[Cite as *State v. Depina*, 2015-Ohio-2254.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2014CA00091
	:	
DWAYNE S. DEPINA	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2014CR0021
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	June 8, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
JOHN D. FERRERO, JR. STARK CO. PROSECUTOR RENEE M. WATSON 110 Central Plaza South - Ste. 510 Canton, OH 44702-1413	MATTHEW PETIT 116 Cleveland Ave. NW - Ste. 808 Canton, OH 44702

Delaney, J.

{¶1} Appellant Dwayne S. DePina appeals from the May 19, 2014 Judgment Entry of conviction and sentence entered in the Stark County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose on December 22, 2013 around 12:30 p.m. at the Wal-Mart store at "The Strip" in Jackson Township, Stark County, Ohio.

{¶3} Sporting goods manager Lenny Woods observed appellant walking quickly in the store with a cart full of merchandise. Woods watched appellant take the cart behind the row of 26 registers and started following him. Appellant said, "Don't worry, I'm going to pay" but then proceeded past all the registers and headed for the exit with the loaded cart. Woods grabbed the front of the cart and told appellant he needed to see his receipt. The two "tussled" briefly over the cart and some of the merchandise spilled out. Appellant put his hand in his pocket and said "Come on, man, I've got a gun." Woods immediately backed off and appellant grabbed a single item out of the cart and walked quickly out of the store with it.

{¶4} Woods and several other Wal-Mart employees and customers walked outside to watch where appellant went and saw him get into a vehicle parked in the crosswalk. Employees wrote down the license plate number of the vehicle as it pulled away. Police later traced the vehicle to Patricia DePina and through her to appellant.

{¶5} Several witnesses overheard the threat. A hotel manager was shopping in the store and observed Woods and appellant fight over the cart from about 20 feet away. She heard appellant say "Come on, man, I've got a gun" and saw Woods back

off. A husband and wife entered the store to shop and the husband returned briefly to the parking lot to retrieve his wallet. In the meantime, the wife observed the struggle between Woods and appellant and heard appellant say he had a gun. The wife ducked to the ground and pulled down a pregnant woman and another customer with her. Her husband re-entered the store in time to see the "ruckus" going on and heard someone say "he has a gun." Appellant walked directly past the husband and said "I have a gun," as if confirming the statement. The husband followed appellant out of the store and saw him leave in a vehicle.

{¶6} The husband, Woods, and another Wal-Mart manager identified appellant in a photo lineup. These witnesses also identified appellant in the courtroom as the man who robbed the store.

{¶7} Appellant was charged by superseding indictment with one count of robbery pursuant to R.C. 2911.02(A)(2) and a repeat violent offender specification pursuant to R.C. 2941.149. Appellant entered a plea of not guilty and the case proceeded to jury trial. Appellant moved for a judgment of acquittal pursuant to Crim.R. 29(A) at the close of appellee's evidence and at the close of all of the evidence. The trial court overruled the motions and appellant was found guilty as charged. The trial court sentenced appellant to an aggregate prison term of 7 years.

{¶8} Appellant now appeals from the judgment entry of his conviction and sentence.

{¶9} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶10} "I. THE APPELLANT'S CONVICTION FOR ONE COUNT OF ROBBERY IN VIOLATION OF R.C. 2911.02 WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

{¶11} "II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S RULE 29 MOTION FOR ACQUITTAL BASED ON A FAILURE TO PROVE VENUE."

ANALYSIS

I., II.

{¶12} Appellant's two assignments of error are related and will be considered together. Appellant argues his conviction upon one count of robbery is against the manifest weight and sufficiency of the evidence. We disagree.

{¶13} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. 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."

{¶14} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "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 clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶15} Appellant was convicted of one count of robbery[1] pursuant to R.C. 2911.02(A)(2), which states: "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * *: [i]Inflict, attempt to inflict, or threaten to inflict physical harm on another." Appellant admits his involvement in the incident at Wal-Mart on December 22, 2013, including leaving the store with an item he didn't pay for. However, he argues he never inflicted, attempted to inflict, or threatened to inflict physical harm on another.

{¶16} Appellant acknowledges several witnesses heard him say he had a gun during the incident, but argues this is insufficient to establish the use or threat of immediate use of force required by the statute. We note appellant is charged pursuant

[1]Appellant does not challenge his conviction upon the accompanying repeat violent offender specification.

to R.C. 2911.02(A)(2), which does not include the element of an immediate threat.[2] Simple robbery is defined in R.C. 2911.02(A)(2) and does not require proof of the use of a "deadly weapon," but only requires the proof that the defendant did "inflict, attempt to inflict, or threaten to inflict physical harm on another." *State v. Hammond*, 8th Dist. Cuyahoga No. 99074, 2013-Ohio-2466, ¶ 34.

{¶17} The issue is whether appellant's statement that he had a gun, as heard by several witnesses, is a sufficient threat of physical harm pursuant to R.C. 2911.02(A)(2). Appellant's cited case, *State v. Davis*, involved a prior version of the robbery statute and a charged offense which did include the element of an immediate threat. *Davis* considered the objective effect of the threat on the person hearing it: "The use or threat of immediate use of force element of the offense of robbery, as expressed in R.C. 2911.02(A), is satisfied if the fear of the alleged victim was of such a nature as in reason and common experience is likely to induce a person to part with property against his will and temporarily suspend his power to exercise his will by virtue of the influence of the terror impressed." *State v. Davis*, 6 Ohio St.3d 91, 451 N.E.2d 772 (1983), paragraph one of the syllabus.

{¶18} Appellee directs us to *State v. Ellis*, which contrasts the two sections of robbery. 10th Dist. Franklin No. 05AP-800, 2006-Ohio-4231, ¶ 5:

> R.C. 2911.02(A)(2) requires proof of infliction or attempted infliction or threatened infliction of physical harm. R.C. 2911.02(A)(3) requires use or threatened use of force against another. These are

[2] **R.C. 2911.02(A)(3)** states: "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [u]se or threaten the immediate use of force against another." (Emphasis added.)

> distinct and separate acts and may be proven by essentially the same evidence but may be offenses of similar import. Appellant made an implied threat of physical harm to Ware when he told her he had a gun, was on drugs and needed the money. **Telling a person that you have a gun in connection with a demand for money permits a reasonable inference of a threat of physical harm, which is sufficient for R.C. 2911.02(A)(2).** (Emphasis added).

{¶19} To establish a violation of R.C. 2911.02(A)(2), "[a]ll that is necessary* * * is proof that appellant threatened to inflict physical harm on another." *State v. Reed*, 6th Dist. Lucas No. L-97-1133, 1998 WL 336317, *5 (June 12, 1998).

{¶20} In this case, Woods testified appellant told him he had a gun during the tussle over the cart, causing Woods to let go of the cart. The hotel manager, husband, and wife also heard the statement. We find appellant's statement, especially coupled with the circumstances of tussling with Woods over a cart filled with unpaid merchandise, "permits a reasonable inference of a threat of physical harm." *Ellis*, supra. Appellee thus presented sufficient evidence of this element of simple robbery.

{¶21} We turn next to appellant's second assignment of error, in which he argues appellee did not establish the element of venue. At trial, this was the basis of appellant's motion for judgment of acquittal pursuant to Crim.R.29(A). The trial court reserved its ruling upon a review of the transcript and found it could take judicial notice of the address of the Wal-Mart store at "The Strip," which is in Jackson Township, Stark

County, Ohio. Each witness referenced "The Strip" when testifying about the location of the store.

{¶22} We have previously held a trial court has broad discretion to determine facts which would establish venue, and venue need not be proven in express terms but may be established by the totality of facts and circumstances. *State v. Walker*, 5th Dist. Licking No. 01-CA-00091, 2002-Ohio-5101, ¶ 8, citing *City of Toledo v. Taberner*, 61 Ohio App.3d 791, 573 N.E.2d 1173 (6th Dist.1989).

{¶23} In *State v. Barr*, the Seventh District Court of Appeals exhaustively identified the myriad ways venue may be established at trial. If the state has demonstrated that the alleged crime occurred in a particular location but failed to provide direct evidence that the location is in the appropriate county, Evid.R. 201(B)(1) permits judicial notice of generally-known facts within the territorial jurisdiction of the trial court; thus judicial notice may be taken that a location is in a particular county. *State v. Barr*, 158 Ohio App.3d 86, 2004-Ohio-3900, 814 N.E.2d 79, ¶¶ 16-17 (7th Dist.). We thus conclude the trial court properly took judicial notice that "The Strip" is located in Jackson Township, Stark County, Ohio.

{¶24} We find appellant's conviction upon one count of robbery is supported by sufficient evidence and is not against the manifest weight of the evidence. Appellant's two assignments of error are thus overruled.

CONCLUSION

{¶25} Appellant's two assignments of error are overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J. and

Gwin, P.J.

Hoffman, J., concur.