[Cite as *State v. Ramirez*, 2013-Ohio-843.]

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

State of Ohio — Court of Appeals No. L-11-1263

Appellee — Trial Court No. CR0201101378

v.

Edgar Ramirez — **DECISION AND JUDGMENT**

Appellant — Decided: March 8, 2013

* * * * *

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

Dan M. Weiss, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Edgar Ramirez, appeals the judgment of the Lucas County Court of Common Pleas, following a jury trial, which found him guilty of four counts of complicity to commit aggravated robbery and two counts of complicity to commit

felonious assault, all with the attendant firearms specifications, and sentenced him to 59 years in prison. We affirm, in part, and reverse, in part.

A. Facts and Procedural Background

{¶ 2} Following a three-day jury trial of appellant and his co-defendant, Jorge Rojas, appellant was convicted of numerous crimes stemming from his conduct on three separate occasions. Testimony from the trial revealed that on June 15, 2010, a group of five masked individuals, two of whom were armed, entered a Marathon gas station. Upon entering, some members of the group held the clerk at gunpoint while other members of the group stole cash and merchandise, placing the items into bags that they had brought. As the group was exiting, one of the members fired a shot above the clerk's head. The entire incident lasted just over a minute. The clerk was unable to identify any of the individuals.

{¶ 3} A few days later, on June 27, 2010, the same group of masked individuals entered a Circle K carryout. A customer was in the store at the time. Again, the clerk and customer were held at gunpoint by some members of the group. The other members stole cash and merchandise from the store, along with $20 from the customer, placing the items into duffel bags. As the group left the store, one of the members touched the door with his ungloved hand, leaving a palm print. Similar to the robbery at the Marathon gas station, this incident lasted a very short time. Neither the clerk nor the customer was able to identify any of the individuals.

{¶ 4} The third incident occurred on July 7, 2010. This time, the group of individuals stormed into a KeyBank branch. Immediately upon entering, one of the individuals fired a shot above the teller's head. The teller was then held at gunpoint while one of the members jumped over the counter and took all of the money out of her drawer. The bank manager, along with another employee, were behind a closed door when the group entered. Upon hearing the gunshot, the bank manager opened the door. When he saw the armed group in the lobby, he ran away from the door, and with the other employee, retreated to the basement. One of the group members saw the door open, and leveled his gun to fire. However, his gun jammed. By the time he was able to fire at the door, the bank manager was no longer near it. The group then fled. The entire incident lasted only a couple of minutes. None of the bank employees were able to identify any of the perpetrators.

{¶ 5} Within minutes after the KeyBank robbery, the police found an abandoned van that matched the description of the group's getaway vehicle. Inside the van, the police found the bank teller's business card. The van also contained a torn off shirtsleeve that was used as a mask. DNA consistent with appellant's DNA was found on that mask.

{¶ 6} Two other incidents occurred after the KeyBank robbery.[1] Following the second incident, the police arrested Raul Moya. Moya's fingerprints matched those left at the Circle K carryout. Armed with a search warrant, the police then searched

[1] Appellant was indicted and tried for aggravated burglary regarding the first incident. However, the trial court granted appellant's Crim.R. 29 motion relative to that charge following the state's presentation of its case.

appellant's residence at 847 Kingston. In the detached garage, the police found clothes and gloves matching those used in the robberies. Those items were entered into evidence along with photos and videos from the robberies. Some clothing items from the robberies had also been sent for DNA analysis. Appellant's DNA was found on some of those items.

{¶ 7} During the trial, Moya testified on behalf of the state. Moya testified that in his initial interviews with the detectives who were investigating the robberies, he lied repeatedly in order to protect the other members of the group. However, at some point, Moya decided to tell the truth, and implicated appellant and Rojas as two of the members involved in the Marathon, Circle K, and KeyBank robberies. As part of his testimony, Moya described the group's preparation and execution of the crimes in detail. Moya also testified that although he had been charged as a juvenile for his involvement in these crimes, he was not being prosecuted.

{¶ 8} In addition, Moya testified that on the day he was arrested, July 18, 2010, Moya had spent the day with appellant. However, appellant later introduced evidence showing that appellant was arrested early in the morning on July 18, 2010, and was not released until July 19, 2010.

{¶ 9} Following the trial, the jury found appellant guilty of complicity to commit aggravated robbery, a felony of the first degree, with the attached gun specification, based on the Marathon robbery. The jury also found him guilty of two counts of complicity to commit aggravated robbery, with the attached gun specifications, based on

the Circle K robbery. Finally, they found him guilty of one count of complicity to commit aggravated robbery, with the attached gun specification, and two counts of complicity to commit felonious assault, felonies of the second degree, with the attached gun specifications, based on the KeyBank robbery.

{¶ 10} The trial court ordered a presentence investigation report, and set the matter for sentencing. At the sentencing hearing, the court sentenced appellant to nine years on each of the four counts of aggravated robbery, five years on the first count of felonious assault, and nine years on the second count of felonious assault. The court then merged the gun specifications within the separate incidents, such that appellant was sentenced to three mandatory three-year terms. The trial court ordered all of the prison terms to be served consecutively for a total prison term of 59 years.

B. Assignments of Error

{¶ 11} Appellant presents two assignments of error for our review:

1. THE TRIAL COURT'S DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

2. APPELLANT'S SENTENCE OF FIFTY-NINE (59) YEARS IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF EDGAR RAMIREZ'S RIGHTS PURSUANT TO THE EIGHTH (8TH) AMENDMENT OF THE U.S. CONSTITUTION AND ART. 1, SEC. 9 OF THE OHIO CONSTITUTION.

II. Analysis

A. Manifest Weight

{¶ 12} In his first assignment of error, appellant contends that the jury's finding of guilt was against the manifest weight of the evidence. When reviewing a manifest weight claim,

> 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. 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. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶ 13} Here, appellant does not contest that the crimes occurred. Instead, he contests the jury's finding that he was one of the perpetrators. As support, appellant argues that the only evidence linking him to the crimes was the testimony of Moya, an admitted liar who escaped prosecution by testifying against appellant. Further, appellant points to Moya's testimony that they spent the day together on July 18, 2010, as evidence of his unreliableness, since appellant was in jail that day.

{¶ 14} The state, on the other hand, argues that the convictions are not against the manifest weight of the evidence because, in addition to Moya's testimony, which the jury found credible, there was physical evidence linking appellant to the crimes in the form of the clothing, masks, and gloves that were recovered from appellant's residence. Further, the state argues that Moya's testimony regarding July 18, 2010, which involved an incident for which appellant was not charged, does not preclude the jury from finding the rest of his testimony to be credible.

{¶ 15} Upon reviewing the evidence as the putative thirteenth juror, we conclude that this is not the exceptional case where the evidence weighs heavily against the conviction. Here, the jury found Moya's testimony to be credible concerning the identity of the robbers despite the fact that he was giving his testimony in exchange for not being prosecuted, and despite the fact that he misremembered the events of July 18, 2010. We must keep in mind that "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact may believe all, some, or none of what a witness says. *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). In addition, we agree with the state that Moya's testimony was corroborated by the physical evidence found at appellant's residence and the fact that appellant's DNA was found on clothing items used in the robberies. Therefore, we hold that appellant's convictions were not against the manifest weight of the evidence.

{¶ 16} Accordingly, appellant's first assignment of error is not well-taken.

B. Cruel and Unusual Punishment

{¶ 17} In his second assignment of error, appellant argues that his 59-year prison sentence constitutes cruel and unusual punishment because it is grossly disproportionate to the crimes committed and the sentences imposed upon co-perpetrators. We disagree for two reasons.

{¶ 18} First, we find appellant's comparison to the sentences imposed upon his co-perpetrators to be without merit. Appellant compares his sentence to Raul Moya, who was not prosecuted because he agreed to testify for the state, Javier Garcia, who was sentenced to two years in prison after pleading guilty to obstructing justice, a third degree felony, and Martin Cheno, who was sentenced to 13 years in prison after pleading guilty to only one of the felonies and attached gun specification. In contrast, appellant notes that for committing the same crimes, he was sentenced to 59 years in prison. However, we find that the individuals cited by appellant do not provide an accurate comparison because they were only convicted of one offense, or in the case of Moya, no offenses. Instead, appellant's situation is closer to his co-defendant, Jorge Rojas, who was convicted of the same crimes plus an additional count of complicity to commit aggravated robbery. Rojas was sentenced to 71 years in prison.

{¶ 19} Second, "[a]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment." *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964). "Cases in which cruel and unusual punishments have been found, are limited to those involving sanctions which under the

circumstances would be considered shocking to any reasonable person." *Id.* at 70. "The penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community." *Id.* When conducting a proportionality review, however, courts

> should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively. Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 20.

Here, considering each offense individually, we do not find that appellant's 59-year prison sentence constitutes cruel and unusual punishment.

{¶ 20} Accordingly, appellant's second assignment of error is not well-taken.

C. Sentencing

{¶ 21} Finally, although not raised by appellant, the state has identified an error in appellant's sentence that requires reversal. Appellant was convicted of two counts of complicity to commit felonious assault, felonies of the second degree. On the first, appellant was sentenced to five years in prison. On the second, which was the lesser-included offense of a charge of complicity to commit attempted murder, appellant was sentenced to nine years in prison. However, the maximum penalty for a felony of the second degree is eight years. R.C. 2929.14(A)(2). Accordingly, appellant's sentence on

the second count of complicity to commit felonious assault, Count 6, is reversed and vacated. The matter is remanded for resentencing solely on that count.

III. Conclusion

{¶ 22} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part. Appellant's sentence on the second count of complicity to commit felonious assault, Count 6, is reversed and vacated. All other aspects of the conviction are affirmed. The matter is remanded to the trial court for resentencing solely on Count 6. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

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

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE