

[Cite as *State v. Howell*, 2009-Ohio-3092.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91569

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERRY J. HOWELL

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-485056

BEFORE: Dyke, J., McMonagle, P.J., and Stewart, J.
RELEASED: June 25, 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).

ANN DYKE, J.:

{¶ 1} Defendant-appellant, Jerry J. Howell (“appellant”), appeals his conviction for aggravated robbery. For the reasons set forth below, we affirm.

{¶ 2} During the morning hours of June 30, 2006, Dale Kovalchik (“Kovalchik”) pulled his vehicle into a parking space at the First Merit Bank. On his car seat was a bag holding money. He explained that he was performing his duties as manager of a Taco Bell and was attempting to deposit the previous evening’s revenue into the business’s bank account.

{¶ 3} When Kovalchik attempted to exit his vehicle, a male he later identified as appellant, blocked his exit. Appellant wedged himself between Kovalchik’s car and his own car door. Initially, appellant asked Kovalchik for the time, but when he responded, “9:15 a.m.,” appellant stated, “I’ll take that bag sitting on your passenger’s seat.” Kovalchik responded “no” to which appellant indicated that he wanted the bag, raised his shirt up, and displayed a handgun stuffed inside his pants. Kovalchik reacted by grabbing the bag of money, jumping out of the car, pushing past appellant, and running inside the bank. Once inside, he turned around and saw appellant in an old, black, beat-up Jeep, fleeing the scene. Kovalchik explained that the entire encounter lasted approximately 90 seconds.

{¶ 4} Police arrived shortly thereafter and obtained a written description of Kovalchik’s assailant. Additionally, Detective Berganski prepared a photographic array in which Kovalchik immediately identified appellant as his assailant.

{¶ 5} On August 17, 2006, the Cuyahoga County Grand Jury indicted appellant on one count of aggravated robbery in violation of R.C. 2911.01, 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. Appellant pled not guilty to the charges.

{¶ 6} On November 20, 2006, appellant filed a motion to suppress the victim's identification of appellant as the assailant from a photo array, arguing that the photo array was impermissibly suggestive.

{¶ 7} On December 11, 2006, appellant filed another motion to suppress maintaining that the police did not have his consent to search his residence located at 12505 Angelus Avenue in Cleveland, Ohio ("Angelus residence"). On September 28, 2007, the trial court granted appellant's motion to suppress with regard to the search of the Angelus residence. More specifically, the court concluded that appellant did not consent to the police entering the home.

{¶ 8} The trial of this matter commenced on April 17, 2008. The state rested its case-in-chief on April 18, 2008 and appellant moved for acquittal pursuant to Crim.R. 29. The trial court denied his motion and appellant presented his case. Thereafter, appellant again moved for acquittal. The trial court denied this request as well.

{¶ 9} On April 21, 2008, the jury found appellant guilty of aggravated robbery but not guilty of the one- and three-year firearm specifications. Additionally, the jury found him not guilty of having a weapon while under disability as charged in Count 2 of the indictment.

{¶ 10} On May 14, 2008, the trial court sentenced appellant to eight years imprisonment and five years of postrelease control. The court ordered the sentence to be served concurrent to that imposed in another case, Case No. CR-507992.

{¶ 11} Appellant now appeals and asserts two assignments of error for our review. Appellant's first assignment of error states:

{¶ 12} "The trial court erred in not granting appellant's motion to suppress the identification of the appellant made by the victim based upon his view of the photo array used by the police officers in this case. The photo array from which the victim selected the photograph of appellant as the perpetrator was impermissibly suggestive."

{¶ 13} Here, appellant argues that the trial court erred in denying his motion to suppress the photo array¹ because it was unduly suggestive and unreliable. For the following reasons, we find appellant's argument without merit.

{¶ 14} When a witness has been confronted with a suspect before trial, due process requires a court to suppress an 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, 588 N.E.2d 819, citing *Manson v. Brathwaite* (1977), 432 U.S.

¹We note that while there is no journal entry indicating appellant's motion to suppress regarding the photo identification was denied, we presume the trial court denied said motion when the record is silent as to a ruling. When a trial court fails to rule on a motion, the motion is considered denied. *Solon v. Solon Baptist Temple, Inc.* (1982), 8 Ohio App.3d 347, 351-352, 457 N.E.2d 858; *Georgeoff v. O'Brien* (1995), 105 Ohio App.3d 373, 378, 663 N.E.2d 1348.

98, 116, 97 S.Ct. 2243, 53 L.E.2d 140 and *Neil v. Biggers* (1972), 409 U.S. 188, 196-198, 93 S.Ct. 375, 34 L.Ed.2d 401.

{¶ 15} The defendant bears the initial burden of establishing that the photographic identification procedure was unnecessarily suggestive. If the defendant meets this burden, the court must consider whether the photographic identification procedure was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247. No due process violation, however, will be found where an identification is instead the result of observations at the time of the crime and does not stem from an impermissibly suggestive confrontation. *Coleman v. Alabama* (1970), 399 U.S. 1, 5-6, 90 S.Ct. 1999, 26 L.Ed.2d 387.

{¶ 16} A court must consider, under the totality of the circumstances, the following factors with regard to potential misidentification: “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation * * * .” *Neil v. Biggers*, supra. Even if the identification procedure may have contained notable defects, this factor does not, per se, prevent the admissibility of the identification. *State v. Merrill* (1984), 22 Ohio App.3d 119, 121, 489 N.E.2d 1057; *State v. Moody* (1978), 55 Ohio St.2d 64, 67, 377 N.E.2d 1008.

{¶ 17} Here, the photo identification of appellant was not impermissibly suggestive. Kovalchik had ample opportunity to view appellant and provided the police with an accurate description of appellant prior to the photo array. Additionally, Kovalchik unequivocally identified appellant as the assailant shortly after the incident. Therefore, we find no error in the trial court's denial of appellant's motion to suppress the photographic identification.

{¶ 18} As previously stated, Kovalchik had ample opportunity to view the assailant. Kovalchik testified that during the morning and while it was light out, he pulled into a parking spot at the bank. He attempted to exit his vehicle but was blocked by appellant. Appellant stood directly over Kovalchik while he asked him for the time. Kovalchik testified that he unequivocally saw appellant's face during the incident as he was only an arm's length away. After Kovalchik informed appellant of the time, he stated, "I'll take the bag sitting on your passenger's seat." Kovalchik, looking up at appellant's face, denied his request. In response, appellant lifted his shirt, displayed a handgun, and ordered Kovalchik to hand him the bag. Instead, Kovalchik grabbed the bag and fled into the bank. Once inside, he turned around and saw appellant in a black, beat-up Jeep leaving the scene. This interaction lasted about 90 seconds, plenty of time to view appellant.

{¶ 19} Next, we find Kovalchik's prior description of appellant more than adequate. Detective Dennis Berganski testified that the police report indicated that Kovalchik described his assailant as an African-American male approximately six feet tall, skinny, wearing a hat with a logo or design, baggy jeans that were tattered

and ripped, and a dark t-shirt. Kovalchik testified that he further provided that the assailant was approximately 160 to 180 pounds, with a little goatee, and a narrow, not round, face. All of the foregoing strongly suggests that Kovalchik's identification was the result of observations at the time of the crime.

{¶ 20} Moreover, there is nothing in the record to indicate that the identification procedure was unnecessarily suggestive. Appellant argues that the five other photos shown to the victim were males with no significant similarities to appellant. More specifically, appellant maintains that the other males had a lighter complexion and different facial features. In support of his argument, appellant directs this court to Kovalchik's testimony in which he described two of the males in the photo as "a lot heavier" and two other males as "not even the same—not even close." We find appellant's assertions without merit.

{¶ 21} Detective Berganski presented Kovalchik with a six-person photo array. Within minutes of being presented with the array, Kovalchik unequivocally picked appellant from the array as his assailant. The men were all African-American and of the same build and, despite appellant's assertions to the contrary, our review of the pictures indicates that the men had comparable facial features. Finally, we cannot accept appellant's claim that his complexion is darker than the others so as to isolate his identity. Upon cross-examination, Kovalchik offered that he excluded the other photographs, not based upon the men's complexions, but rather by their cheekbones and by imagining the other men in hats. In light of these circumstances, we conclude that the photo array was well-constituted and not impermissibly suggestive

as to give rise to a very substantial likelihood of irreparable misidentification. Appellant's first assignment of error is overruled.

{¶ 22} Appellant's second assignment of error states:

{¶ 23} "The jury's verdict on the count of aggravated robbery was against the manifest weight of the evidence."

{¶ 24} In the case sub judice, appellant argues that because a conviction for aggravated robbery in violation of R.C. 2911.01(A)(1) or (2) is inconsistent with a jury's not guilty findings for firearm specifications or a charge of having a weapon while under a disability, appellant in this case is presumed to have been convicted of aggravated robbery pursuant R.C. 2911.01(A)(3). Appellant argues, however, that any such conviction is against the manifest weight of the evidence because the state failed to demonstrate that the victim suffered "serious physical harm." Because we find appellant's conviction for aggravated robbery not inconsistent with the not guilty verdicts for the firearm specifications or the charge of having a weapon while under a disability, we find appellant's argument unpersuasive.

{¶ 25} In *State v. Fair*, Cuyahoga App. No. 89653, 2008-Ohio-930, this court determined that a conviction for aggravated robbery was not inconsistent with a finding of not guilty on firearm specifications or a verdict of not guilty to a charge of having a weapon while under a disability. In *Fair*, supra, the jury convicted the defendant of one count of aggravated robbery in violation of R.C. 2911.01, but found him not guilty of one- and three-year firearm specifications. The trial court also found him not guilty of having a weapon while under a disability in violation of R.C.

2923.13. We determined that the verdicts were not inconsistent with each other. In reaching this conclusion, we relied on the reasoning provided in *Browning v. State* (1929), 120 Ohio St. 62, 165 N.E. 566. In that case, the Supreme Court of Ohio stated:

{¶ 26} “A verdict will not be set aside as inconsistent, or uncertain because it finds differently as to counts in which there is no material difference.’ *** Each count of an indictment charges a complete offense; that the separate counts of an indictment are not interdependent, but are, and necessarily must be, each complete in itself, and that in determining the effect of a verdict that responds by designation to a given count the other counts of the indictment will be ignored, and the response of the jury to such other counts likewise ignored; that an inconsistency does not arise, unless it arises out of inconsistent responses to the same count.” *Id.*, quoting *Griffin v. State* (1858), 18 Ohio St. 438.

{¶ 27} We find the instant matter identical to that posed in *State v. Fair*, *supra*. Here, the jury convicted appellant of aggravated robbery in violation of R.C. 2911.01 while finding him not guilty of one- and three-year firearm specifications, as well as not guilty of one count of having a weapon while under a disability in violation of R.C. 2923.13. In line with the precedent of this court, we do not find these verdicts inconsistent. Accordingly, appellant’s second assignment of error is without merit.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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.

ANN DYKE, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
MELODY J. STEWART, J., CONCUR