

[Cite as *State v. Jackson*, 2009-Ohio-2388.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91613

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERRON JACKSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505637

BEFORE: Celebrezze, J., Cooney, A.J., and Jones, J.

RELEASED: May 21, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant Jerron Jackson brings this appeal challenging his convictions for aggravated robbery, kidnapping, and having a weapon while under a disability. After a thorough review of the record, and for the reasons set forth below, we affirm in part, reverse in part, and remand.

{¶2} On January 16, 2008, a Cuyahoga County Grand Jury indicted appellant on one count of aggravated robbery in violation of R.C. 2911.01(A)(1), with one- and three-year firearm specifications; two counts of kidnapping in violation of R.C. 2905.01, both with one- and three-year firearm specifications; and one count of having a weapon while under a disability in violation of R.C. 2923.13.

{¶3} On May 12, 2008, after appellant executed a jury waiver, a bench trial commenced. Appellant's counsel stipulated to the operability of the firearm and to appellant having a prior conviction, as they related to Count 4.

{¶4} The state presented Pamela Waite, one of the victims of the crimes, to testify to the events that occurred on December 12, 2007. Ms. Waite testified that she was grocery shopping mid-morning at Dave's Eagle Mart ("Dave's"), located at East 33rd Street and Payne Avenue. While inside the store, she cashed a check for \$1,500 and put the money in her left coat pocket. Ms. Waite testified that after she completed her shopping, she walked to her car accompanied by her nephew, James Waite, who worked at Dave's. Ms. Waite testified that when she arrived at her car, she felt a hard object poke her in her side. She testified that a black male, wearing a

brown hoodie, was pointing a black and silver gun at her and that he repeatedly demanded that she give him what she had in her left pocket.

{¶15} Ms. Waite testified that she refused to give the man her money and that, although she was frightened, she tried to get into her car. She testified that the man blocked her access to the interior of the car while he tried to grab her money. She also testified that at one point during the confrontation, the man pulled back the slide on the gun and a bullet was discharged. Ms. Waite was ultimately able to enter her car by pushing past the man, at which point she drove into the street and flagged down a passing police car.

{¶16} Ms. Waite testified that the incident in the Dave's parking lot lasted approximately five minutes and that she stared at the perpetrator's face the entire time. She also testified that the police asked her to make an identification of two different suspects within approximately 20 minutes of the incident. Ms. Waite told the police the person they asked her to identify at the cold stand at Dave's ("first cold stand") was definitely not the perpetrator; she then identified appellant from the cold stand the police conducted at 1585 East 33rd Street ("second cold stand").

{¶17} James Waite testified that he was with his aunt as she left Dave's on the morning of December 12, 2007. He testified that, while he was placing the grocery bags in the back seat, behind the driver's seat, a black male dressed in a brown hoodie and blue ski cap approached his aunt and held a black and silver gun to her side. James testified that the man demanded Ms. Waite give him her money, but she refused. James testified that he was frozen with fear and could neither run away

nor assist his aunt. He also testified that the man instructed him to stay still, and then the man pulled back the slide on the gun and a bullet was discharged. James testified that while his aunt tried to maneuver herself into her car, James pushed the man, and the man left the scene on a green bicycle heading down East 33rd Street.

{¶8} James further testified that approximately ten minutes later, the police asked him to view a suspect who was seated in the back of a zone car (the first cold stand). James testified that when he looked through the tinted police car window, he told the police that he was not sure if that person was the perpetrator. James testified that he was then asked to identify a suspect in the second cold stand, at which time he identified appellant as the perpetrator with complete certainty.

{¶9} Officer Aman Gamble testified that, based on information he received from Pamela Waite about an attempted robbery, he found appellant in the backyard at 1585 East 33rd Street. Officer Gamble testified that appellant told him someone wearing a brown hoodie had hit him and then jumped over the back fence. At the time Officer Gamble apprehended him, appellant was not wearing a brown hoodie. Officer Gamble testified that the police retrieved a loaded handgun lying on the driveway, an abandoned green bicycle near 1585 East 33rd Street, and a brown hoodie from the backyard of the house at 1585 East 33rd Street.

{¶10} Officer Gamble testified that he spoke with Robert Mathews, the resident at 1585 East 33rd Street. Mathews told Officer Gamble that he had seen appellant wearing the brown hoodie and crouching in the backyard. Mathews stated that the gun had not been on the driveway previously. Officer Gamble was one of

the officers who conducted the second cold stand with appellant as the suspect, and both Ms. Waite and James identified appellant as the perpetrator.

{¶11} Officer Gamble and Detective Dale Moran viewed videotape surveillance from the Dave's store in which they saw appellant, wearing a brown hoodie like the one they retrieved, apparently following Ms. Waite through the store. The videotape also showed appellant on a bicycle outside the store. A bullet that matched the black and silver handgun the police found was retrieved from the Dave's parking lot.

{¶12} The state did not present any physical evidence linking appellant to the crime. No fingerprint analysis was done on the gun, and the only fingerprints the police found on the bicycle did not match appellant's.

{¶13} At trial, Ms. Waite, James Waite, Mr. Mathews, and Officer Gamble identified appellant as the person they had seen in connection with the alleged crimes.

{¶14} At the close of the state's case, appellant moved for a Crim.R. 29 dismissal. The trial court denied the motion. Appellant presented no witnesses.

{¶15} The trial court found appellant guilty on all four counts and the firearm specifications. Appellant was sentenced to six years on the aggravated robbery charge and six years on both kidnapping charges, all to run concurrently, and three years on the merged firearm specifications, to run prior to and consecutive to the six years for the underlying offenses. He was also sentenced to one year for having a

weapon under disability, to run concurrently with the underlying sentences in Counts 1 through 3, for a total of nine years in prison.

Review and Analysis

{¶16} Appellant filed this timely appeal. He cites four assignments of error for our review.

Ineffective Assistance of Counsel

{¶17} “I. Appellant was denied effective assistance of counsel.”

{¶18} In his first assignment of error, appellant argues that his attorney’s failure to file a motion to suppress the identification at the cold stands constitutes ineffective assistance of counsel. We disagree.

{¶19} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient, and 2) the result of the appellant’s trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶20}The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that “[w]hen considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.’ *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668. ***

{¶21}“Accordingly, to show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.”

{¶22}Appellant argues that the witnesses’ identifications of him were inconsistent. He specifically argues that neither witness gave the police a description of the perpetrator other than saying “black male”; that James thought the suspect in the first cold stand “might have been” the perpetrator; that James relied on the proximity of the bicycle and gun to where the second

cold stand was conducted to connect appellant to the crime; and that James may have indicated to his aunt that appellant was the “right guy” even before she had an opportunity to see him.

{¶23} In *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375, 34 L. Ed. 2d 401, the United States Supreme Court held that an identification derived from unnecessarily suggestive procedures, which has a likelihood of leading to a misidentification, violates a defendant's right to due process. Accordingly, a simply “suggestive identification procedure” will not result in a suppression of the identification unless the procedure impacts the reliability of the identification itself. *Id.* The United States Supreme Court and the Sixth Circuit Court of Appeals have long recognized the danger inherent in eyewitness identifications resulting from show-ups, even if these courts have found, under the totality of the circumstance, the identification was reliable. See *Stovall v. Denno* (1967), 388 U.S. 293, 87 S.Ct. 1967, 18 L. Ed. 2d 1199; *Gregory v. Louisville* (C.A.6, 2006), 444 F.3d 725. *Stovall* holds, however, that the admission of evidence of a show-up without more does not violate due process.

{¶24} Addressing the admissibility of identification testimony arising from relying on cold stands or one-on-one show-ups, “[c]ourts employ a two-step process to determine the admissibility of identification testimony. The first step focuses only upon whether the identification procedure was impermissibly suggestive. *Biggers* places show-ups (or cold stands) in this category. See, e.g.,

State v. Gross, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061; *State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682.

{¶25}The second part of the inquiry then focuses upon five factors necessary to assess the reliability of the identification, despite the taint of the show-up. These five factors are: “(1) the witness's opportunity to view the defendant at the time of the crime, (2) the witness's degree of attention at the time of the crime, (3) the accuracy of the witness's description of the defendant prior to the identification, (4) the witness's level of certainty when identifying the defendant at the confrontation, and (5) the length of time that has elapsed between the crime and the confrontation.” *State v. Williams*, 172 Ohio App.3d 646, 2007-Ohio-3266, 876 N.E.2d 991.

{¶26}In this case, both victims testified that they had approximately five minutes to view appellant during the commission of the crime and that their view of the perpetrator's face was unobstructed. Ms. Waite testified that she stared at appellant's face the entire time he held her at gunpoint and attempted to take her money. Both Ms. Waite and James identified appellant as the perpetrator with absolute certainty, even though James admittedly was unsure about the first suspect he viewed. Finally, both witnesses testified that the amount of time that elapsed between the crime and the identification of appellant as the perpetrator was approximately 20 minutes. With the exception

of the third factor, the accuracy of the witness's description prior to the identification, the state presented evidence on the other four factors.

{¶27} We find that the evidence presented by the state satisfies the second part of the inquiry as to the reliability of the identification. Therefore, we are not convinced that had appellant's counsel filed a motion to suppress, it would have been granted. Therefore, under the first prong of *Strickland*, appellant's counsel did not violate an essential duty to appellant. Thus we do not need to address the second prong of *Strickland* to determine whether appellant was prejudiced by his counsel's decision not to file a motion to suppress.

{¶28} Nonetheless, we find that the state presented other corroborating evidence of appellant's guilt. Mr. Mathews testified that he saw appellant wearing the same brown hoodie that the victims saw him wearing during the commission of the crime. The videotape surveillance from Dave's showed appellant wearing the brown hoodie and following Ms. Waite in the store. Officer Gamble testified that the man wearing the brown hoodie who he observed jump the fence was appellant, whom he arrested in Mr. Mathews' yard. This evidence, even without the cold stand identification, was enough to remove any prejudice from an impermissibly suggestive procedure.

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

Kidnapping Convictions

{¶30}“II. The state failed to present evidence to sustain appellant’s conviction for kidnapping.”

{¶31}In his second assignment of error, appellant argues there was insufficient evidence to support his convictions for kidnapping. Appellant was convicted of two counts of kidnapping, and since he does not identify which count he is challenging, we address his argument as to both.

{¶32}Under Crim.R. 29, a trial court “shall not order an entry of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.” *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus. “A motion for judgment of acquittal under Crim.R. 29(A) should only be granted where reasonable minds could not fail to find reasonable doubt.” *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394.

{¶33}Thus, the test an appellate court must apply in reviewing a challenge based on a denial of a motion for acquittal is the same as a challenge based on the sufficiency of the evidence to support a conviction. See *State v. Bell* (May 26, 1994), Cuyahoga App. No. 65356. In *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492, the Ohio Supreme Court set forth the test an appellate court should apply when reviewing the sufficiency of the evidence in support of a conviction:

{¶34} “[T]he relevant inquiry on appeal is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. In other words, an appellate court’s function when reviewing the sufficiency of the evidence is to examine the evidence admitted at trial and determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169.” See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct 2781, 61 L.Ed.2d 560.

{¶35} In addition to being convicted of one count of aggravated robbery, appellant was convicted of two counts of kidnapping -- one as to each victim. When the trial court announced its verdict, it stated: “Keeping in mind that the kidnapping of Pamela Waite and the robbery of her would be considered as allied offenses and subject, of course, to concurrent terms, I believe the state has met its burden on each of the counts and the verdict will be guilty as to all counts and specifications.” The journal entry, however, does not reflect that any of the underlying counts were merged. We find that the kidnapping conviction as to Ms. Waite merges with the offense of aggravated robbery, and the kidnapping conviction as to James Waite does not merge with any of the other offenses.

{¶36} R.C. 2941.25 provides: “(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one. (B) Where the defendant's conduct

constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.”

{¶37} The application of this statute involves a two-tiered analysis. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, citing *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181. “In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.” *Id.*, quoting *State v. Blankenship*, 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶38} The *Cabrales* court rejected a “strict textual comparison” stating: “Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.” *Cabrales*, *supra*.

{¶39}R.C. 2905.01 defines kidnapping: “(A) No person, by force, threat, or deception, *** shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: *** (2) To facilitate the commission of any felony or flight thereafter.”

{¶40}R.C. 2911.01 defines aggravated robbery: “(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: (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.”

{¶41} “[T]he elements to be compared in the abstract are the restraint, by force, threat, or deception, of the liberty of another to ‘facilitate the commission of any felony’ (kidnapping, R.C. 2905.01(A)(2)) and having ‘a deadly weapon on or about the offender's person or under the offender's control and either display[ing] the weapon, brandish[ing] it, indicat[ing] that the offender possesses it, or us[ing] it’ in attempting to commit or committing a theft offense (aggravated robbery, R.C. 2911.01(A)(1)). It is difficult to see how the presence of a weapon that has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not also forcibly restrain the liberty of another. These two offenses are ‘so similar that the commission of one offense will necessarily result in commission of the other.’

*** They meet the test for allied offenses as it was refined by *Cabrales*.” *State v. Winn*, Slip Opinion No. 2009-Ohio-1059; see, also, *State v. Logan* (1979), 60 Ohio St.2d 126, 130, 397 N.E.2d 1345 (authority for the proposition that kidnapping and robbery are allied offenses of similar import); *State v. Jenkins* (1984), 15 Ohio St.3d 164, 473 N.E.2d 264; *State v. Fears*, 86 Ohio St.3d 329, 344, 1999-Ohio-111, 715 N.E.2d 136.

{¶42} Here, appellant held a gun to Ms. Waite’s side and demanded she give him her money. Not only was he robbing her, but he restrained her movement, as proscribed by the kidnapping statute. At the same time that appellant brandished a handgun and robbed James’s aunt, he ordered James to stay still, thus satisfying the elements of kidnapping as to James. In this case, the trial court properly merged the crimes of kidnapping and aggravated robbery as to Ms. Waite and convicted appellant on the separate count of kidnapping as to James Waite. See *State v. Menendez* (June 5, 1986), Franklin App No.85AP-1056 (“defendant could be convicted of a separate violation of kidnapping for each victim as the result of his conduct); see, also, *State v. Jones* (1985), 18 Ohio St. 3d 116, 480 N.E.2d 408; *State v. Higgins* (1986), 23 Ohio St.3d 68, 491 N.E.2d 684.

{¶43} To the extent the journal entry reflects the conviction for kidnapping as it relates to James Waite, that conviction stands. Where the journal entry does not reflect the merger of appellant’s convictions on aggravated robbery and

one count of kidnapping as they relate to Pamela Waite, we reverse and remand with instructions to the trial court to correct it.

{¶44} Appellant's second assignment of error is sustained in part and reversed in part.

Firearm Specification

{¶45} "III. The application of the firearm specification in R.C. 2941.145, as applied to the underlying offense of aggravated robbery, R.C. 2911.01(A)(1), violates appellant's right to due process and equal protection."

{¶46} In his third assignment of error, appellant argues that he should not have been found guilty of the firearm specification because the state was not required to prove an additional element to those elements contained in R.C. 2911.01(A)(1) for aggravated robbery. We disagree.

{¶47} As set forth above, R.C. 2911.01(A) states in pertinent part: "No person, in attempting or committing a theft offense, *** shall do any of the following: (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; ***." "Deadly weapon" is defined by R.C. 2923.11(A) as "any instrument, device or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."

{¶48} To be convicted of a firearm specification, the state must prove that a firearm is operable at the time of the offense. *State v. Caraballo*, Cuyahoga App. No. 89775, 2008-Ohio-5248, relying on *State v. Vondenberg* (1980), 61 Ohio St.2d 285, 401 N.E.2d 437. This additional element is over and above what is needed to prove the offense of aggravated robbery.

{¶49} In this case, the parties stipulated that the handgun used in the crime against Ms. Waite and her nephew was operable. This is sufficient to permit the trier of fact to convict appellant on the firearm specifications in addition to convicting him of aggravated robbery. Furthermore, the trial court merged all firearm specifications as part of a single offense and sentenced him accordingly.

{¶50} Appellant's third assignment of error is overruled.

Manifest Weight of the Evidence

{¶51} "IV. The appellant's convictions are against the manifest weight of the evidence."

{¶52} In his fourth assignment of error, appellant argues that all of his convictions were against the manifest weight of the evidence. He focuses primarily on the weakness of the cold stand identifications and the lack of forensic evidence. We are not persuaded.

{¶53} Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the

factfinder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court “has the authority and the duty to weigh the evidence and determine whether the findings of *** the trier of fact were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial.” *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

{¶54} The standard employed when reviewing a claim based upon the weight of the evidence is not the same standard to be used when considering a claim based upon the sufficiency of the evidence. The United States Supreme Court recognized these distinctions in *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652, where the court held that unlike a reversal based upon the insufficiency of the evidence, an appellate court’s disagreement with the jurors’ weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. *Id.* at 43.

{¶55} Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: “There being sufficient evidence to support the conviction as a matter of law, we next consider the claim that the judgment was against the manifest weight of the evidence. Here, the test is much broader.

The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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.”

{¶56} Moreover, it is important to note that the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. Hence we must accord due deference to those determinations made by the trier of fact.

{¶57} In this case, appellant points to Officer Gamble’s unsubstantiated testimony that the victims gave him certain identifying information before he apprehended appellant. Appellant points to James’s testimony that the proximity of the green bike and handgun influenced his identification of appellant at the second cold stand. He also stresses the fact that the only physical evidence, fingerprints lifted from the bicycle, did not match his fingerprints.

{¶58} Appellant ignores the bulk of the evidence that ties him to the crimes. Both victims positively identified appellant after having viewed him for at least five minutes during the commission of the crime. Both victims testified that their view of appellant’s face was unobstructed during the commission of the crime. The store’s videotape showed appellant, dressed in the brown hoodie that both victims testified he was wearing, following Ms. Waite inside the store. Both victims identified the

black and silver handgun used by the perpetrator as the same gun that was found on Mr. Mathews' driveway near where appellant was apprehended. Mr. Mathews positively identified appellant wearing a brown hoodie in his yard as the same person who was apprehended by the police minutes later.

{¶59} The record shows that the trial court, as the finder of fact, did not lose its way in finding appellant guilty on all counts in the indictment. The fact that the judge acknowledged some of the weaknesses in the prosecution's case further indicates he carefully weighed the evidence and the testimony of the witnesses.

{¶60} Appellant's fourth assignment of error is overruled.

{¶61} This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

LARRY A. JONES, J., CONCURS;
COLLEEN CONWAY COONEY, A.J., CONCURS IN JUDGMENT ONLY