**[Cite as *State v. Gloss*, 2010-Ohio-4059.]**

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| | : | JUDGES: |
| STATE OF OHIO | : | Julie A. Edwards, P.J. |
| | : | Sheila G. Farmer, J. |
| Plaintiff-Appellee | : | Patricia A. Delaney, J. |
| | : | |
| -vs- | : | Case No. 2009 CA 00213 |
| | : | |
| | : | |
| BRIAN A. GLOSS | : | O P I N I O N |

Defendant-Appellant

| | |
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| CHARACTER OF PROCEEDING: | Criminal Appeal from Stark County Court of Common Pleas Case No. 2009 CR 0265 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | August 23, 2010 |

APPEARANCES:

For Plaintiff-Appellee

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*Edwards, P.J.*

**{¶1}** Defendant-appellant, Brian Gloss, appeals his conviction and sentence from the Stark County Court of Common Pleas on six counts of robbery, three accompanied by repeat violent offender specifications. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

**{¶2}** On March 16, 2009, the Stark County Grand Jury indicted appellant on three counts of robbery in violation of R.C. 2911.02(A)(2), felonies of the second degree, and three counts of robbery in violation of R.C. 2911.02(A)(3), felonies of the third degree. The second degree felonies were accompanied by repeat violent offender specifications. At his arraignment on March 20, 2009, appellant entered a plea of not guilty to the charges.

**{¶3}** On May 18, 2009, appellant filed a Motion to Suppress his pretrial identification, arguing that the same was unnecessarily suggestive. Following a hearing, such motion was denied.

**{¶4}** Subsequently, a jury trial commenced on July 27, 2009. The following testimony was adduced at trial.

**{¶5}** On September 10, 2008, Ashley Calderone was working at the Check into Cash store located near the Canton Centre Mall. Calderone testified that close to closing time, a man wearing mirror image glasses and a ball cap walked in and said "Give me the fucking money" in a firm voice. Trial Transcript at 376. The man then jumped over the counter at Calderone. When Calderone opened the cash register drawer, the man grabbed the money from the same. He also grabbed money that was

sitting in plain view on Calderone's desk. The man, who was wearing blue jeans, a T-shirt and a dark colored ball cap, then left the store. In all, the man took between $4,000.00 and $5,000.00.

**{¶6}** Calderone testified that she also was working at the same Check into Cash store on October 28, 2008. A security guard who had been hired after the above incident was also with her. Calderone testified that the same man walked in at around 1:00 p.m. or 2:00 p.m. and rushed up to the counter. According to Calderone, the man then jumped over the counter and demanded money. When the security guard drew a gun on the man, the man, who was wearing a tan Carhartt type jacket, left. Calderone testified that the store had a security camera and that she gave the video from both incidents to the police. Calderone picked appellant out of the photo array after the second incident and also identified appellant in court as the person who had robbed her store on both dates.

**{¶7}** Nathan Mackey testified that, on September 26, 2008, he was working at the Check into Cash store in Hartville when, at around 11:00 a.m., a man walked in quickly behind him and demanded all the cash. The man, who Mackey testified was approximately six feet tall and was "scruffy", told Mackey in a hurried voice to hurry up and told him not to touch anything. Trial Transcript at 301. The man was wearing jean shorts, either a gray or blue shirt, sunglasses and had a bandana on his head. After Mackey gave him the money, the man left. Approximately two or three months later, Mackey was shown a photo array. Mackey picked appellant out of the array and also identified appellant at trial as the man who had committed the robbery.

**{¶8}** Testimony was adduced at trial that Christopher Sible was working at the Check into Cash store on Dressler Road on October 4, 2008, with Stephen Wahl. Approximately ten minutes before closing time, a man came in and demanded all of the store's money. Sible testified that the man was wearing a bandana around his head and sunglasses and "[l]ooked kind of scruffy. Looked like he had a couple of days of beard growth." Trial Transcript at 174. Sible testified that he thought that the man was joking until the man said "no, you can give me all the fucking money" in a "very authoritative voice." Trial Transcript at 174. Sible and Wahl then emptied the registers. The man then asked them where "the stash" was. Id. According to Sible, the man looked like he had something under his shirt. Sible and Wahl gave the man money from two different stashes in the store. In total, the man collected over $5,000.00. The man then had Sible and Wahl lay face down on the floor. The following is an excerpt from Sible's testimony:

**{¶9}** "Q. Okay. Did you see him put his hand anywhere else on his body or anywhere else?

**{¶10}** "A. He might have put his hand behind his back at one point, I'm not for certain.

**{¶11}** "Q. Okay. When he put his hand in front of you, what did it lead you to believe?

**{¶12}** "A. I didn't know if he had a weapon under his shirt or not.

**{¶13}** "Q. Okay. Is it fair to say that's the reason you complied with his request?

**{¶14}** "A. Yes." Trial Transcript at 178.

**{¶15}** After the man departed, Sible pushed the panic button and called 911. A videotape from the store was turned over to police. Sible was unable to pick the man out of a photo array, but identified appellant at trial as the man who had committed the robbery.

**{¶16}** Stephen Wahl testified that the man, after demanding money, acted as if he were going behind his back. Wahl testified that the man's voice was "threatening" and that he was wearing a yellow bandana, sunglasses and blue jeans. Trial Transcript at 215. Wahl further testified that at the time the man made his second demand for money, he knew that the man had his hand behind his back. Wahl was unable to pick the man out of a photo array, but identified appellant as the man at trial.

**{¶17}** On October 24, 2008, Sible was working at the same store near closing time when the same man came in and demanded money in an authoritative voice. At the time, Mike Jones, the store's assistant manager, also was present. According to Sible, the man kept one hand behind his back, leading Sible to think that he might have a weapon. After receiving money from the cash register tills, the man asked again for "the stash." Trial Transcript at 186. Sible told the man that there was no stash due to a change in company policy and, after a while, the man, who kept insisting that there was a stash, gave up and left. Sible then hit the panic button and called 911. Sible testified that during both incidents, the man said "[g]ive me the fucking money, don't hit any buttons." Trial Transcript at 187. Sible turned over a video from the store to police, but it was in the same poor quality as the earlier tape. In January of 2009, Sible picked appellant out of a photo array. He also identified appellant at trial as the man who had committed the robbery at trial.

**{¶18}** Mike Jones, who picked appellant out of a photo array, testified that he was "about 60% sure." Trial Transcript at 267. He also identified appellant at trial as the person who had robbed the store.

**{¶19}** On October 28, 2008, Jennifer Engle was shopping at the Wal-Mart near both Canton Centre Mall and the Check into Cash store with her three year old daughter. Engle testified that she was walking toward the Wal-Mart when a man ran up behind her and said that he needed a ride because of an emergency. The man appeared to be nervous. After Engle told the man that she could not give him a ride, he grabbed for her purse which contained her car keys. Engle testified that the man pulled her purse from behind until the strap broke. When the man grabbed Engle, she screamed. The man, who Engle testified was wearing a tan Carhartt jacket, then left. Engle picked appellant out of a photo array and also identified him at trial. Engle found the jacket abandoned in a shopping cart just inside the store. DNA analysis concluded that appellant was the major source of the DNA found on the jacket.

**{¶20}** Mary Stevenor testified that she was working at a Check into Cash store in Wooster, Ohio, which is in Wayne County, on December 1, 2008. Stevenor testified that a man came into the store complaining of the cold and that he walked around the counter and told her not to touch the panic button. The man, who was wearing a hood, then walked around to the manager's desk and demanded money. Stevenor testified that the man had one hand behind his back. After the man left with the money, Stevenor called the police. She picked appellant out of a photo array and also identified him at trial. The robbery, for which appellant was not on trial in the case sub judice, was captured on video.

**{¶21}** At trial, Timothy Johnson, a former truck driver who was living with appellant during this time, testified that appellant told him that he used to install security systems in Check into Cash stores. Johnson testified that appellant told him that he had "hit" the Check into Cash store near Canton Centre Mall. According to Johnson, appellant ducked down in Johnson's truck when they drove by such store.

