[Cite as *State v. Townsend*, 2011-Ohio-6308.]

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

State of Ohio — Court of Appeals No. L-09-1231

Appellee — Trial Court No. CR0200901253

v.

Owen Townsend — **DECISION AND JUDGMENT**

Appellant — Decided: December 9, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Thomas P. Kurt, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of conviction and sentence entered by the Lucas County Court of Common Pleas after defendant-appellant, Owen Townsend, was found guilty of aggravated robbery and felonious assault. Appellant now challenges that judgment, and the lower court's denial of his motion to suppress, through the following assignments of error:

{¶ 2} "First Assignment of Error

{¶ 3} "Appellant's conviction of aggravated robbery and felonious assault are a nullity, and in violation of the Sixth Amendment, since the trier of fact never made a finding that appellant was guilty of those offenses beyond a reasonable doubt."

{¶ 4} "Second Assignment of Error

{¶ 5} "Evidence that the complaining witness identified the defendant from an array of photographs should not have been allowed, since the photo array unduly suggested defendant as the assailant, and under the totality of the circumstances the identification procedure was unreliable, in violation of the due process guarantee of the Fifth Amendment.

{¶ 6} "Third Assignment of Error

{¶ 7} "The trial court, sitting as the trier of fact, should not have given any weight to evidence that trace DNA matching the defendant's DNA was found on an indistinct 'skullcap'-style black hat, where no evidence was presented as to the source of the hat, and no evidence was presented which conclusively connected the hat to the complaining witness's assailant.

{¶ 8} "Fourth Assignment of Error

{¶ 9} "If the trial court improperly relied on the DNA evidence referred to in the First [sic] Assignment of Error, or if the trial court improperly admitted the identification evidence referred to in the Second Assignment of Error, (or both), the trial court's finding that appellant assaulted and robbed the complaining witness is against the manifest weight of the evidence."

{¶ 10} The facts of this case, as testified to at the trial below, are as follows. On January 11, 2009, at approximately 8:20 p.m., Monica Sanders arrived at the Sunoco gas station and convenience store at 1708 East Manhattan Blvd. in Toledo, Lucas County, Ohio. Although it was dark outside, the parking lot of the gas station was well lit. Sanders parked her car to the left of the convenience store and walked into the store to buy cigarettes. She then exited the store and headed back to her car. As she approached the driver's side of her car, she saw an African-American man walking toward the store. As she reached her car door, however, the man approached her and began to hit her with what looked like a stick or small baseball bat. He began hitting her on the left side of her body and left arm, which held her purse. When she would not let go of her purse, the assailant hit her in the head. Sanders tried to fight back by striking the assailant with her keys, which she held in her right hand. While striking the assailant about his head, she knocked off a stocking cap that he had been wearing. Sanders testified at the trial below that during the assault she was able to get a good look at her attacker's face. As the assault continued, Sanders saw another individual approaching the parking lot. Because she feared that he may be an accomplice, she let go of her purse and ran into the convenience store for help. Shortly thereafter, a clerk went out into the parking lot and retrieved Sanders' keys and the cap that had fallen to the ground and brought them to Sanders. When police officers arrived, Sanders told them what had happened and described her assailant as African-American, about six feet tall, and described his clothing. She also described the contents of her purse and gave them the black stocking

cap. Sanders was eventually transported by ambulance to the St. Vincent's Hospital, where it was determined that the ulna in her left forearm was fractured.

{¶ 11} Several hours later, Detective Steven Applin visited Sanders at the hospital and showed her a photo array of six similarly looking men. After viewing the array, Sanders did not identify any of the individuals as her assailant, although she thought the man in the number two position on the array, subsequently identified as Sam Adams, looked familiar. Two days later, Detective Applin telephoned Sanders and asked her to come to the police station to view another photo array. Upon viewing that array, Sanders immediately identified the number five photograph, appellant, as that of her attacker. She specifically stated that she had no doubt that the suspect was her attacker because she recognized his eyes. During the trial below, Sanders also pointed to appellant and identified him as her attacker.

{¶ 12} Officer Jeremie Barclay of the Toledo Police Department testified that he first responded to the 911 call on the evening of January 11, 2009. When he arrived at the Sunoco station, he spoke with Sanders, the store clerk, and a third woman. Sanders appeared to be in pain, but described what happened, described the assailant and gave Barclay the black stocking cap. Because Sanders told him that it was the assailant's hat, he secured it for DNA testing and later gave it to Detective Applin. After interviewing Sanders, Officer Barclay and other officers at the scene followed footprints in the snow that led to a neighborhood down the street. The footprints took the officers to a home in the 1800 block of Fredonia Avenue, the home of Sam Adams. After interviewing Adams

and searching his home, Barclay, Applin, and other officers immediately went to appellant's home, two to four houses away. Although they searched that home with appellant's consent, they found nothing to connect appellant to the crime. In addition to appellant, his girlfriend Tiffiny Whitzel was at the home, although Detective Applin described her during the trial below, as being curled up on a bed and "out of it."

{¶ 13} In addition to Detective Applin and Officer Barclay, Jennifer Akbar testified for the state at the trial below. Akbar is a forensic scientist in the forensic biology and DNA section of the Ohio Bureau of Criminal Identification and Investigation ("BCI"). Akbar testified that the black cap was submitted to her for DNA analysis. She took swabs from the interior band of the cap where it most likely would have come in contact with the wearer. She also stated that she was looking for sweat and skin cells in particular. She was then given DNA samples from Sam Adams and appellant to compare to the cap samples. Akbar testified that the DNA profile from the swabs taken from the cap was a mixture consistent with contributions from appellant and at least two other individuals. She further stated that Sam Adams was not a contributor to the DNA found on the cap and that appellant was a major contributor to the DNA on the cap.

{¶ 14} In addition to the above witnesses, Tiffiny Whitzel testified on behalf of appellant. Whitzel stated that appellant is her boyfriend and that on the evening of January 11, 2009, between the hours of 8:30 p.m. and 11:00 p.m. she and appellant were at their home at 1725 Fredonia, sleeping. She explained that they had gone to bed early because in the early morning hours of January 11, she had been attacked outside a nearby

gas station while appellant was inside. She stated that the gas station at which she was attacked was not the Sunoco at issue in this case. After the attack, appellant took her to St. Vincent's Hospital because the assailant had injured her left knee. After receiving treatment she and appellant returned home at around 4:00 a.m. and went to bed. Whitzel testified that she was prescribed Percocet for her injury and she and appellant slept most of the day. They then woke up around 4:30 p.m. and appellant went to the store to buy them dinner. After eating, Whitzel said the two went back to sleep and did not wake up until the police knocked at their door. On cross-examination, however, Whitzel admitted that it was possible that appellant was not with her all night. In addition, Whitzel stated that appellant owned a black knit hat, and when shown the black cap that was evidence in this case, she stated that she had seen appellant wear a hat like that before. She also stated that the hat could very well be hers.

{¶ 15} At the conclusion of the trial, the court reviewed the facts of the case and found appellant guilty of aggravated robbery and felonious assault. The court thereafter sentenced appellant to eight years incarceration on the aggravated robbery offense, seven years incarceration on the felonious assault offense, and ordered the terms to be served consecutively. It is from that judgment that appellant now appeals.

{¶ 16} We will first address appellant's second assignment of error in which he challenges the trial court's denial of his motion to suppress.

{¶ 17} In the proceedings below, appellant filed a pre-trial motion to suppress Sander's identification of him through the photo array. Appellant asserted that because

the array was overly suggestive, there was a substantial likelihood of misidentification. The court held a hearing on the motion at which Sanders and Detective Applin testified. Sanders stated that when she was attacked, it was dark outside but the parking lot of the gas station was well-lit and she was able to get a good look at her assailant's face. She further stated that during the attack he was only an arm's-length away from her and that the attack lasted for a few minutes. Regarding the first photo array that she was shown by Detective Applin, Sanders stated that Applin handed her the array and stated that her attacker may or may not be in the array. After looking over the array of six African-American males, Sanders told Applin that although one of the men looked familiar, her attacker was not in array. Regarding the second photo array, Sanders testified that Applin contacted her and asked her to come to the police department. When she arrived, she was shown a second photo array. Again, Applin told her that her assailant may or may not be in the array and again the array depicted six African-American males. Sanders quickly pointed to the man posted in the number five position, appellant. That photograph is shaded slightly darker than the other photographs in the array, but Sanders stated the shading did not influence her choice of the number five suspect because she recognized his eyes. She was certain of her identification. Detective Applin testified that through his investigation of the attack, he learned of two potential suspects, Sam Adams and appellant. When he then showed Sanders the second photo array, she only looked at the photos for about five seconds before she identified appellant as her attacker.

{¶ 18} In reviewing the motion to suppress, the lower court found that although the photograph of appellant had a darker hue than the photographs of the other men in the array, all of the six men posted were African-American males with similar facial structure and similar in age and that the identification procedure was not unnecessarily suggestive. The court also found that the attack happened in a well-lit area and that Sanders had sufficient time to see her attacker. Accordingly, applying the relevant case law, the court denied the motion to suppress.

{¶ 19} Review of a trial court's grant or denial of a motion to suppress presents mixed questions of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. An appellate court defers to a trial court's factual findings made with respect to its ruling on a motion to suppress where the findings are supported by competent, credible evidence. Id. See, also, *State v. Brooks* (1996), 75 Ohio St.3d 148, 154. "[T]he appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside*, at ¶ 8, citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶ 20} In *Neil v. Biggers* (1972), 409 U.S. 188, the United States Supreme Court considered due process limitations on the use of evidence derived through suggestive identification procedures. "When 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*, supra; *Manson v. Brathwaite* (1977), 432 U.S. 98. The court first asks whether the identification procedure was unnecessarily suggestive of the defendant's guilt. *Waddy*, supra, at 438. 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, however, the defendant establishes that the identification procedure was unduly suggestive, the court must consider "whether, under all the circumstances, the identification was reliable, i.e., whether suggestive procedures created 'a very substantial likelihood of irreparable misidentification.'" *Waddy*, supra, at 439, quoting *Simmons v. United States* (1968), 390 U.S. 377, 384.

{¶ 21} Appellant contends that because his photograph was so different from the others in the array that was shown to Sanders, it drew her attention to it and away from the other photographs and, as such, it was unduly suggestive of his guilt. Appellant notes three differences in the photographs that he asserts make it unduly suggestive. First, he notes that the background color of his photograph was golden brown, while the backgrounds of the other photographs were white, second he states that he is the only suspect in the array with "bulging eyes," and third, he states that facial hair cannot be clearly seen on his photograph while each of the other five individuals clearly have facial hair.

{¶ 22} Having reviewed the photo array in question, we cannot say that the trial court erred in finding that it was not unnecessarily suggestive. Although the photograph of appellant is more shaded than those of the other men, all of the men depicted are similar in age, have similar hair lines and similar facial hair. We also disagree with appellant's contention that facial hair cannot be clearly seen on his photograph as it is clear on the right side of his face. Finally, of the men depicted, three have narrow eyes, one has eyes somewhat similar to appellant's, and the final man has eyes in between.

{¶ 23} Assuming arguendo that the photo array was unduly suggestive, we further agree with the trial court that Sanders' identification of appellant from the photo array, when viewed under the totality of the circumstances, was reliable. Sanders viewed her attacker in good light for what she believed was several minutes. Each time she was shown an array by Detective Applin, he told her that her attacker may or may not be among the men depicted. When she was shown the first array, she indicated that Sam Adams looked familiar but was certain that he was not her attacker. When she was shown the second array she quickly identified appellant, stating that she recognized his eyes. Detective Applin testified that he did not recall Sanders describing her attacker as having bulging eyes. Given the totality of the circumstances in this case, we cannot say that there was a substantial likelihood of irreparable misidentification. The lower court did not err in denying the motion to suppress and the second assignment of error is not well-taken.

{¶ 24} We will now address the third assignment of error in which appellant challenges the trial court's consideration of the DNA evidence admitted at the trial below. Appellant contends that because the state did not call the witness who recovered the black hat (the store clerk) to testify at the trial below, the state did not lay a proper foundation for the admission of the hat, and the DNA evidence connected to it, at the trial. Accordingly, appellant asserts that the court should not have given any weight to the DNA evidence recovered from the hat.

{¶ 25} In the trial below, Sanders first testified on direct examination that during her struggle with her attacker she tried to hit him in his face with her keys and in doing so "knocked off his stocking cap which was found next to my car with my keys." She further testified that she gave the cap to the police. She then identified the stocking cap, state's exhibit No. 6, as the cap that was found on the night she was attacked. On cross-examination, Sanders admitted that the station clerk found her keys and the hat shortly after the attack and handed them to her. Then, during redirect, Sanders testified as follows:

{¶ 26} "Q The keys and the hat were found next to the door?

{¶ 27} "A Yes, sir.

{¶ 28} "MR. CANDIELLO: I'm going to object, Your Honor. If she is not at the scene, she's inside, I don't know how she can testify to that.

{¶ 29} "THE COURT: We're going to sustain it. You have to lay the proper foundation.

{¶ 30} "MR. MILLER: I'm getting there.

{¶ 31} "* * *

{¶ 32} "Q Did you observe the area where this struggle occurred?

{¶ 33} "A After when we – after the fact?

{¶ 34} "Q Yes.

{¶ 35} "A Yes.

{¶ 36} "Q Did you personally see your keys by the side of the front door?

{¶ 37} "A No, I didn't.

{¶ 38} "Q Did you see the hat there?

{¶ 39} "A No, I didn't.

{¶ 40} "Q Were they given to you by the clerk?

{¶ 41} "A Yes.

{¶ 42} "Q Together?

{¶ 43} "A Together."

{¶ 44} The judge then indicated that she had a couple of questions for Sanders and asked appellant's counsel if he objected. He stated that he did not. The court then questioned Sanders in relevant part as follows.

{¶ 45} "THE COURT: What color was this hat that this assailant was wearing?

{¶ 46} "MS. SANDERS: Black.

{¶ 47} "THE COURT: Black? How do you know you knocked this hat off?

{¶ 48} "MS. SANDERS: When I fought back I I [sic] aimed for his face and his head. I felt something fall. I didn't see anything fall.

{¶ 49} "THE COURT: All right. At any time before you went in to the carryout, did you see anything at or near the area of that door?

{¶ 50} "MS. SANDERS: No, ma'am, I was too scared.

{¶ 51} "THE COURT: When the clerk brought these items in, did you recognize that hat?

{¶ 52} "MS. SANDERS: Yes, ma'am.

{¶ 53} "THE COURT: You're sure of that?

{¶ 54} "MS. SANDERS: Yes, ma'am.

{¶ 55} "THE COURT: All right. Anything else, Bob?

{¶ 56} "MR. CANDIELLO: Nothing further, Your Honor."

{¶ 57} When the state moved to admit the hat into evidence, appellant's counsel objected for the reasons previously stated. The court overruled the objection and admitted the hat. It was from this hat that DNA evidence was recovered. In particular, appellant was found to be a major contributor of the DNA found on the hat.

{¶ 58} Evid.R. 901(A) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." It is well-established that "[a] strict chain of custody is not always required in order for physical evidence to be admissible." *State v. Wilkins* (1980), 64 Ohio St.2d 382, 389. "Moreover,

a chain of custody can be established by direct testimony or by inference." *State v. Lenoir*, 5th Dist. No. 10CAA010011, 2010-Ohio-4910, ¶ 18. "In order to establish sufficient relevance of clothing to the crime the offeror of the evidence must show that there is identity between the clothing and the crime, that the clothing is in substantially the same condition as it was at the time of the crime, and that it is probative of an element of the crime." *Wilkins*, supra, at 389.

{¶ 59} In the present case, although Sanders did not personally retrieve the hat and her keys after she was attacked, she testified that when she tried to hit her attacker with her keys she felt something fall. She then recognized the hat that the clerk handed her as the hat her attacker wore. Appellant contends that because the hat was a simple non-distinctive black stocking cap, and because appellant lived nearby, the state did not sufficiently connect the hat to the assault. We disagree. Moreover, the weight to be afforded this evidence, and the DNA recovered from the hat, were matters for the trier of fact, in this case the court. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In our view, the hat was sufficiently tied to the crimes charged to permit the lower court to consider it in evidence. The third assignment of error is not well-taken.

{¶ 60} In his fourth assignment of error, appellant asserts that if the trial court improperly relied on the DNA evidence or if the court improperly admitted into evidence the pretrial identification of him by Sanders, then the court's findings that he was guilty of aggravated robbery and felonious assault were against the manifest weight of the evidence.

{¶ 61} As discussed above, we have found no error in the trial court's consideration of the DNA evidence or of Sanders' pretrial identification of appellant. Nevertheless, we will review the record under a manifest weight of the evidence standard.

{¶ 62} Under a manifest weight standard, an appellate court sits as a "thirteenth juror" and may disagree with the fact finder's resolution of the conflicting testimony. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. The appellate 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 miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" Id. quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 63} Appellant was convicted of aggravated robbery in violation of R.C. 2911.01(A)(1), a first degree felony, and felonious assault in violation of R.C. 2903.11(A)(1), a second degree felony. The aggravated robbery statute provides in relevant part:

{¶ 64} "(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:

{¶ 65} "(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[.]"

{¶ 66} In the trial below, testimony established that appellant used a stick or small baseball bat to repeatedly hit Sanders' arm, breaking it, while stealing her purse and its contents from her. In finding appellant guilty, the lower court expressly found that the weapon used by appellant was, by definition, a deadly weapon. In reviewing the record, we cannot say that the lower court clearly lost its way and created a manifest miscarriage of justice in convicting appellant of aggravated robbery.

{¶ 67} The felonious assault statute provides in relevant part that "[n]o person shall knowingly * * * [c]ause serious physical harm to another or to another's unborn[.]" Again, we have reviewed the testimony and evidence submitted in the trial below, and cannot say that the court clearly lost its way in finding appellant guilty of felonious assault. Accordingly, the fourth assignment of error is not well-taken.

{¶ 68} Finally, under his first assignment of error, appellant contends that his convictions of aggravated robbery and felonious assault are a nullity and in violation of the Sixth Amendment to the United States Constitution because the trial court did not find him guilty "beyond a reasonable doubt." Appellant has not cited any statutory authority or case law in support of his proposition. Rather, he looks to R.C. 2901.05(A), which reads in part: "Every person accused of an offense is presumed innocent until

proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution."

{¶ 69} In a bench trial, the court assumes the fact-finding role of the jury. Moreover, in reviewing a bench trial, an appellate court must presume that the trial court applied the law correctly unless the record clearly demonstrates otherwise. *State v. Coombs* (1985), 18 Ohio St.3d 123, 125.

{¶ 70} In the proceedings below, after the parties presented their cases, the court retired to review the evidence. Upon its return, the court reviewed the factual findings that it had made, discussing them in detail and then found appellant guilty of aggravated robbery and felonious assault. Similarly, the court's judgment entry reads: "Defendant found Guilty by the Court of the offense of Aggravated Robbery, count 1, in violation of R.C. 2911.01(A)(1), a felony of the 1st degree, and Felonious Assault, count 2, in violation of R.C. 2903.11(A)(1), a felony of the 2nd degree."

{¶ 71} While it is the most basic principle of our criminal justice system that a defendant must be found guilty beyond a reasonable doubt, we can find no statutory authority or case law that requires a court to expressly state that it finds a defendant guilty "beyond a reasonable doubt," when the case is tried to the bench. Regardless, appellant has failed to establish that the lower court applied the wrong legal standard in the proceedings below and, therefore, has failed to overcome the presumption afforded the trial court. *City of Niles v. Cadwallader*, 11th Dist. No. 2003-T-0137, 2004-Ohio-6336, ¶ 38. The first assignment of error is not well-taken.

{¶ 72} On consideration whereof, the court finds 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. 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