

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92549

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL JARMON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510435

BEFORE: Boyle, J., Rocco, P.J., and Dyke, J.

RELEASED: November 5, 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).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Michael Jarmon, appeals his convictions for aggravated robbery, kidnapping, and possessing criminal tools. He raises three assignments of error for our review:

{¶ 2} “[1.] The trial court erred when it denied appellant’s motion to suppress eyewitness identification.

{¶ 3} “[2.] The state failed to present sufficient evidence to sustain the convictions.

{¶ 4} “[3.] Appellant’s convictions are against the manifest weight of the evidence.”

{¶ 5} Finding no merit to the appeal, we affirm.

Facts and Procedural Background

{¶ 6} In May 2008, the Cuyahoga County Grand Jury indicted Jarmon on four counts: aggravated robbery, in violation of R.C. 2911.01(A)(1), with one- and three-year firearm specifications; kidnapping, in violation of R.C. 2905.01(A)(2), with one- and three-year firearm specifications; having weapons while under a disability, in violation of R.C. 2923.13(A)(3); and possessing criminal tools, in violation of R.C. 2923.24(A). Jarmon pled not guilty to the charges and moved to suppress evidence of the victim’s cold stand identification of him.

{¶ 7} The following evidence was presented at the suppression hearing.

{¶ 8} The victim, Dennis Wilder, was working as a pizza delivery driver for Upper Crust Pizza on the night in question. That night, the owner of the pizza shop, Susan Jackson, asked him to drive by 4628 Ventnor Avenue. Jackson told Wilder that she received a telephone call from a man wanting pizza delivered to that address, but no such address existed. Jackson was “leery” about the order because she told the man that the address did not exist, but the man kept insisting that it did. Wilder drove by the address to see if it was a “good address.” Wilder explained the correct address was actually 4628 West 158th Street, but the street sign was turned so it looked like Ventnor Avenue, not West 158th Street. The house was actually on the corner of Ventnor and West 158th. He told Jackson that they had delivered to that house before, so it was probably a good order.

{¶ 9} Wilder delivered the pizza in his mother’s white minivan, a 2002 Ford Windstar. He knocked on the door, but no one answered. Wilder said he was then approached by three men wearing blue jackets and bandanas covering most of their faces, except for their eyes. One of the men had a gun. He said the men asked him for money, took the pizza, his tip money (\$30-\$35), and cell phone. The men told Wilder to get on the ground, but he refused. He told the men that he was 46 years old and that if they were going to shoot him, they had to shoot him standing up. The men then stole his mother’s minivan and fled the scene.

{¶ 10} Wilder immediately sought help at a nearby home where the residents called 911. Wilder also ran back to the pizza shop and told Jackson that he had been robbed. She also called 911.

{¶ 11} Officer James Brill and his partner, Art Fessler, responded to reports of a robbery at 4628 West 158th Street. Within minutes of receiving the radio call, they saw a minivan matching the description of the one that was stolen. Officers Brill and Fessler pulled into the parking lot with their headlights off. They saw the van begin to back out of a parking space, and at that time Officer Fessler turned on the “zone car headlights.” When he did, the three individuals immediately exited the van and took off running. Officer Brill began chasing the men and heard the sound of a chain-link fence rattling. He ran up to the fence and could see the three individuals running on the other side of it. He tried to climb over the fence, but was unsuccessful, so he radioed for police assistance.

{¶ 12} Officer Brill explained that when the other officers arrived, they assisted in the search for the three suspects. Soon after they arrived, Officer Hervanek yelled to Officer Brill that he found an individual hiding underneath a red truck parked near the fence. They apprehended the man, who was later identified to be Jarmon. Officer Brill testified that Jarmon looked like one of the three individuals he saw jumping out of the van. When he was caught, Jarmon had on a light-colored “hoodie” and dark pants.

{¶ 13} Officer Timothy McGinty testified that he was working with his partner, Officer Manuel Strefas, on the night of the robbery. They responded to

reports that three suspects had fled on foot. When they arrived, they assisted other officers in searching for the suspects. After Jarmon was found, Officer McGinty went to the pizza shop to get Wilder to see if he could identify Jarmon in a cold stand. Wilder was approximately 20 to 25 feet away from Jarmon when Officer McGinty asked him if he recognized Jarmon. Officer McGinty testified that Wilder could not identify Jarmon. According to Officer McGinty, Wilder said that “it looked a lot like him, but he wasn’t quite sure.”

{¶ 14} Officer McGinty then drove Wilder back to the pizza shop. When Officer McGinty got back to the scene, he learned that other officers had apprehended a second suspect, so he retrieved Wilder again from the pizza shop. Officer McGinty said that Wilder positively identified the second man (codefendant Andrew Warren) as one of the men who robbed him.

{¶ 15} Wilder testified to the exact opposite of Officer McGinty regarding who he identified and in what cold stand. He stated that he could identify the first suspect, but not the second (which would mean he identified Jarmon, not Warren). But Officer William Busse, who listened to Wilder’s in-court testimony and wrote the police report regarding the robbery, clarified that Wilder had the two cold stands confused. Officer Busse was standing next to Wilder when Officer McGinty asked Wilder if he could identify Jarmon as one of the robbers.

{¶ 16} Officer Busse confirmed, as Officer McGinty had testified, that Jarmon was the first suspect found that night and the first suspect shown to Wilder in the cold stand, and further, that Wilder was not able to identify him.

{¶ 17} Wilder's testimony describing the suspects also indicates that he got the cold stands confused. He said that he could identify the man in the cold stand who was found wearing a blue jacket (which was Warren), but that he could not identify the man who was wearing the beige jacket (Jarmon). He said he could not identify the man with a beige jacket because the robbers were wearing blue jackets.

{¶ 18} Officer Manuel Strefas testified that after Jarmon was found underneath the red truck, he escorted Jarmon to where the zone cars were located. Officer Strefas said he patted Jarmon down and found \$16 and a cell phone in his right front pants pocket.

{¶ 19} After Wilder was taken back to the pizza shop, Officer Busse said that on a "whim," he decided to call the phone number that Jackson had given the police when she called 911. Jackson had explained that when people place a food order, she asks them for their name, address, and telephone number. She testified that the man who called to place the order gave her a return phone number and that she had called it back to verify the order because she had been "leery" about the sale. When Officer Busse dialed the number, the cell phone that was found on Jarmon, which was sitting on the back of a zone car, began to ring. After the cell phone rang, they arrested Jarmon.

{¶ 20} The other suspect (Warren) was found approximately five blocks from where the minivan was parked, wearing dark pants and a dark sweatshirt. Officer Busse testified that Wilder positively identified him in a cold stand as one

of the men who robbed him because he was wearing a blue jacket, like one of the men who robbed him.

{¶ 21} At the close of the suppression hearing, the trial court denied Jarmon's motion. Jarmon then waived his right to a jury trial, and the case proceeded to a bench trial, where the state presented the same five witnesses who testified at the suppression hearing, as well as five additional witnesses, essentially corroborating the testimony already presented with respect to Jarmon's case. (Warren was tried at the same time.)

{¶ 22} At the close of the state's case, Jarmon moved for a Crim.R. 29 acquittal as to all charges. The trial court denied it, except with respect to having weapons while under a disability. Jarmon then rested, without presenting evidence on his own behalf.

{¶ 23} The trial court found Jarmon guilty of the remaining charges: aggravated robbery and kidnapping, with the firearm specifications, as well as possessing criminal tools. The trial court sentenced him to a total of six years in prison.

Motion to Suppress

{¶ 24} In his first assignment of error, Jarmon argues that the trial court erred when it denied his motion to suppress Wilder's identification of him in the cold stand. The record reveals, however, that Wilder never identified Jarmon in the cold stand. Officers McGinty and Busse testified that Wilder could not positively identify Jarmon. Wilder also testified that he could not be sure that

Jarmon was one of the men who robbed him (even though, as Jarmon admits in his brief, that Wilder “had the order of the two different males presented to him, both by cold stands, reversed”).

{¶ 25} Jarmon’s first assignment of error is overruled.

Sufficiency of the Evidence

{¶ 26} In his second assignment of error, Jarmon argues that his convictions were not supported by sufficient evidence.

{¶ 27} An appellate court’s function in reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. “In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jenks* at 273.

{¶ 28} Jarmon sets forth several reasons why he believes the state did not present sufficient evidence. But he maintains, “certainly identification is the main issue here.” We disagree. Although Wilder could not identify

Jarmon, Officer Brill testified that Jarmon looked like one of the three men he saw jumping out of the van — the same van that was stolen from Wilder at gunpoint minutes before. Moreover, Jarmon was found hiding under a truck that was parked close to the van, soon after Officers Brill and Fessler saw the three men jump from the van and take off running. Finally, and most importantly, the cell phone that was found in Jarmon's pocket matched the number given to Jackson when the pizza order was placed.

{¶ 29} Jarmon further argues that the state did not present sufficient evidence because (1) Jarmon was not wearing clothes that matched the victim's description of the men who robbed him; (2) the police did not find a bandana on Jarmon; (3) the victim could not positively say that Jarmon ever had the gun in his hand; and (4) food was not found in the van.

{¶ 30} These facts, however, do not mean the state did not present *sufficient* evidence. Sufficient evidence is the *minimum* amount of evidence the state must present to sustain a verdict. The state did that in this case. The first two issues address Jarmon's identity, which we discussed previously. The state also presented evidence that a man called Upper Crust Pizza to have pizza delivered to an address that did not exist; three men proceeded to rob Wilder — at gunpoint — when he attempted to deliver the pizza; the men stole Wilder's cell phone, tip money, and the pizza; and then fled the scene in Wilder's mother's minivan. It is of no consequence that

Wilder could not put the gun in Jarmon's hand. See R.C. 2923.03. This evidence, if believed, was sufficient for a rational trier of fact to find Jarmon guilty beyond a reasonable doubt of aggravated robbery, kidnapping, and possessing criminal tools.

{¶ 31} Jarmon's second assignment of error is overruled.

Manifest Weight

{¶ 32} In his final assignment of error, Jarmon maintains that convictions were against the manifest weight of the evidence.

{¶ 33} The *Thompkins* court further "distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id.* at 386-387. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? [The court] went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the

conflicting testimony.’ Id. at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42.” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶25.

{¶ 34} Jarmon simply argues that “it is difficult to fathom the verdict in this case given the lack of evidence.” He claims he was in the “wrong place at the wrong time.” If that is the case, then Jarmon was in the wrong place at the wrong time — hiding under a truck with the cell phone in his pocket that was used to facilitate the plan to rob a pizza delivery driver. We find no merit to Jarmon’s claim.

{¶ 35} Jarmon’s third assignment of error is overruled.

Judgment 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.

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and

ANN DYKE, J., CONCUR