[Cite as *State v. Alkhatib*, 2015-Ohio-4094.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2014CA00212
	:	
HEITHAM MOHAMMED ALKHATIB	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2014CR0921
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 14, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
JOHN D. FERRERO, JR. STARK CO. PROSECUTOR RONALD MARK CALDWELL 110 Central Plaza S., Ste. 510 Canton, OH 44702-1413	JAMES L. BURDON 137 South Main St. Ste. 201 Akron, OH 44308

Delaney, J.

{¶1} Appellant Heitham Mohammed Alkhatib appeals from the October 30, 2014 judgment entries 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 May 30, 2014, when A.R. awoke to find her neighbor, appellant, in her bed, fondling her.

{¶3} A.R. and appellant lived in different apartments in the same complex on East State Street in Alliance, Ohio for several years. Appellant also operated a convenience store and gas station across the street within sight of the apartment complex.

{¶4} A.R. was familiar with appellant because they had several uncomfortable run-ins with each other in the time since A.R. moved in. A.R. had no romantic interest in appellant; she had a boyfriend and appellant had a live-in girlfriend. Nevertheless, appellant once approached A.R. and asked "if she wanted to have sex sometime." A.R. was shocked and said no. One day in 2013 appellant approached A.R. outside her apartment and asked for her telephone number. She laughed and refused to give it to him. Shortly thereafter, A.R. observed a sign in appellant's kitchen window, facing her parking area, which said "Whore." A.R. notified the landlord of the incident and showed him a picture of the sign. The landlord told appellant to leave A.R. alone. A.R. then found an unsigned note of apology in her mailbox.

{¶5} A.R.'s boyfriend does not live at the apartment but regularly visits overnight. The boyfriend leaves the apartment by 5:35 a.m. to go to work. A.R. and her

children usually remain in the apartment, asleep, until around 7:00 a.m. and leave around 7:30 a.m. A.R.'s boyfriend lost his key to the apartment so he would often leave the front door unlocked.

{¶6} A.R's boyfriend spent the night on May 29, 2014 and left the apartment at 5:35 a.m. on May 30. He told A.R. goodbye before he left but did not lock the apartment's front door. A.R. went back to sleep.

{¶7} A.R. awakened again when she felt someone rubbing her upper thigh and buttock area. At first she thought it was her boyfriend, but opened her eyes to find appellant in her bed beside her, on his knees. Appellant wore blue pajama bottoms and no socks or shoes. A.R. jumped out of bed and screamed "What the f--- are you doing in my house?" Appellant ran out of the bedroom and down the hallway, where he tripped. A.R. chased appellant out of the apartment with a mop she found nearby. She locked the door behind appellant and called 911.

{¶8} Officer Johnson of the Alliance Police Department was in the area when he was dispatched to A.R.'s apartment for a possible sexual assault. As he approached, he observed appellant walking from the direction of A.R.'s apartment around the corner to his own porch and into his apartment. Johnson activated his cruiser video camera and knocked at A.R's door and asked whether the assailant lived "right here," motioning to appellant's door. A.R. said yes and identified and described appellant as the intruder despite not knowing appellant's name. The description she provided matched the man Johnson observed upon his arrival.

{¶9} Johnson knocked at appellant's door and it opened because it was not completely shut. Appellant came to the door in blue pajama pants and no shoes.

{¶10} Johnson arrested appellant, Mirandized him, and placed him in the back of his cruiser. From the stoop of her second-floor apartment, A.R. identified appellant in the cruiser as the intruder.

{¶11} Appellant was transported to the Alliance Police Department. Johnson and another officer detected the odor of an alcoholic beverage on appellant's person and he said he consumed three or four beers; he was coherent and able to walk. Appellant asked if there was something he could do so he wouldn't go to jail and wondered what the big deal was.

{¶12} Appellant was charged by indictment with one count of burglary pursuant to R.C. 2911.12(A)(2), a felony of the second degree [Count I] and one count of sexual imposition pursuant to R.C. 2907.06(A)(1), a misdemeanor of the third degree [Count II]. Count II was later dismissed upon motion of appellee. Appellant then filed a motion in limine to exclude evidence of any prior derogatory or insulting comments by appellant to A.R. Appellee responded in opposition, arguing the history of interaction was relevant to the res gestae of the crime and was admissible other-acts evidence pursuant to Evid.R. 404(B). The trial court tentatively overruled the motion noting it was subject to further review at trial.

{¶13} Appellant made another motion in limine the day of trial arguing the identification by A.R. from the stoop and his statements to law enforcement were inadmissible. The motion was also overruled subject to review.

{¶14} Appellant waived his right to trial by jury and the matter proceeded to bench trial. The trial court found appellant guilty upon the sole count of burglary and

memorialized its verdict with findings of fact and conclusions of law. Appellant was sentenced to a prison term of five years.

{¶15} Appellant now appeals from the judgment entries of his conviction and sentence.

{¶16} Appellant raises three assignments of error:

ASSIGNMENTS OF ERROR

{¶17} "I. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL BY THE ADMISSION OF TESTIMONY CONCERNING A ONE MAN SHOW UP."

{¶18} "II. THE APPELLANT'S ARREST WAS NOT SUPPORTED BY PROBABLE CAUSE AND ALL EVIDENCE SEIZED THEREAFTER SHOULD NOT HAVE BEEN CONSIDERED BY THE COURT."

{¶19} "III. THE COURT'S JUDGMENT OF GUILTY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

ANALYSIS

I.

{¶20} In his first assignment of error, appellant argues the one man show-up procedure was unduly suggestive. We disagree.

{¶21} First, we note the admissibility of the identification procedure was raised in the trial court with a motion in limine. Appellant did not file a motion to suppress and by the time appellant raised the issue, the time for filing a suppression motion had expired. Crim.R. 12(C)(3).

{¶22} Second, even assuming the issue was properly raised in the court below, we find the identification procedure in this case was not so unduly suggestive as to create a substantial likelihood of misidentification. *State v. Lott*, 51 Ohio St.3d 160, 175, 555 N.E.2d 293, cert. denied, 498 U.S. 1017, 111 S.Ct. 591, 112 L.Ed.2d 596 (1990).

{¶23} Generally, evidence of an unduly-suggestive police identification procedure may violate a defendant's right to due process and require suppression of the evidence. See, *Foster v. California,* 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969). Due process concerns arise, however, only when (1) the identification procedure is arranged by law enforcement officials, (2) the procedure is unnecessarily suggestive, and (3) the procedure creates a substantial likelihood of misidentification. *State v. Qirat*, 5th Dist. Licking No. 14-CA-72, 2015-Ohio-863, at ¶ 25, citing *Perry v. New Hampshire,* ––– U.S. ––––, 132 S.Ct. 716, 724, 181 L.Ed.2d 694 (2012). Even when police use an unduly-suggestive procedure, due process does not necessarily require the suppression of the resulting identification. *Manson v. Brathwaite,* 432 U.S. 98, 112–13, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). "Where the 'indicators of [a witness'] ability to make an accurate identification' are 'outweighed by the corrupting effect' of law enforcement suggestion, the identification should be suppressed. Otherwise, the evidence (if admissible in all other respects) should be submitted to the jury." Id.

{¶24} The identification procedure in the instant case was neither unnecessarily suggestive nor created any substantial likelihood of misidentification. Officer Johnson was on the scene almost immediately after the incident, so quickly that he observed an individual matching the assailant's description walking from the direction of the victim's apartment. The victim confirmed the apartment the individual entered was the

apartment of the assailant. Most importantly, this was not the first time the victim saw the assailant: he was her neighbor and was familiar to her for several years. During the incident she was able to recognize him, observe what he was wearing, and to chase him from the apartment.

{¶25} The due-process axioms appellant argues are concerned with cases in which the witness does not know the suspect, as in the case law support offered by appellant. *State v. Duke*, 2nd Dist. Montgomery No. 23110, 2009-Ohio-5527. In that case, after noting the inherently suggestive nature of a "one-man show-up," the Court found such procedures are not necessarily inadmissible. When evaluating the reliability of pretrial identifications, a court should consider “the prior opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” Id. at ¶ 12, citing *State v. Johnson,* 2nd Dist. Montgomery No. 22656, 2009-Ohio-1288, ¶ 20.

{¶26} In this case, the victim was familiar with appellant and was able to provide the officer with everything but his name, including the apartment he lived in and what he was wearing. Combined with the circumstances of the officer observing appellant entering his apartment, matching the description provided by the victim, we find the show-up from the cruiser was not unduly suggestive and did not create a substantial likelihood of misidentification.

{¶27} Appellant's first assignment of error is therefore overruled.

II.

{¶28} In his second assignment of error, appellant argues his arrest was not supported by probable cause and all evidence obtained subsequent to the arrest was inadmissible. We disagree.

{¶29} The question whether appellant's arrest was supported by probable cause should have been raised in a motion to suppress; as we discussed above, by the time the issue was raised in the motion in limine, time for suppression had expired. Crim.R. 12(C)(3). The motion in limine was not renewed during trial after the court's provisional ruling. Appellant has thus waived all but plain error. "In general, the ruling on a motion *in limine* does not preserve the record on appeal and an appellate court need not review the ruling unless the claimed error is preserved by an objection at trial." *State v. Pyo,* 5th Dist. Delaware No. 04CAA01009, 2004–Ohio–4768, ¶ 19, citing *State v. Grubb,* 28 Ohio St.3d 199, 503 N.E.2d 142 (1986), paragraph two of the syllabus; *State v. Leslie,* 14 Ohio App.3d 343, 344, 471 N.E.2d 503 (2nd Dist.1984); *State v. Brown,* 38 Ohio St.3d 305, 528 N.E.2d 523 (1988), paragraph three of the syllabus; *State v. Maurer,* 15 Ohio St.3d 239, 259, 473 N.E.2d 768 (1984).

{¶30} We find no plain error with regard to appellant's arrest. Probable cause to arrest exists if the facts and circumstances within the knowledge of the officer are sufficient to cause a reasonably prudent person to believe the offender has committed the offense. *State v. Cummings,* 5th Dist. Stark No.2005–CA–00295, 2006–Ohio–2431, ¶ 15, citing *State v. Heston,* 29 Ohio St.2d 152, 280 N.E.2d 376 (1972). Here, police were on the scene within moments of A.R.'s 911 call and observed a man matching her description walking from the direction of her apartment into his own. A.R. was visibly

upset and was able to tell officers what happened when she awoke to find an intruder in her bed. She chased him from the apartment and he was observed by police minutes later. Appellant's arrest for burglary is supported by probable cause.

{¶31} Appellant's second assignment of error is overruled.

III.

{¶32} In his third assignment of error, appellant argues his conviction upon one count of burglary is against the manifest weight of the evidence.[1] We disagree.

{¶33} 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*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. 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.*

{¶34} In this case, appellant was convicted upon one count of burglary pursuant to R.C. 2911.12(A)(2), which states, "No person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure * * * that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or

[1] Appellant does not challenge the sufficiency of the evidence.

likely to be present, with purpose to commit in the habitation any criminal offense." We find the trial court did not lose its way in convicting appellant upon one count of burglary.

{¶35} Appellant does not challenge the evidence as to any specific element of the offense but instead points to eight alleged discrepancies. Appellant argues, e.g., the trial court attached "improper significance" to allegations of his attraction to the victim; his girlfriend may have put the "whore" sign in the kitchen window; and it supposedly took appellant 22 minutes to walk from the victim's apartment to his own but took the police officer only "ten seconds." These arguments do not demonstrate that in resolving any purported conflicts in the evidence, the trial court clearly lost its way and created a manifest miscarriage of justice. Instead, they go to the weight and credibility of the evidence, matters for the trier of fact. *State v. Yarbrough,* 95 Ohio St.3d 227, 231, 2002–Ohio–2126, 767 N.E.2d 216, ¶ 79.

{¶36} We have thoroughly reviewed the record and find appellee's evidence established appellant trespassed in the victim's apartment and was discovered in the victim's bed, touching her. We do not disagree with the fact finder's resolution of any conflicting evidence. *Thompkins*, supra, 78 Ohio St.3d at 387.

{¶37} Appellant's conviction is not against the manifest weight of the evidence and his third assignment of error is overruled.

CONCLUSION

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

By: Delaney, J. and

Hoffman, P.J.

Baldwin, J., concur.