[Cite as *State v. McAlpine*, 2009-Ohio-2878.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91678

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH MCALPINE

DEFENDANT-APPELLANT

[Inconsistent spellings of McAlpine's last name appear in the record. At times, his last name is spelled "McAlpin."]

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510580

BEFORE: Jones, J., Dyke, P.J., and Celebrezze, J.

RELEASED: June 18, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Michael J. Gordillo
1370 Ontario Street
2000 Standard Building
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Erica Barnhill
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Joseph McAlpine ("McAlpine"),[1] appeals his conviction. Finding no merit to the appeal, we affirm.

{¶ 2} In 2008, McAlpine, was charged with aggravated robbery, robbery, identity fraud, four counts of forgery, and two counts of tampering with records. McApine's co-defendant was his brother, Javaugh McAlpin, who was charged with one count of aggravated robbery and one count of robbery.

{¶ 3} McAlpine moved to suppress his identification, arguing that the photo array in which the victim identified him was unduly suggestive. The trial court denied his motion after a brief hearing. The matter proceeded to a jury trial, at which the following evidence was adduced.

{¶ 4} The victim in this case, Shanel Jordan ("Jordan"), testified that she went to a friend's house to have her hair permed. While she was at her friend's house, McAlpine and his brother arrived. McAlpine spoke with Jordan and played with one of her children. Around midnight, Jordan left her children and went to another hair shop to have her hair worked on because there was extensive damage to her hair. McAlpine and his brother were still at the apartment when Jordan left.

{¶ 5} Jordan, who was noticeably pregnant, testified that she left the hair shop around three in the morning and drove back to her friend's apartment to pick up

[1]It appears as though appellant spells his last name "McAlpin"; however, the spelling "McAlpine" appears on all lower court and appellate records.

her kids. As she drove up she observed two men standing nearby. As she got out of her car, she accidentally dropped her keys. After retrieving the keys, she stood up and a man later identified as McAlpine put his arm around her neck and held a knife to her throat. Jordan stated that she recognized McAlpine by his voice when he told her, "b***, don't say nothing, I'll kill you," and pricked her neck with the knife. Jordan testified that both McAlpine and his brother were wearing do-rags on their heads and had the lower half of their faces covered with white shirts.

{¶ 6} McAlpine rifled through Jordan's pockets, snatched her purse and ran off. The brothers stole $2000 in cash, credit cards, Jordan's identification, birth certificates for Jordan and her children, and the lease and title to her car.

{¶ 7} The police initially showed Jordan two photo arrays, but Jordan was unable to identify either of her attackers. Several days later, Jordan went to the license bureau to get a duplicate license and title. While at the bureau, she discovered that her information had been used on a power-of-attorney form allegedly with Jordan granting Joseph McAlpine her power of attorney. Jordan testified that she never gave McAlpine her power of attorney, and the inscription on that form was not her signature. Jordan took this information to the police and the police developed two new photo arrays that contained McAlpine and his brother.

{¶ 8} When the detective showed Jordan the photo arrays, Jordan told the detective that her attackers had on do-rags, so the detective took a piece of paper and covered up the foreheads of the men in the two photo arrays. At that time, Jordan was able to positively identify McAlpine and his brother. During their

investigation, the police also recovered a certificate of registration for a car with McAlpine's and Jordan's names on it that listed McAlpine's address. Jordan testified that someone forged her name on the registration form. The police went to the address listed on the car registration and observed the car listed on that form. A few days later, the police arrested McAlpine and his brother.

{¶ 9} Janee Harris, McAlpine's former girlfriend, testified on his behalf that she went out with McAlpine every weekend, so he must have been with her when the robbery occurred, but conceded she could not remember where they were on the evening of the robbery.

{¶ 10} The jury convicted McAlpine of all counts, and the trial court sentenced

{¶ 11} him to a total of seven years in prison.[2]

{¶ 12} McAlpine now appeals, raising two assignments of error for our review. In the first assignment of error, McAlpine argues that the trial court erred in denying his motion to suppress. In the second assignment of error, McAlpine argues that his conviction was against the manifest weight of the evidence.

I. Motion to Suppress

{¶ 13} "In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility." *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172, quoting *State v. Clay* (1973), 34 Ohio St.2d 250, 298 N.E.2d 137. A reviewing court is

[2]The jury convicted Javaugh McAlpin of one count each of robbery and aggravated robbery, and the trial court sentenced him to three years in prison.

bound to accept those findings of fact if supported by competent, credible evidence. See *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54. But it must be determined independently and without deference to the trial court's conclusion whether, as a matter of law, the facts meet the appropriate legal standard. *Curry*, citing State *v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906, 908. h his motion to suppress, and on appeal, McAlpine argues that the second photo array police showed the victim was unduly suggestive.

{¶ 14} Courts apply a two-prong test to determine the admissibility of challenged identification testimony. First, the defendant bears the burden of demonstrating that the identification procedure was unnecessarily suggestive. If this burden is met, the reviewing court must then consider whether the procedure was so unduly suggestive as to give rise to irreparable mistaken identification. *State v. Page*, Cuyahoga App. No. 84341, 2005-Ohio-1493, citing *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140. In other words, the issue is whether the identification, viewed under the totality of the circumstances, is reliable despite the suggestive procedure. *State v. Wills* (1997), 120 Ohio App.3d 320, 324-325, 697 N.E.2d 1072.

{¶ 15} Thus, our first step is to determine whether McAlpine established that the identification procedure was unreasonably suggestive. Detective Terrace of the Cleveland Police Department conducted the investigation into the robbery. Det. Terrace testified at the motion hearing that she constructed the second photo array so that the men pictured had similar hairstyles, skin tone, and facial structure.

McAlpine argues that the photo array that Det. Terrace showed to Jordan was unduly suggestive because he was the only man pictured that had visible wound marks on his face.

{¶ 16} We do not find that the photo array was unduly suggestive. The photos in the array were similar in nature. Even if we found that the identification procedure was unduly suggestive, McAlpine is unable to show that the identification was unreliable. Jordan testified that she recognized McAlpine by his voice because she spoke with him earlier in the evening. Even though she did not immediately pick him out of the photo array, she was able to identify him after the detective covered up the suspects' foreheads. Jordan testified that she recognized the brothers by the eyes, eyebrows, and noses. Moreover, Jordan was able to positively identify McAlpine in court and confirm her prior identification.

{¶ 17} Accordingly, we find that the trial court's denial of the motion to suppress is supported by competent, credible evidence.

{¶ 18} The first assignment of error is overruled.

II. Manifest Weight of the Evidence

{¶ 19} In the second assignment of error, McAlpine contends that his convictions were against the manifest weight of the evidence.

{¶ 20} When evaluating a challenge to the verdict based on the manifest weight of the evidence, a court sits as the thirteenth juror, and intrudes its judgment into proceedings that it finds to be fatally flawed through misrepresentation or

misapplication of the evidence by a jury that has "lost its way." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 21} As the *Thompkins* court declared:

> "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' * * *
>
> "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." Id.

{¶ 22} In *State v. Bruno*, Cuyahoga App. No. 84883, 2005-Ohio-1862, we stated that the court must be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact. A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the prosecution proved the offense beyond a reasonable doubt. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus; *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132. Moreover, in reviewing a claim that a conviction is against the manifest weight of the evidence,

the conviction cannot be reversed unless it is obvious that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Garrow* (1995), 103 Ohio App.3d 368, 659 N.E.2d 814. This is a difficult standard to meet, and we are not persuaded it was met in the instant case.

{¶ 23} McAlpine argues that Jordan's testimony was unreliable and inconsistent and the police investigation was incomplete. We disagree. It is within the province of the jury to determine whether the eyewitness identification was sufficiently reliable and accurate to be worthy of belief. We further find that any minor inconsistencies do not lead to the conclusion that McAlpine's conviction is against the manifest weight of the evidence. And although the detective did not do any further investigation once she developed McAlpine and his brother as suspects, the evidence linking McAlpine to the robbery was overwhelming. Jordan was able to identify McAlpine both in and out of court, testified that she did not sign a power of attorney over to McAlpine, and that her name was forged on those documents.

{¶ 24} Therefore, we find that the convictions are not against the manifest weight of the evidence. The second assignment of error is overruled.

{¶ 25} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant 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.

LARRY A. JONES, JUDGE

ANN DYKE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR