[Cite as *State v. Heflin*, 2011-Ohio-4134.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-10-1268

Appellee — Trial Court No. CR0201001577

v.

Jerry Jermain Heflin — **DECISION AND JUDGMENT**

Appellant — Decided: August 19, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael E. Narges, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Jerry J. Heflin, appeals from his conviction in the Lucas County Court of Common Pleas on two counts of aggravated robbery with firearm specifications. For the reasons that follow, we affirm.

{¶ 2} On March 31, 2010, appellant was indicted on two counts of aggravated robbery with gun specifications in violation of R.C. 2911.01(A)(1) and felonies of the first degree. He was also indicted on two counts of robbery in violation of R.C. 2911.02(A)(2) and felonies of the second degree. Appellant filed a motion to suppress challenging the photo arrays that were used to identify him as a suspect. The motion was denied on August 5, 2010. A jury trial followed.

{¶ 3} Christopher Osborn testified that he has worked in the downtown Toledo, Ohio area for approximately 25 years. On the morning of October 28, 2009, he headed to his normal parking spot located on Walnut Street near Huron Street. As he proceeded down Walnut Street, he noticed someone standing at the corner. He testified that he kept his eye on the man because it was unusual to see someone just standing at the corner. Osborn parked and exited his car. He began walking to work. From the corner of his eye he watched as the man started walking towards him. When they were within three feet of each other, Osborn testified that the man opened his jacket and pulled out a gun. He instructed Osborn to go back to his car. Once there, he asked Osborn if he had any valuables and he asked for Osborn's wallet. Osborn gave the man his wallet and the man then told Osborn to walk away. Osborn went into a nearby business to call the police and report the robbery. In court, Osborn identified appellant as the man who robbed him.

{¶ 4} Anthony Schortgen testified that he also works in the downtown Toledo area. On the morning of January 22, 2010, he parked his car at the corner of Walnut and Huron Streets. As he exited his vehicle, he noticed a man standing on the other side of the Street.

As he began his walk to work, he testified that he kept his eye on the man. The man crossed the street and soon came up behind Schortgen. Schortgen said "good morning" to the man and the man demanded money. When Schortgen told him that he did not have any money, the man showed him a gun and pointed it at Schortgen's stomach. Schortgen then gave the man $14.00 from his pocket. The man turned and walked away and Schortgen called 911. In court, Schortgen identified appellant as the man who robbed him.

{¶ 5} A jury found appellant guilty on two counts of aggravated robbery with gun specifications. He was sentenced to nine years in prison. Appellant now appeals setting forth the following assignments of error:

{¶ 6} "I. The trial court erred in denying the defendant's motion to sever.

{¶ 7} "II. The identification procedure was unduly suggestive."

{¶ 8} In his first assignment of error, appellant contends that the court erred in denying his motion to sever the two counts of aggravated robbery.

{¶ 9} Crim.R. 8(A) provides:

{¶ 10} "[T]wo or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

{¶ 11} Under Crim.R. 8(A), the law favors the joinder of multiple crimes allegedly committed by the same offender when those offenses are of the same or similar character. *State v. Brinkley* (2005), 105 Ohio St.3d 231. Nevertheless, sometimes it may be necessary to require separate trials to prevent prejudice to the defendant. See Crim.R. 14; *State v. Brinkley*, supra.

{¶ 12} On appeal, the burden is on the defendant to show that he was prejudiced by the trial court's refusal to sever the counts in the indictment. *State v. Robinson*, 6th Dist. No. L-09-1001, 2010-Ohio-4713, ¶ 22, citing *State v. Torres* (1981), 66 Ohio St.2d 340, syllabus. We review the trial court's decision on a motion to sever under an abuse of discretion standard. *State v. Lott* (1990), 51 Ohio St.3d 160, 163. A trial court abuses its discretion when its attitude in reaching its judgment is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 13} In this case, the offenses alleged against appellant were of the same or similar nature. Both involved armed robberies in the same location and at a similar time in the morning. Thus, they were properly joined pursuant to Crim.R. 8(A). And, as the appellant failed to demonstrate how he was prejudiced by the trial court's denial of his motion to sever, we will not disturb the trial court's decision.

{¶ 14} Furthermore, even if we would find that appellant demonstrated prejudice, we cannot say that the trial court abused its discretion in denying appellant's motion to sever. Specifically, the state may rebut a defendant's claim of prejudice by one of two methods. *State v. Ashcraft*, 12th Dist. No. CA2008-12-305, 2009-Ohio-5281, ¶ 16, citing

State v. Lott, supra, at 163. First, the state may rebut a defendant's claim of prejudice by demonstrating that it could have introduced evidence of the joined offenses at separate trials pursuant to the "other acts" provision found in Evid.R. 404(B). *State v. Coley* (2001), 93 Ohio St.3d 253, 259. In the alternative, the state may negate a claim of prejudice by satisfying the less rigorous "joinder test," which requires the state to establish "that evidence of each crime joined at trial is simple and direct." Id. at 260. Here, the state established that the evidence of each offense was simple and direct, that is, each involved a robbery by gunpoint, in the same location, in the morning as the victims were on their way to work. See *State v. French*, 6th Dist. No. L-09-1087, 2010-Ohio-6517. Accordingly, we find that the trial court did not abuse its discretion in denying appellant's motion to sever. Appellant's first assignment of error is found not well-taken.

{¶ 15} In his second assignment of error, appellant contends that the trial court erred in denying his motion to suppress the photo array identification process used to identify appellant as a suspect.

{¶ 16} An appellate review of a ruling on a motion to suppress evidence presents mixed questions of law and fact. *United States v. Martinez* (C.A.11, 1992), 949 F.2d 1117, 1119; *State v. Long* (1998), 127 Ohio App.3d 328, 332. During a suppression hearing, the trial court assumes the role of the trier of fact and is, therefore, in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mills* (1992), 62 Ohio St.3d 357, 366; *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548. As a result, an appellate court must accept a trial court's factual findings if they are supported by

competent and credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. The reviewing court must then review the trial court's application of the law de novo. *State v. Russell* (1998), 127 Ohio App.3d 414, 416.

{¶ 17} Photo array evidence is suppressed only if the identification, or method of identification, is unduly suggestive and unreliable. *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, citing *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401. The defendant has the burden to show that the identification procedure was unduly suggestive. *State v. Harris*, 2d Dist. No. 19796, 2004-Ohio-3570, ¶ 19. 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. *State v. Wills* (1997), 120 Ohio App.3d 320, 325. If the defendant meets his or her burden, the court must then consider whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. *Harris*, supra. Factors to be considered in determining the reliability and suggestiveness of a challenged identification include: (1) the victim's opportunity to view the defendant during the crime, (2) the victim's degree of attention, (3) the accuracy of the victim's prior description, if any, of the defendant, (4) the victim's certainty, and (5) the amount of time that has elapsed between the offense and the identification. *Neil v. Biggers* at 199. "In addition, if a pretrial photographic identification is followed by an eyewitness identification at trial, the photographic identification can be suppressed only if the procedure was suggestive enough to create 'a very substantial likelihood of irreparable

misidentification.'" *State v. Gaines*, 6th Dist. No. WD-08-058, 2010-Ohio-91, ¶ 15, quoting, in part, *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247.

{¶ 18} 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*, 8th Dist. No. 85025, 2005-Ohio-2620, ¶ 15. Where the other men depicted in the photo array with the defendant all appeared relatively similar in age, features, skin tone, facial hair, dress, and photo background, the photo array was not impermissibly suggestive. *State v. Jacobs*, 7th Dist. No. 99-CA-110, 2002-Ohio-5240, ¶ 18, *State v. Lampkin*, 6th Dist. No. L-09-1270, 2010-Ohio-4934.

{¶ 19} At the suppression hearing, Detective Brian Lewandowski of the Toledo Police Department testified that in February 2010, he was assigned to the FBI Violent Crime Safe Street Task Force. He testified he had a suspect in mind for the robbery of Osborn and Schortgen so he prepared a photo array of six pictures. One picture was of his suspect, appellant, and the other five pictures were of men who resembled appellant. Detective Lewandowski testified that he took the photo array to Osborn's place of employment and asked Osborn to take a look at it and see if he recognized the man who had robbed him some three months before. Lewandowski testified that within 15 to 20 seconds, Osborn selected the third picture, a picture of appellant, and identified it as a picture of the man who had robbed him.

{¶ 20} Dan Vanvorhis testified that he works for the Ohio Adult Parole Authority and he is also assigned to the FBI Violent Crime Safe Street Task Force. On February 24, 2010, fellow task force member, Detective Lewandowski, asked Vanvorhis to take a photo array over to Schortgen's place of employment, the parole office, to show Schortgen and determine whether he could identify the man who had robbed him. Vanvorhis, who was going to the parole office for a meeting anyways, agreed. He showed Schortgen the same photo array Osborn saw. Vanvorhis testified that Schortgen looked at the photo array for approximately a minute and then identified the man in the third picture, a picture of appellant, as the man who had robbed him. Vanvorhis testified that Lewandowski did not tell him who the suspect was in the photo array before Vanvorhis showed the array to Schortgen.

{¶ 21} We have reviewed the photo array used in this case and find that appellant's photo is similar in size and the skin tones of the men and facial features appear similar, including mouth, nose, eyebrows, facial hair, and eye shape. Accordingly, we do not find the photo array to be unduly suggestive.

{¶ 22} Appellant also contends that the photo array should be suppressed because the victims were shown the array too long after the robberies. Osborn identified appellant approximately four months after he was robbed and Schortgen identified appellant approximately one month after he was robbed. We do not find this to be too long a time for the victims to make a valid identification. Both victims testified they focused on appellant before he robbed them. Both victims testified that they were able to get a good

look at appellant's face as he robbed them in the morning and neither victim hesitated when picking out appellant's photo from the photo array. Based on the totality of the circumstances, we do not find that the trial court erred in denying appellant's motion to suppress. Appellant's second assignment of error is found not well-taken.

{¶ 23} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE