[Cite as *In re Q.E.*, 2014-Ohio-4445.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF: Q.E.	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
JUVENILE DELINQUENT	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
	:	
	:	
	:	Case No. 2014CA00049
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2013JCR2168
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	September 29, 2014

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Prosecuting Attorney RENEE M. WATSON 110 Central Plaza South, Suite 510 Canton, OH 44702-0049	AARON KOVALCHIK 116 Cleveland Avenue, NW Suite 808 Canton, OH 44702

Farmer, J.

{¶1} On October 16, 2013, the Stark County Grand Jury indicted appellant, Q.E., a juvenile, on one count of aggravated burglary in violation of R.C. 2911.11, one count of aggravated robbery in violation of R.C. 2911.01, and one count of assault in violation of R.C. 2903.13. The two aggravated counts included firearm and serious youthful offender specifications. Said charges arose from a home invasion of Lucretia Kittle.

{¶2} A jury trial commenced on December 13, 2013. The jury found appellant guilty as charged. By judgment entry filed December 18, 2013, the trial court found appellant to be a serious youthful offender. By judgment entry filed February 19, 2014, the trial court sentenced appellant to the Ohio Department of Youth Services for an aggregate minimum of one year to age twenty-one, stayed in lieu of appellant successfully completing the Community Corrections Facility Program, and to an aggregate term of seven years in prison, stayed in lieu of appellant successfully completing the juvenile disposition and post care supervision.

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

I

{¶4} "APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

II

{¶5} "APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS VIOLATED WHEN THE TRIAL COURT PERMITTED THE ADMISSION OF HEARSAY STATEMENTS."

I

{¶6} Appellant claims his convictions were against the sufficiency and manifest weight of the evidence as proof was lacking that he was one of the perpetrators and the victim's testimony lacked credibility. We disagree.

{¶7} 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,* 61 Ohio St.3d 259 (1991). "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,* 443 U.S. 307 (1979). 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,* 20 Ohio App.3d 172, 175 (1st Dist.1983). 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.

{¶8} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison,* 49 Ohio St.3d 182 (1990). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260. In addition, circumstantial evidence is that which can be "inferred from reasonably and justifiably connected facts." *State v. Fairbanks,* 32 Ohio St.2d 34 (1972), paragraph five of the syllabus. "[C]ircumstantial evidence may be more certain, satisfying and persuasive than direct evidence." *State v. Richey,* 64 Ohio St.3d 353, 1992-Ohio-44. It is to be given the same weight and deference as direct evidence. *Jenks, supra*.

{¶9} Appellant was convicted of aggravated burglary in violation of R.C. 2911.11, aggravated robbery in violation of R.C. 2911.01, and assault in violation of R.C. 2903.13 which state the following, respectively:

> [R.C. 2911.11] (A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
>
> (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

[R.C. 2911.01] (A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

[R.C. 2903.12] (A) No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn.

{¶10} Appellant was also charged with firearm specifications in violation of R.C. 2941.145 which states the following:

(A) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the

offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.

{¶11} R.C. 2923.11(B)(1) defines "firearm" as "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. 'Firearm' includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable."

{¶12} All the charges involved the same set of facts and the same victim, Lucretia Kittle.

{¶13} Ms. Kittle testified she collected funds for bail money to help her boyfriend who was in jail. T. at 188-189. She told a friend, Giselle Johnson, about the money she had collected. T. at 190. Present during the conversation were other individuals including the co-defendant, Nicholas Vazquez. T. at 190-191.

{¶14} The following evening, Ms. Kittle heard a knock on her door. T. at 173. When she opened the door, two masked men, one of which was holding a silver gun, stated "give me your money" and shoved her into a china cabinet and hit her over the head causing injuries. T. at 174, 176-178, 199-200; State's Exhibits 4-C, 4-D, 4-E, 4-F, and 2-A. Ms. Kittle's uncle heard her screaming and came running. T. at 176, 181. The two masked men fled and the uncle gave chase until he lost them. T. at 176. Ms. Kittle identified the two men as black, wearing masks and black hoodies. T. at 176, 178-179. The man with the gun had white lettering on his hoodie. T. at 176, 178, 185; State's Exhibit 1.

{¶15} This description was broadcast to the responding Canton Police officers. T. at 138-139, 182, 221. Within a few minutes of the dispatch, Officer Scott Jones and Officer Steve Jakupca encountered two black males dressed in black hoodies within the immediate vicinity of the Kittle residence. T. at 139, 221. Their appearance was consistent with the information provided. T. at 140, 222. Appellant was wearing a black hoodie with white letters (YMCMB) and blue jeans, and had a loaded silver gun in his pocket. T. at 142-144. Mr. Vazquez was wearing a black hoodie, and stuffed in the pocket were white gloves, a balled up black t-shirt, and a winter style ski mask. T. at 223-224; State's Exhibits 3-A, 3-B, and 3-C.

{¶16} In an effort to establish where the two men had come from, a "reverse track" was done by a K-9 officer. T. at 146-147, 226. The tracking was done from the stop and ended very close to the area of the Kittle residence. T. at 146-148, 226. In fact, it was in the approximate area of where Ms. Kittle's uncle had pursued the two men before he lost contact. T. at 148, 167-169.

{¶17} The two men were taken to the home of Ms. Kittle whereupon she identified the two as the perpetrators. T. at 151, 186-187, 228. She identified them by their eyes, skin tone, height, clothes, and hair. T. at 179-180, 187.

{¶18} In the courtroom, Ms. Kittle identified appellant as the man wearing the black hoodie with the white lettering holding the gun. T. at 197. Ms. Kittle's father, Ronald Kittle, testified Mr. Vazquez and another male as well as a female were at the home the day before looking for Ms. Kittle. T. at 239.

{¶19} On cross-examination, Ms. Kittle was asked about her previous convictions for theft, crimes involving dishonesty. T. at 215-216.

{¶20} A criminalist with the Canton-Stark County Crime Laboratory, Larry Mackey, testified the gun was an operable firearm. T. at 254-255; State's Exhibit 5.

{¶21} Based upon the direct and circumstantial evidence presented and the rule on credibility, we find sufficient evidence, if believed, to support the convictions beyond a reasonable doubt, and no manifest miscarriage of justice.

{¶22} Assignment of Error I is denied.

II

{¶23} Appellant claims the trial court erred in permitting hearsay testimony. We agree the complained of statement was hearsay, but find the error to be harmless.

{¶24} The complained of statement was elicited during Ms. Kittle's testimony. Ms. Kittle testified during her conversation with Ms. Johnson about the money she was collecting for her boyfriend's bail, Mr. Vazquez stated "we should rob her." T. at 193, 196. At first the trial court sustained the objection on hearsay grounds and the answer was stricken, but later reversed its ruling and permitted the statement. T. at 191, 193, 196.

{¶25} Evid.R. 801(C) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

{¶26} Appellant was not identified as being present when the conversation occurred, and Mr. Vazquez was not a witness at trial nor was he tried at the same time. Therefore, the statement did not qualify under any of the exceptions to the hearsay rule pursuant to Evid.R. 803 and 804.

{¶27} Appellant further challenges the statement as a violation of the confrontation clause to the United States Constitution. In *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004), the United States Supreme Court explained "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."

{¶28} We find the statement was not testimonial because it was not made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford* at 52. The statement was made in passing and as an aside while walking away from Ms. Kittle. T. at 191. Further, the statement was not made to law enforcement as in *Crawford* or a medical professional as in *State v. Stahl,* 111 Ohio St.3d 186, 2006-Ohio-5482, but only in the audible presence of Ms. Kittle.

{¶29} The hearsay statement was permitted and therefore our review is now focused on harmless error. Harmless error is described as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right.

{¶30} As we found in Assignment of Error I, the evidence was sufficient given the immediate apprehension by the police, the "reverse track" by the K-9 officer, and Ms. Kittle's identification of appellant and his clothing.

{¶31} Ms. Kittle never identified Mr. Vazquez at the trial; therefore, his statement alone would have had no bearing on the outcome of the case. The evidence was presented, but it only demonstrated Mr. Vazquez's knowledge of Ms. Kittle's money.

{¶32} Upon review, we find the error to permit the statement was harmless and did not rise to the level of undue prejudice.

{¶33} Assignment of Error II is denied.

{¶34} The judgment of the Court of Common Pleas of Stark County, Ohio Juvenile Division is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

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