**{¶22}** At the conclusion of the evidence and the end of deliberations, the jury, on July 29, 2009, found appellant guilty of all six counts of robbery. As memorialized in a Judgment Entry filed on August 11, 2009, the trial court found appellant guilty of the three repeat violent offender specifications. Pursuant to a Judgment Entry filed the same day, appellant was sentenced to an aggregate prison sentence of twenty-two (22) years.

**{¶23}** Appellant now raises the following assignments of error on appeal:

**{¶24}** "I. THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

**{¶25}** "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING INADMISSIBLE EVIDENCE OF AN OFFENSE FOR WHICH THE APPELLANT WAS NOT ON TRIAL.

**{¶26}** "III. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY AS TO THE APPROPRIATE LESSER INCLUDED OFFENSE.

**{¶27}** "IV. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE UNNECESSARILY SUGGESTIVE OUT OF COURT IDENTIFICATION."

I

**{¶28}** Appellant, in his first assignment of error, argues that his convictions for robbery were against the manifest weight and sufficiency of the evidence. We disagree.

**{¶29}** In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, 'weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

**{¶30}** An appellate court's function when reviewing the sufficiency of the evidence is to determine 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

**{¶31}** Appellant was convicted of three counts of robbery in violation of R.C. 2911.02(A)(2) and three counts of robbery in violation of R.C. 2911.02(A)(3). R.C. 2911.02 states, in relevant part, as follows: A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: … (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another; (3) Use or threaten the immediate use of force against another."

**{¶32}** Appellant contends that the State failed to prove that appellant committed the robberies and notes that "each of the witnesses testified as to different characteristics of the offense." Appellant also maintains that the State failed to prove that the offender inflicted, attempted to inflict or threatened to inflict physical harm on another during the course of a theft offense.

**{¶33}** However, we find that, 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 of robbery proven beyond a reasonable doubt. We note that Nathan Mackey picked appellant's photo out of a photo array and indentified appellant at trial and that both Christopher Sible and Steven Wahl identified appellant as the offender at trial. In addition, after the second incident involving the store on Dressler Road, Sible picked appellant out of a photo array. In addition, Ashley Calderone, after the second incident at the store near Canton Centre Mall, was able to identify appellant form a photo array and also identified appellant at trial. We further note that appellant's DNA was found on the jacket retrieved after the robbery of Jennifer Engle, who described appellant as wearing the same tan jacket that Calderone had seen him wearing and who picked appellant out of a photo array. In addition, as is stated above, Timothy Johnson, appellant's then roommate testified that appellant had told him that he had "hit" the store near Canton Centre Mall.

**{¶34}** In addition, while no one was injured during any of the incidents, there was testimony from Christopher Sible that appellant looked like he had something under his shirt and, at one point may have put his hand behind his back. Sible indicated that he thought that the man might have a weapon. Steven Wahl also testified that the man

kept his hand behind his back. There was testimony at trial that appellant used profanity and a threatening tone of voice. In addition, Jennifer Engle testified that appellant grabbed her from behind and pulled her purse strap until it broke.

**{¶35}** Based on the foregoing, we find that appellant's convictions for robbery were not against the sufficiency of the evidence. We further find that appellant failed to demonstrate that the jury lost its way and created such a manifest miscarriage of justice that the convictions must be reversed. We find, therefore, that appellant's convictions were not against the manifest weight of the evidence.

**{¶36}** Appellant's first assignment of error is, therefore, overruled.

II

**{¶37}** Appellant, in his second assignment of error, argues that the trial court committed reversible error by admitting evidence of an offense for which appellant was not on trial. Appellant specifically contends that trial court erred in allowing in testimony from Mary Stevenor about the December 1, 2008, robbery of the Check into Cash store in Wooster, Ohio, which is in Wayne County. The trial court allowed such evidence in under Evid.R. 404(B).

**{¶38}** The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

**{¶39}** Evid.R. 404(B) states as follows: "(B) Other crimes, wrongs or acts**.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a

person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

**{¶40}** We find that the trial court did not abuse its discretion in admitting in testimony about the Wooster robbery because such decision was not arbitrary, unconscionable or unreasonable due to the general similarities between the robberies in the case sub judice and the Wooster robbery. The trial court indicated on the record, after conducting a voir dire of Mary Stevenor and hearing arguments of counsel as to the admissibility of her testimony, that it was admitting the same because it showed a common scheme or plan that went to identification. The trial court noted that all of the stores that were robbed were all Check into Cash stores and that all of the robberies were in close geographic proximity. The trial court also noted that the robberies were close in time since they occurred between September and December of 2008. In addition, the trial court further noted that during the Stark County robberies and the Wooster robbery, the offender told the victims not to push the panic button and that "[w]e have references to a hand being out of sight which is similar to the other situation." Trial Transcript at 519. The court further noted that while there was no evidence that the offender wore sunglasses or a bandana during the Wooster robbery, there was evidence of a "hood being up over the head." Transcript at 120. As is stated above, while Nathan Maclay, Christopher Sible and Steven Wahl testified that the offender wore a bandana on his head, Stevenor testified that the offender in Wooster wore a hood. Thus, there was testimony that the offender attempted to conceal his identity.

**{¶41}** Based on the foregoing, we find that there were sufficient similarities between the robberies in the case sub judice and the Wooster robbery and that the trial court did not abuse its discretion in admitting Mary Stevenor's testimony.

**{¶42}** Appellant's second assignment of error is, therefore, overruled.

III

**{¶43}** Appellant, in his third assignment of error, argues that the trial court failed to instruct the jury as to the lesser included offense of theft by threat. We disagree.

**{¶44}** The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Martens* (1993), 90 Ohio App.3d 338, 629 N.E.2d 462. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore*, supra. Jury instructions must be reviewed as a whole. *State v. Coleman* (1988), 37 Ohio St.3d 286, 525 N.E.2d 792.

**{¶45}** Jury instructions on lesser offenses are required only when the evidence at trial reasonably supports both an acquittal on the crime charged and a conviction on the lesser included offense. *See State v. Robb*, 88 Ohio St.3d 59, 74, 2000-Ohio-275, 723 N.E.2d 1019.

**{¶46}** R.C. 2913.02(A)(4), which proscribes theft by threat, states that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [b]y threat." As is stated above, appellant was indicted and convicted of robbery in violation of R.C. 2911.02(A)(2) and (3). R.C. 2911.02 states, in relevant part, as follows: A) No person,

in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: … (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another; (3) Use or threaten the immediate use of force against another."

**{¶47}** As noted by the court in in *State v. Stone* (Jan. 31, 1996), Hamilton App. No. C-950185, 1996 WL 34144; "Theft by threat is a lesser included offense of robbery. *State v. Davis* (1983), 6 Ohio St.3d 91, 95, 451 N.E.2d 772, 776. It occurs when a person knowingly obtains property by threat with purpose to obtain or exert control over the property. R.C. 2913.02(A)(4). The difference between theft by threat and robbery is the relative graveness of the threat. The threat involved in theft by threat is of a lesser nature than the threat involved in robbery, and consists only of the threat of "disagreeable consequences." *Id.* at 96, 451 N.E.2d at 776." Id. at 1.

**{¶48}** The trial court, in denying appellant's request for an instruction on theft by threat, stated, in relevant part, as follows:

**{¶49}** "THE COURT: And as it relates to the lesser included offense of theft by threat, in comparing that with the robbery counts as indicted, the Court finds that it is not a lesser included under the circumstance of this case in that the only - - the issue for the jury to determine to make is whether or not there was, in fact, through his conduct, or voice, or otherwise, a threat made. And the only type of threat that could be made that fits the statute is a threat of force or a threat of bodily harm.

**{¶50}** "Accordingly, you can - - it does not fit the definition for a lesser included offense, and the Court has denied that request." Trial Transcript at 623-624.

**{¶51}** As is stated above, there was testimony at trial that appellant threatened the use of immediate force or bodily harm and led at least some of his victims to believe that he had a gun. As noted by the appellee "the implied threat that [appellant] communicated to his victims was that he was armed or would inflict physical harm on them if they did not comply with his demands. These implied threats dealt with inflicting physical harm or the use of force." There is no evidence of any other type of threat. We find, therefore, that the trial court did not err in failing to give the instruction on theft by threat.

**{¶52}** Appellant's third assignment of error is, therefore, overruled.

IV

**{¶53}** Appellant, in his fourth and final assignment of error, maintains that the trial court erred in denying his Motion to Suppress. We disagree.

**{¶54}** As is stated above, appellant filed a Motion to Suppress, arguing that the pretrial identification of him was "unnecessarily suggestive and impermissible according to law." Appellant, in his motion, argued that all of the persons in the photo arrays shown to the victims were bald while the victims never indicated to the police that the offender was bald. Appellant also argued that the offender was described as by the police as having facial hair and that appellant was the only person in the array with facial hair. Following a hearing, the trial court denied the Motion to Suppress.

**{¶55}** When a witness is shown a photograph of a suspect before trial, due process requires a court to suppress a photo identification of the suspect if the photo array was unnecessarily suggestive of the suspect's guilt and the identification was not reliable. *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, 588 N.E.2d 819, superseded

by constitutional amendment on other grounds. The defendant has the burden to show that the identification procedure was unduly suggestive. *State v. Harris,* Montgomery App. No. 19796, 2004-Ohio-3570, ¶ 19. If the defendant meets that burden, the court must then consider whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. *Id.,* citing *State v. Wills* (1997), 120 Ohio App.3d 320, 324, 697 N.E.2d 1072.

**{¶56}** If the pretrial confrontation procedure was not unduly suggestive, any remaining questions as to reliability go to the weight of the identification, not its admissibility, and no further inquiry into the reliability of the identification is required. *Id.* at 325. If the court finds the procedure is suggestive, then it must assess the reliability of the identification, considering: (1) the witness's opportunity to view the defendant at the time of the incident, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description, (4) the witness's certainty when identifying the suspect at the time of the confrontation, and (5) the length of time elapsed between the crime and the identification. *State v. Davis*, 76 Ohio St .3d 107, 113, 1996-Ohio-414, 666 N.E.2d 1099. A photo array, “created by police prior to the victim giving a description of the suspect, * * * is not unreasonably suggestive, as long as the array contains individuals with features similar to the suspect.” *State v. Jones,* Cuyahoga App. No. 85025, 2005-Ohio-2620, ¶ 15. Where the other men depicted in the photo array with the defendant all appear relatively similar in age, features, skin tone, facial hair, dress, and photo background, the photo array is not impermissibly suggestive. *State v. Jacobs,* Mahoning App. No. 99-CA-110, 2002-Ohio-5240.

**{¶57}** However, we note that appellant does not argue that the photo array itself was unnecessarily suggestive. Rather, appellant, in his brief, now argues that the trial court erred in failing to suppress the pretrial identification of appellant because "two separate officers [one from the Canton Police Department and one from the Hartville Police Department] testified [the suppression hearing] that they informed the witnesses that the suspect was in the photograph array presented to them." According to appellant, "[i]nstead of presenting the array without indicating that police had determined a suspect, police prejudiced the line up by placing pressure on the witnesses to select someone from the array."

**{¶58}** While appellant argues that the procedure for identification was unnecessarily suggestive because two separate police officers told witnesses that the suspect was included in the array that was presented to them, we find that such a statement does not, in and of itself, make the procedure unduly suggestive. "A police statement that the picture of a suspect was among those in the array [i]s not impermissibly suggestive. It seems not unreasonable for a witness to assume that any time police show a photo array, one of the pictures there is of an individual of police interest." *State v. Starks,* Lucas App. Nos. L-05-1417 and L-05-1419, 2007-Ohio-4897, at ¶ 33. See also *State v. Bandy,* Lake App. No.2007-L-089, 2008-Ohio-1494, ¶ 48. As noted by appellee, "[c]ommon sense should tell the person looking at the array that the police have a possible suspect included in the array."

**{¶59}** Appellant's fourth assignment of error is, therefore, overruled.

**{¶60}** Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Farmer, J. and

Delaney, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES

JAE/d0518

**[Cite as *State v. Gloss*, 2010-Ohio-4059.]**

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | |
| -vs- | : | JUDGMENT ENTRY |
| BRIAN A. GLOSS | : | |
| Defendant-Appellant | : | CASE NO. 2009 CA 00213 |

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES