[Cite as *State v. Henderson*, 2009-Ohio-4157.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DANTE HENDERSON

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2008 CA 00245

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 00732
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 17, 2009

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Dante Henderson appeals his conviction on nine counts of aggravated robbery and one count of attempted aggravated robbery entered in the Stark County Court of Common Pleas.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On May 23, 2008, the Stark County Grand Jury indicted appellant, Dante Henderson, on nine (9) counts of aggravated robbery, in violation of R.C. 2925.11 and one count of attempted aggravated robbery. Each count was accompanied by a fIrearm specification.

{¶4} Said charges arose from an investigation involving a series of robberies or attempted robberies which took place in Massillon between June, 2007, and April, 2008, which included New Home Sing Restaurant, Check into Cash, BP Oil, Pizza Pan, Papa John's, Massillon Speedway in addition to a Canton Sheetz station and a Perry Township Sheetz station.

{¶5} The robberies at Pizza Pan, BP Oil and Speedway were captured on video and revealed that the perpetrator in both the Pizza Pan and Speedway robberies wore the same black flight jacket and face covering.

{¶6} Massillon Police Department Detectives Kenneth Hendricks and Thomas Solinger worked on the investigation.

{¶7} A witness at the Perry Township Sheetz station was able to obtain the license plate number from the car driven by the perpetrators. The plate was registered to Karen Brown, who has two sons, Dante Henderson and Derrick Brown. Based on this

information, Det. Solinger began looking at Brown's sons as suspects, specifically Dante Henderson.

{¶8} One month later, Check into Cash was robbed again. Dt. Solinger believed Dante Henderson was again the perpetrator. He knew that Henderson had a girlfriend in Canton and suspected he would go there after the robbery. Det. Solinger contacted Canton Police Detective Greenfield and requested that Canton officers go to Henderson's girlfriend's apartment to see if Henderson was there.

{¶9} Henderson and his girlfriend were both present at the apartment when police arrived. Greenfield, Hendricks and Solinger obtained consent to search the apartment from Henderson and his girlfriend. During the search officers found the flight jacket Henderson wore during the Pizza Pan and Speedway robberies, the head scarves that he used to conceal his face, a loaded Ruger .9 millimeter weapon, .9 millimeter ammunition and cash in a dresser drawer totaling within ten dollars of what had been taken from Check into Cash two hours earlier.

{¶10} Henderson was transported to the Massillon Police Department. There, he was provided with his Miranda warnings for a third time. Henderson waived his rights and agreed to speak with Hendricks, Solinger and Detective Barker. Henderson gave a 27-minute taped statement. The officers assured Henderson that they would tell the prosecutor that he cooperated with them and Henderson agreed that this was the only promise officers had made in exchange for his confession. Hendricks then read Henderson's Miranda warnings again, and Henderson acknowledged that he understood each right and desired to waive those rights.

{¶11} Henderson admitted to committing all ten robberies. He explained that he covered his face with a "do-rag" for each robbery. He also admitted he didn't use the same weapon each time. The gun he used in the New Home Sing robbery was later confiscated by the Akron Police department when he was arrested for having weapons under disability. After that, he used a Ruger .9 millimeter or a chrome .22 or .25 that belonged to "Duke," his accomplice in the BP and Speedway robberies. When asked what kind of weapon he used in the Papa John's robbery, Henderson said he couldn't remember, but thought it was the black automatic pistol.

{¶12} On June 17, 2008, appellant filed a motion to suppress the statements he made to law enforcement, arguing that neither his statements nor his waiver of his *Miranda* rights was voluntary. A hearing was held on July 21, 2008. By judgment entry filed September 3, 2008, the trial court denied the motion.

{¶13} Appellant entered guilty pleas on four of the aggravated robbery counts and four of the attendant firearm specifications as set forth in the indictment.

{¶14} On September 25, 2008, a bench trial commenced on he remaining counts. The jury found appellant guilty as charged an all six counts and on all but one of the firearm specifications. By judgment entry filed September 29, 2008, the trial court sentenced appellant to an aggregate term of twenty-four (24) years in prison.

{¶15} Appellant filed an appeal and this matter is now before this Court for consideration. Assignments of error are as follows:

ASSIGNMENTS OF ERROR

{¶16} "I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

{¶17} "II. THE TRIAL COURT'S FINDING OF GUILT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I.

{¶18} Appellant claims the trial court erred in denying his motion to suppress. We disagree.

{¶19} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116

S.Ct. 1657, 1663, "…as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶20} Appellant argues the trial court erred in finding that his confession was voluntary, arguing that the promises made to him "stripped [him] of his 'capacity for self determination'."

{¶21} The inquiry as to whether a waiver of one's *Miranda* rights is made voluntarily, knowingly and intelligently is two-fold.

{¶22} "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *State v. Davie* (Dec. 27, 1995), 11th Dist. No. 92-T-4693, unreported (quoting *Moran v. Burbine* (1986), 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410). In evaluating the totality of the circumstances, the court should consider "'the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.' " *State v. Brinkley,* 105 Ohio St.3d 231, 2005-Ohio-1507 (quoting *State v. Edwards* (1976), 49 Ohio St.2d 31, paragraph two of the syllabus) and (citing *State v. Green,* 90 Ohio St.3d 352, 366, 2000-Ohio-182; *State v. Eley,* 77 Ohio St.3d 174, 178, 1996-Ohio-323).

{¶23} "[T]he burden of showing admissibility rests, of course, on the prosecution." *Brown v. Illinois,* 422 U.S. 590, 604 (1975). The prosecution bears the burden of proving, at least by a preponderance of the evidence, the *Miranda* waiver, *Colorado v. Connelly,* 479 U.S. 157, 169 (1986), and the voluntariness of the confession, *Lego v. Twomey,* 404 U.S. 477, 489 (1972).

{¶24} Based on the totality of the circumstances, we agree with the trial court that appellant did knowingly, intelligently and voluntarily waive his *Miranda* protections.

{¶25} In the case sub judice, appellant contends that the police officers promised him leniency in exchange for his confession.

{¶26} Improper inducement occurs when "the defendant is given to understand that he might reasonably expect more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement." *United States v. Johnson* (6th Cir. 2003), 351 F.3d 254, 262.

{¶27} With regard to any promises made to appellant, Detective Hendricks testified as follows:

{¶28} "Det. Hendricks: We tell the Judge, the Jury, the Prosecutor of your cooperation, what you did to assist us in closing the investigations.

{¶29} "Defense Counsel: What good does that do somebody?

{¶30} "Det. Hendricks: Shows that they are being honest and taking charge of their - taking responsibility for their actions and trying to help.

{¶31} "Defense Counsel: But, of course you knew that these gun specifications have to be served consecutively, didn't you?

{¶32} "Det. Hendricks: That's correct.

{¶33} "Defense Counsel: And so you're telling him we're going to give you, we're going to let the Judge and Prosecutor and everybody know that you cooperated?

{¶34} "Det. Hendricks: Yes.

{¶35} "Defense Counsel: But did you also know that that really didn't matter?

{¶36} "Det. Hendricks: Mattered for him maybe that he was being honest about it in closing it up, and getting it done, getting the whole thing out of the way in a certain amount of time.

{¶37} "Defense Counsel: Because you later told him specifically, didn't you, that we got you on this one, we know that we can prove this one. If you tell us what you did on the other ones and let us clear these things, we can clear them up all at once?

{¶38} "Det. Hendricks: Correct.

{¶39} "Defense Counsel: Rather than going back and you serve this time and you get back out and we will file another one?

{¶40} "Det. Hendricks: That's correct.

{¶41} "Defense Counsel: And serve that time?

{¶42} "Det. Hendricks: Yes, he was told he could.

{¶43} "Defense Counsel: So what you were describing for him was in fact, that it would be consecutive sentences if he didn't tell you?

{¶44} "Det. Hendricks: Correct, because we had enough to prove the other things. We can do one and talk to us about the others, then we can charge you with the others separately.

{¶45} "Defense Counsel: But that was somewhat of a bluff, wasn't it?

{¶46} "Det. Hendricks: No, sir.

{¶47} "Defense Counsel: But what you described to him was if you don't help us, we're going to make you serve these one after the other?

{¶48} "Det. Hendricks: We can go that route, yes.

{¶49} "Defense Counsel: But if you admit to it, clear these up, we can take care of this all at once?

{¶50} "Det. Hendricks: All done, out of the way, all closed up instead of going one at a time.

{¶51} "Defense Counsel: Did you ever mention any kind of time? Did you ever mention to him that these gun specs if you add them one after the other is 30 years?

{¶52} "Det. Hendricks : No. I wouldn't have a clue how many years total...". (T. at 30-32).

{¶53} On redirect, Hendricks testified:

{¶54} "Prosecutor: Did you ever talk about consecutive or concurrent time with him, those words?

{¶55} "Det. Hendricks: No.

{¶56} "Prosecutor: Did you ever talk about gun specs and time on gun specs?

{¶57} "Det. Hendricks: Uh-huh.

{¶58} "Prosecutor: Was this in response to a question or how did that come about?

{¶59} "Det. Hendricks: In response to his questions.

{¶60} "Prosecutor: So were you answering questions regarding time and gun specs?

{¶61} "Det. Hendricks : Yes.

{¶62} “Prosecutor: And did you ever make a promise that we will wrap them up into one charge?

{¶63} “Det. Hendricks: No, not one charge.” (T. at 36-37).

{¶64} The trial court also heard the following testimony from appellant with regard to why he chose to give a statement to the police:

{¶65} “Defense Counsel: Why did you change your mind? Why did you agree to speak with Detective Hendricks and the other officers about these robberies?

{¶66} “Appellant: For the fact that he said that if you work with me, we will, I'll make sure and run them concurrent, concurrent. That's why.

{¶67} “Defense Counsel: And had you begun to work with him?

{¶68} “Appellant: He was going to run them consecutive.

{¶69} “Defense Counsel: Now, did he use those words or - -

{¶70} “Appellant: He used concurrent. He used concurrent. He said if he didn't say consecutive, he said, I'm going to run them concurrent but if you don't, I'm going to charge you with it and then if you get done with them, at that time I'm going to charge you with another one, so forth and so on.

{¶71} “Defense Counsel: And so is that why you waived your right to an attorney?

{¶72} “Appellant: Yes.” (T. at 48).

{¶73} Appellant challenges the trial court’s determination that the officers’ version of events was more credible than appellant’s version.

{¶74} In *State v. Brown* (2003), 100 Ohio St.3d 51, 2003-Ohio-5059, the Ohio Supreme Court noted “[I]t is well established that at a suppression hearing, ‘the

evaluation of evidence and the credibility of witnesses are issues for the Trier of fact.' *State v. Mills* (1992), 62 Ohio St.3d 357, 366, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. The trial court was free to find the officers' testimony more credible than appellant's. We therefore defer to the trial court's ruling regarding the weight and credibility of witnesses. *State v. Moore* (1998), 81 Ohio St.3d 22, 31." Id. at 55, 2003-Ohio-5059 at ¶ 15.

{¶75} Upon review, we do not find that the promises made to appellant that the police would inform the prosecutor of his cooperation resulted in improper inducement, nor does the record before us establish that appellant's "will was overborne" by the officers' activities in this case.

{¶76} Based on the foregoing, we find the trial court did not err in denying appellant's motion to suppress.

{¶77} Assignment of Error I is denied.

II.

{¶78} Appellant claims his conviction was against the sufficiency and manifest weight of evidence. We disagree.

{¶79} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "The relevant 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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the

evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶80} After pleading guilty to four counts of aggravated robbery, appellant was convicted of five counts of aggravated robbery and one count of attempted aggravated robbery.

{¶81} Appellant claims that he is the victim of mistaken identity, arguing that the robberies were committed by different people because different weapons were used to commit some of the robberies.

{¶82} In addition to the testimony of the robbery victims who were able to give a physical description which matched that of appellant but who were unable to identify their assailants because their faces were concealed, the trial court also had before it the surveillance video showing the perpetrator in two of the robberies wearing a black flight jacket matching the one recovered at appellant's girlfriend's apartment. Head scarves, or "do-rags" matching those used in the robberies were also found there. Additionally, the license plate number of the get-away vehicle came back as registered to appellant's mother.

{¶83} Appellant could also be placed at the scene of the Speedway robbery because he returned looking for a set of keys he had lost there, where he encountered

and identified himself to police officer Brian Muntean who was on the scene investigating the robbery.

{¶84} The trial court also had before it appellant's confession.

{¶85} Upon review, we find sufficient circumstantial evidence that appellant committed aggravated robbery and attempted aggravated robbery, and further find no manifest miscarriage of justice.

{¶86} Assignment of Error II is denied.

{¶87} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

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JUDGES

JWW/d 806

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DANTE HENDERSON	:	
Defendant-Appellant	:	Case No. 2008 CA 00245

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

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JUDGES