[Cite as *State v. Hakim*, 2011-Ohio-5525.]

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

State of Ohio — Court of Appeals No. L-10-1153

Appellee — Trial Court No. CR0200803936

v.

Ali Abdul Hakim — **DECISION AND JUDGMENT**

Appellant — Decided: October 28, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Ali Abdul Hakim, appeals the May 4, 2010 judgment of the Lucas County Court of Common Pleas which, following a jury trial convicting appellant of three counts of aggravated robbery and one count of aggravated burglary all

with gun specifications, sentenced him to a total of 16 years of imprisonment. For the reasons that follow, we affirm.

{¶ 2} On December 17, 2008, appellant was indicted on four first-degree felony counts with gun specifications. Specifically, appellant was indicted on one count of aggravated burglary, R.C. 2911.11(A)(2), and three counts of aggravated robbery, R.C. 2911.01(A)(1). The counts contained gun specifications. The charges stemmed from an incident on December 9, 2008, where three women in an apartment were robbed, at gunpoint, by two masked assailants. Appellant entered not guilty pleas to the counts.

{¶ 3} Although represented by counsel, on July 21, 2009, appellant filed a pro se motion to suppress the witnesses' identifications and the gun found at the scene. Trial counsel ultimately adopted the motion. On November 12 and 20, 2009, hearings were held on the motion to suppress. On February 3, 2010, the motion was denied.

{¶ 4} On April 12, 2010, the matter proceeded to a jury trial where appellant was found guilty. On May 4, 2010, appellant was sentenced to eight years in prison for aggravated burglary, five years in prison for each of the aggravated robbery counts, and a three year mandatory term for the firearm specifications. The robbery convictions were ordered to be served concurrently but consecutively to the burglary count for a total of 16 years. This appeal followed.

{¶ 5} Appellant raises three assignments of error for our review:

{¶ 6} "1) The trial court erred when it denied appellant's motion to suppress evidence.

{¶ 7} "2) Appellant's conviction falls against the manifest weight of the evidence.

{¶ 8} "3) The trial court erred by not merging allied offenses at sentencing."

{¶ 9} In appellant's first assignment of error, he first argues that the one-on-one identification of appellant should have been suppressed. "A trial court enjoys broad discretion in admitting evidence. [An appellate court] will not reject an exercise of this discretion unless it clearly has been abused and the criminal defendant thereby has suffered material prejudice." *State v. Long* (1978), 53 Ohio St.2d 91, 98. A trial court will not be found to have abused its discretion unless its decision can be characterized as unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard of review, an appellate court must not substitute its judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 138.

{¶ 10} An appellate court's review of a motion to suppress presents mixed questions of law and fact; therefore, the court must accept the trial court's findings of fact where they are supported by competent, credible evidence. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶ 11} In *Neil v. Biggers*, the United States Supreme Court considered due process limitations on the use of evidence derived through suggestive identification procedures.

The court utilized a two-prong analysis stating that "[w]hen a witness has been confronted with a suspect before trial, due process requires a court to suppress her identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances." *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, superseded by constitutional amendment on other grounds, citing *Neil v. Biggers* (1972), 409 U.S. 188; *Manson v. Brathwaite* (1977), 432 U.S. 98. The first question is whether the identification procedure was unnecessarily suggestive of the defendant's guilt. Id. The second, "is whether, under all the circumstances, the identification was reliable, i.e., whether suggestive procedures created 'a very substantial likelihood of irreparable misidentification.'" Id. at 439, quoting *Simmons v. United States* (1968), 390 U.S. 377, 384.

{¶ 12} At the November 12, 2009 suppression hearing the following evidence was presented. Selina Lipscomb testified that on December 9, 2008, around 6:00 p.m., she had just returned to her apartment complex from work. Lipscomb's apartment was on the second floor and, as she walked up the outside stairs, she heard footsteps running toward her. Two men with guns approached her; she tried to run away but tripped and fell. One of the men grabbed her and hit her in the head with his gun. Lipscomb described the men as the "aggressive guy" and the "quiet guy." She stated that the aggressive guy forced her to call to her neighbor, after the quiet guy knocked on the door, in order for them to gain entry into the apartment.

{¶ 13} Lipscomb described the men as both African American and that the silent guy was taller and lighter skinned than the aggressive guy. Lipscomb stated that the quiet guy had on a "half" face mask, a black Carhartt jumpsuit and black Carhartt jacket with the hood tied tightly around his face. The aggressive guy had a stockier build and round frame glasses. He had a scarf covering the lower part of his face and wore a black jacket with a hooded sweatshirt, blue denim pants, and (possibly) white tennis shoes.

{¶ 14} The men, with Lipscomb, entered the apartment where tenant, Tashara Ballard, her sister Steaira Ballard, and their infant niece were located. The group wound up in Tashara's bedroom while one of the assailants went through her dresser drawers. Lipscomb testified that the aggressive guy's mask fell off and she saw that he had a short beard with grey hairs.

{¶ 15} Steaira Ballard testified that she was visiting her sister and niece at her sister's apartment when they heard a commotion outside. Steaira and Tashara looked out the window and saw Selina; however, when they opened the door two men burst into the apartment. Steaira described the men as younger and older. She stated that her sister went into the bedroom with the older guy. Eventually they were all in the bedroom where the two assailants were going through dresser drawers.

{¶ 16} Steaira described the older man as taller and stockier than the younger man and wearing a black leather jacket and glasses. She stated that the older man had a bandana over his face; it was white with a green and orange pattern. She stated that the older man was African American and had a beard.

{¶ 17} Tashara Ballard described the assailant who did most of the talking as older with a beard and glasses and wearing a leather bomber jacket, a hoodie, and black leather gloves. Tashara stated that the older man had a type of material covering the lower half of his face but that she saw him scratch under the material once and that he removed it once.

{¶ 18} Toledo Police officer Donald Hatch testified that he responded to a burglary call. Upon approaching Hill and Reynolds roads he observed an individual that matched the description of the suspect. After a short pursuit, Hatch was able to apprehend the suspect at the BP gas station at the corner.

{¶ 19} Sergeant Ashley Nichols testified that the three women were separately driven over to the BP gas station in order to identify the suspect. The victims were taken separately, appellant was uncuffed, and was illuminated by a spotlight. Selina Lipscomb stated that the suspect had the same build, clothing, and glasses as the assailant but because the assailant's face was partially covered during the incident, she could not positively identify the suspect. Lipscomb did identify the scarf found on appellant as the one that had covered the assailant's face.

{¶ 20} Steaira Ballard was driven over next. She could not positively identify the suspect. Tashara Ballard said that the jacket, beard, and glasses were the same but she could not positively identify the suspect's face because the assailant's face had been partially covered.

{¶ 21} Appellant argues that because none of the three witnesses could positively identify him as one of the assailants, the identifications were unreliable and should have been suppressed. Conversely, the state asserts that so long as the identification procedure was not unnecessarily suggestive, any questions as to the reliability of the identifications go to the weight, not the admissibility, of the evidence.

{¶ 22} Regarding the reliability of the one-on-one or show-up identification, Ohio courts have held that although a one-on-one identification may be suggestive under certain circumstances, under some circumstances, such as when the show-up occurs shortly after the time of the crime, the identification could be very accurate. *State v. Young*, 6th Dist. No. L-08-1142, 2009-Ohio-4770, ¶ 18, citing *State v. Madison* (1980), 64 Ohio St.2d 322, 332.

{¶ 23} In *Young*, a witness identified a suspect in a one-on-one within approximately one hour of the burglary. *Young* at ¶ 20. During the one-on-one, the suspect was standing next to a police cruiser and was handcuffed. The suspect matched the physical description the witness had given a police officer immediately following the burglary. In *Young*, after considering the circumstances surrounding the identification of the suspect, this court found that the identification was not unnecessarily suggestive and that there was not a substantial likelihood of misidentification. Id. at ¶ 21. See, also, *State v. Brown*, 6th Dist. No. L-10-1030, 2011-Ohio-643; *State v. Crosby*, 6th Dist. No. L-05-1241, 2007-Ohio-3468.

{¶ 24} Similar to *Young*, in the instant case, appellant was identified in a one-on-one within an hour of the incident and matched the description given by the witnesses. Appellant was not handcuffed and the area was well-lit. Selina Lipscomb positively identified the scarf found in appellant's left jacket pocket as the scarf worn by the assailant during the incident. Tashara Ballard was unable to make a positive identification of appellant's face at the BP station, but she did identify his clothing as matching one of the assailant's. The victims all testified that police did not "suggest" anything to them prior to the one-on-one. The victims were extensively questioned at trial as to the certainty of their descriptions or identifications. The jury then had the role of determining their credibility. See *State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732, ¶ 113.

{¶ 25} Accordingly, we find that the one-on-one identifications were not unnecessarily suggestive and, thus, the discussion of the second prong of the *Neil v. Biggers*, supra, test, whether the suggestive procedures created a substantial likelihood of misidentification, is unnecessary.

{¶ 26} Appellant next contends that the gun found by Toledo police the day after appellant's arrest should have been suppressed. Appellant argues that, under Evid.R. 403(A), the danger of unfair prejudice outweighed the probative value of the gun.

{¶ 27} At the hearing on the motion, police officers testified that appellant had crouched down near some bushes bordering the BP gas station. At the time of appellant's arrest, several different officers spent at least one hour searching in the area of the bushes

but did not find the gun he was alleged to have. At that time, it was dark outside and officers testified that there were several bushes. The next morning, approximately 16 hours after appellant's arrest, officers returned and immediately spotted the gun under a bush in the area where appellant had been crouching down.

{¶ 28} Upon review, we find that the trial court did not err in admitting the gun into evidence. Police officers were extensively questioned about the delay in finding the gun and the fact that the area had been unsecured overnight. Thus, it was up to the jury to determine the weight to give the evidence.

{¶ 29} Based on the foregoing, we find that the trial court did not err in failing to suppress the eyewitness identifications or the handgun. Appellant's first assignment of error is not well-taken.

{¶ 30} Appellant's second assignment of error asserts that his convictions were against the manifest weight of the evidence. In an appeal of a criminal case where it is claimed that a verdict is against the manifest weight of the evidence, an appellate court acts as a "thirteenth juror," reweighs the evidence, and may disagree with a factfinder's conclusions on conflicting testimony. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387; *State v. Lee*, 6th Dist. No. L-06-1384, 2008-Ohio-253, ¶ 12. "The court, 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 reversed and a new trial ordered." *Thompkins* at 387, quoting *State v.*

Martin (1983), 20 Ohio App.3d 172, 175. Reversals on this ground are granted "only in the exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 31} We have carefully reviewed the evidence presented in this case and find that appellant's convictions were not against the weight of the evidence. In addition to testimony similar to that presented at the suppression hearing, police officers testified regarding the circumstances of appellant's apprehension—including the fact that he ran from police. Appellant's videotaped police interview was played for the jury. During the interview, appellant changed his version of the events leading up to and following the robbery several times. The victims testified that the armed assailants forced their way into the apartment, demanded money (they took $75-$100 from Selina), dumped out their purses and rummaged through Tashara's dresser drawers.

{¶ 32} Based on the foregoing, we find that the jury did not lose its way or create a miscarriage of justice in convicting appellant of aggravated robbery and aggravated burglary. Appellant's second assignment of error is not well-taken.

{¶ 33} In appellant's third and final assignment of error he argues that his sentence was contrary to law where the court erroneously failed to merge the aggravated burglary and aggravated robbery counts at sentencing. Recently, the Supreme Court of Ohio, overruling *State v. Rance* (1999), 85 Ohio St.3d 632, provided a new standard to aid in determining whether two offenses are allied and should be merged. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.

{¶ 34} *Johnson* provides that "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." Id. at ¶ 44. The first question to be asked is whether "it is possible to commit one offense and commit the other with the same conduct * * *." Id. at ¶ 48. If so, then it must be determined whether the offenses were committed by a single act with a single state of mind. Id. at ¶ 49. If both of these questions are answered affirmatively, then the offenses are allied offenses of similar import and will be merged. Id. at ¶ 50.

{¶ 35} "Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." Id. at ¶ 51.

{¶ 36} Appellant was convicted of aggravated burglary and aggravated robbery. Aggravated burglary, R.C. 2911.11(A)(2) provides:

{¶ 37} "(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:

{¶ 38} "* * *

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

{¶ 40} Aggravated robbery pursuant to R.C. 2911.01(A)(1) provides:

{¶ 41} "(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:

{¶ 42} "(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; * * *."

{¶ 43} As to the first prong of the *Johnson* test, we find that it is not possible to commit aggravated burglary and aggravated robbery with the same conduct. The wording of the burglary statute provides that the crime of burglary is committed when one enters an occupied structure by force with the intent to commit a criminal offense. Aggravated robbery can be the subject of the criminal offense but it is a separate criminal act. See *State v. Smith*, 8th Dist. No. 95243, 2011-Ohio-3051, ¶ 80; *State v. O'Neil*, 11th Dist. No. 2010-P-0041, 2011-Ohio-2202, ¶ 47-49.

{¶ 44} Further, the robberies were committed against three separate victims and, thus, were three separate criminal acts. *Smith* at ¶ 79. Accordingly, the trial court did not err when it failed to merge the convictions at sentencing. Appellant's third assignment of error is not well-taken.

{¶ 45} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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

Thomas J. Osowik, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE