

[Cite as *State v. Payne*, 2010-Ohio-2459.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92976

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CALLOWAY PAYNE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516932

BEFORE: Cooney, J., Kilbane, P.J., and Sweeney, J.

RELEASED: June 3, 2010

**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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Calloway Payne (“Payne”), appeals his convictions and sentences. We find no merit to the appeal and affirm.

{¶ 2} In October 2008, Payne was charged with two counts of aggravated robbery, one count of attempted grand theft of a motor vehicle, and one count of receiving stolen property. All counts included firearm and forfeiture specifications. The case proceeded to trial, at which the following evidence was presented.

{¶ 3} On October 12, 2008, in the early morning hours, William Smith (“Smith”) looked out a window and observed two men attempting to steal his mother’s car, which was parked on Hosmer Avenue in Cleveland. Smith woke up his sister Anastasia and ran outside to stop the attempted theft. While Smith was confronting the two men who were inside his mother’s car, a silver Dodge Intrepid pulled up between Smith and his mother’s car, and the driver pointed a gun at Smith. Smith yelled to his sister, who had followed behind him, to go back inside the house. Smith looked at the man driving the Intrepid for about four seconds until the man drove up the street and stopped to pick up the two men who had attempted to steal Smith’s mother’s car. Smith watched the car drive off, and then he immediately called the police.

{¶ 4} As the police were responding to the scene, they observed a silver Dodge Intrepid, which matched the description Smith had reported, near East 93rd Street and Harvard Avenue. When the driver of the Intrepid noticed the police, he accelerated, and the police pursued the car for several blocks until the car stopped and the occupants fled on foot.

{¶ 5} Officer Allen testified that he did not see the driver's face but he estimated that the driver was six feet tall and between 225-250 pounds. The driver was wearing a dark top, pants, and a dark hat. The other individuals were shorter and thinner. Officer Allen followed the driver who ran down Gaylord Avenue. Officer Keane testified that he observed a man who fit the description of the driver running between two houses about two blocks away from the Intrepid. Keane's partner, Officer Lentz, followed the driver to a house where they arrested him and brought him back to Smith and his sister for a cold stand identification.

{¶ 6} Officer Keane asked Smith and Anastasia if they thought they would be able to identify "a possible suspect." The police did not make any statements about the suspect nor did they describe what role the suspect might have played in the attempted theft. Upon seeing the suspect, Smith immediately stated that the suspect was the man who was driving the silver Dodge Intrepid and who had pointed a gun at him. Payne denied being involved in an attempted theft and claimed that he was just walking home from his girlfriend's house.

{¶ 7} At approximately 6:30 a.m. the same morning, the owner of the Dodge Intrepid, Mary Ann Morgan-Bey ("Morgan-Bey"), discovered her car had been stolen. When she contacted the police, she learned that her car had been involved in a robbery and had been impounded.

{¶ 8} The Dodge Intrepid was processed and searched. Police found a BB gun inside the car as well as fingerprints of two other individuals and not Payne's. The State disclosed the identities of the individuals whose fingerprints were found in the car approximately one week before trial. On the day of trial, Payne waived his right to speedy trial and requested a continuance until after the police arrested the two individuals. The court denied the motion.

{¶ 9} Payne waived his right to a jury. At the close of the State's case, Payne moved for acquittal pursuant to Crim.R. 29. The court granted the motion as to one count of aggravated robbery and denied the motion as to the other three counts. At the close of the evidence, the court found Payne guilty of one count of aggravated robbery, one count of attempted theft of a motor vehicle, and one count of receiving stolen property. The court sentenced Payne to three years on the firearm specification, three years for aggravated robbery, and six months for the attempted grand theft and receiving stolen property. The court ordered the three years on the firearm specification to run consecutive to the three years for aggravated robbery as mandated by R.C. 2941.145. The remaining counts were to run concurrently for a total six-year sentence.

{¶ 10} Payne appeals, raising four assignments of error.

Sufficiency of Evidence

{¶ 11} In his first assignment of error, Payne claims the convictions are not supported by sufficient evidence. Payne argues there was insufficient evidence to prove that he committed the charged offenses with the use of a firearm or deadly weapon as defined in R.C. 2923.11(A) or (B).

{¶ 12} When determining whether a conviction is supported by sufficient evidence, the reviewing court views the evidence adduced at trial, both direct and circumstantial, in a light most favorable to the prosecution to determine if a rational trier of fact could find the essential elements of the offense were proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372, 683 N.E.2d 1096.

{¶ 13} R.C. 2923.11(B)(2) provides that a trier of fact may rely upon circumstantial evidence, “[w]hen determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant.” The circumstantial evidence may include, but is not limited to, “the representations and actions of the individual exercising control over the firearm.” *Id.*

{¶ 14} Payne claims his convictions are not supported by sufficient evidence because the State failed to present any evidence that the BB gun found in the Dodge Intrepid was capable of firing like a gun or causing deadly harm.

However, Smith testified that he saw the gun Payne pointed at him and that it looked like a black 9mm pistol. He explained that the gun pointed at him looked like a real handgun because he saw the outer ring and it looked like a bullet would fit inside. When presented with the BB gun in court, Smith was unable to identify it as the same gun that was pointed at him.

{¶ 15} According to Smith's testimony, Payne brandished a gun while he was guarding the other men who were stealing Smith's mother's car. It is possible that Payne disposed of the firearm while he was fleeing or that one of the other suspects took possession of the gun before fleeing. Smith testified that rather than merely brandishing the gun, Payne pointed the gun at him to aid the escape of his co-conspirators. Such an act implies a threat that the firearm was operable. After viewing the evidence in a light most favorable to the prosecution, we find that sufficient evidence was presented to establish beyond a reasonable doubt that Payne possessed an operable firearm.

{¶ 16} Moreover, Payne failed to raise the issue of the firearm when he raised the other issues in his Crim.R. 29 motion for acquittal. This court has held that "if an accused does set forth specific grounds in a motion for judgment of acquittal, all grounds not specified are waived." *State v. Cayson* (May 14, 1998), Cuyahoga App. No. 72712, citing *U.S. v. Dandy* (C.A.6, 1993), 998 F.2d 1344, 1356-57 (finding that "[a]lthough specificity of grounds is not required in a

[Crim.R. 29] motion, where a [Crim.R. 29] motion is made on specific grounds, all grounds not specified are waived [.]” (Internal citation omitted.)).

{¶ 17} Accordingly, the first assignment of error is overruled.

Structural Defect

{¶ 18} In the second assignment of error, Payne argues the indictment charging him with aggravated robbery was constitutionally defective because it failed to allege the required mental state. We disagree.

{¶ 19} Payne was charged with aggravated robbery pursuant to R.C. 2911.01(A)(1). This section states:

“(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[.]”

{¶ 20} The omission of a culpable mental element in R.C. 2911.01(A)(1) does not default to reckless because the Ohio Supreme Court has held that R.C. 2911.01(A)(1) is a strict liability offense and the State is not required to charge a mens rea. *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038. Consistent with this precedent, aggravated robbery under R.C. 2911.01(A)(1) is a strict liability offense, and therefore the State did not err by failing to charge a culpable mental state.

{¶ 21} Accordingly, the second assignment of error is overruled.

Exculpatory Evidence

{¶ 22} In the third assignment of error, Payne claims his right to due process was violated because the State failed to disclose the identities of the two individuals whose fingerprints were found in the Dodge Intrepid. However, the record does not support this claim.

{¶ 23} According to the trial transcript, the State disclosed the identities of the two individuals whose fingerprints were found in the Dodge Intrepid. Payne's trial counsel stated on the record: "It is my understanding * * * two individuals were identified based on their fingerprints in car involved in this incidence. One Dorian Simpson and one Justin Rogers." Payne's trial counsel also sought a continuance until after the two named individuals were arrested so that all three defendants could be tried together. Finally, Payne argued in closing arguments that fingerprints of two individuals other than Payne were recovered in the Dodge Intrepid. Therefore, Payne's argument on appeal that the State did not disclose the identities of these individuals is without merit.

{¶ 24} Accordingly, the third assignment of error is overruled.

Cold Stand Identification

{¶ 25} In the fourth assignment of error, Payne argues he was subjected to an impermissibly suggestive cold stand identification procedure. He claims that Smith was unable to see his face at the time of the out-of-court identification and

that Smith could not have been able to see him during the alleged crime because he must have been shocked by what was happening. We disagree.

{¶ 26} Due process requires suppression of an out-of-court identification if the confrontation procedure was “unnecessarily suggestive of the suspect’s guilt and the identification was unreliable under all the circumstances.” *State v. Davis*, 76 Ohio St.3d 107, 112, 1996-Ohio-414, 666 N.E.2d 1099, citing *State v. Waddy* (1992), 63 Ohio St.3d 424, 438, 588 N.E.2d 819; *Manson v. Brathwaite* (1977), 432 U.S. 98, 116, 97 S.Ct. 2243, 53 L.Ed.2d 140; *Neil v. Biggers* (1972), 409 U.S. 188, 196-198, 93 S.Ct. 375, 34 L.Ed.2d 401. In *Neil v. Biggers*, the United States Supreme Court set forth certain factors to be considered in evaluating the reliability of a show-up identification including the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's 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. *Id.* at 199.

{¶ 27} Here, the record reflects that Smith looked at Payne for four seconds as Payne pointed the gun at him. During this time, Payne had a clear view of Payne’s face because he was standing five or six feet away from him. He told police that the driver was wearing a black jacket and a black knit stocking cap pulled down to just above his eyebrows. The police had Payne in custody and presented him for possible identification within forty-five minutes after the crime

was committed. When the police approached Smith to conduct the identification procedure, they simply told him that they had “a possible suspect.” They made no mention of what role Payne might have played in the crime.

{¶ 28} Nonetheless, upon seeing Payne, Smith immediately stated: “That’s him.” He identified Payne as the driver of the Dodge Intrepid and as the one who pointed the gun at him. Under these circumstances, we find the cold stand procedure conducted in this case was reliable and not impermissibly suggestive.

{¶ 29} Accordingly, the fourth 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.

COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR