Jenks*, 61 Ohio St.3d at 273; *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Further, reviewing courts are not asked to assess if the "state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶ 18} In the case sub judice, we readily conclude that sufficient evidence was adduced at trial for the jury to find appellant guilty of the offense of aggravated robbery. R.C. 2911.01(A)(3) provides that "[n]o person, in attempting or committing a theft offense shall [i]nflict, or attempt to inflict, serious physical harm on another." Blanton testified that appellant stole his wallet and inflicted such a severe beating that required two separate hospital visits to treat his injuries. If believed by the trier of fact, this evidence is sufficient to prove the elements of aggravated robbery.

{¶ 19} Concerning the issue of the manifest weight of the evidence, appellate courts will generally not reverse a conviction on that ground unless after a review of the entire record, the court weighs the evidence and all reasonable inferences, and determines whether in resolving conflicts in the evidence it is obvious that the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. See *State v. Earle*, 120 Ohio App.3d 457, 473, 698 N.E.2d 440 (11th Dist.1997); *State v. Garrow*, 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814 (4th Dist.1995). Just as we found no merit under appellant's sufficiency of the evidence argument, we likewise find no merit here.[4]

{¶ 20} The premise underlying this part of the assignment of error is that (1) the victim was dazed and confused after the attack, (2) appellant was drunk and gave a very general statement to Officer Cooper, and (3) appellant's denial was more believable. Generally, evidence weight and witness credibility are issues that the trier of fact must determine. See *State*

[4] Although we have concluded the verdict is supported by sufficient evidence, a "sufficiency" question is subsumed within a "manifest weight" challenge. That is to say, if a jury's verdict is supported by the manifest weight of the evidence, that verdict is, ipso facto, supported by sufficient evidence. See *State v. Gravely*, 188 Ohio App.3d 825, 2010–Ohio–3379, 937 N.E.2d 136, at ¶46 (10th Dist.); *State v. Green*, 10th Dist. Franklin No. 11AP–526, 2012-Ohio-950, at ¶7.

v. Dye, 82 Ohio St.3d 323, 329, 695 N.E.2d 763 (1998); *State v. Williams*, 73 Ohio St.3d 153, 165, 652 N.E.2d 721 (1995). The rationale for this position is that the jury is better positioned than an appellate court to view the witnesses, to observe their demeanor, gestures and voice inflections and to use those observations to weigh the credibility of their testimony. See *Myers v. Garson*, 66 Ohio St.3d 610, 615, 614 N.E.2d 742 (1993); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273, 1276 (1984). Also, the trier of fact is free to believe all, part or none of the testimony of any witness who appears before it. *State v. Nichols*, 85 Ohio App.3d 65, 76, 619 N.E.2d 80 (4th Dist., 1993). *State v. Harriston*, 63 Ohio App.3d 58, 63, 577 N.E.2d 1144 (8th Dist., 1999). This is why reviewing courts are reluctant to second-guess a trier of fact on credibility issues. *State v. Riggs*, 4th Dist. Washington No. 02CA74, 2013-Ohio-1711, at ¶13.

{¶ 21} In the case at bar, the jury heard 911 Dispatcher Kathy Groves relate how Blanton identified appellant as his attacker during his telephone call to the authorities. Also, Officer Edelman related that Blanton identified the appellant as his attacker. The victim himself not only identified appellant as his attacker, but also related how appellant had asked him for money prior to the attack. Further, the victim made no mention to the police of any "black man" at the crime scene. Finally, Officer Cooper testified that appellant admitted that he assaulted appellant, although he denied stealing his wallet. Apparently, the jury found this testimony to be credible. We believe, after our review, that ample competent, credible evidence supports the jury's conclusion.

{¶ 22} We readily acknowledge that appellant testified that he was not the attacker, but instead valiantly fought a "black man" who was attacking the victim. Appellant's girlfriend also

corroborated this version of the events. However, questioning the existence of bias in any testimony is a legitimate factor a fact-finder may consider when weighing witness credibility.

{¶ 23} For all of these reasons, we cannot conclude that appellant's conviction is against the manifest weight of the evidence. Accordingly, we hereby overrule his second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and judgment be entered in favor of appellee. Appellee to recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Hoover, J.: Concur in Judgment & Opinion For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.