[Cite as *State v. Smith*, 2011-Ohio-306.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94167

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RODNEY SMITH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517073

BEFORE: Blackmon, J., Gallagher, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: January 27, 2011

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Rodney Smith appeals his convictions for aggravated robbery and assigns the following errors for our review:

> **"I. The state failed to present sufficient evidence to sustain appellant's conviction."**
>
> **"II. The appellant was denied his constitutional right to confront his accuser and challenge the witness against him."**
>
> **"III. Appellant's convictions are against the manifest weight of the evidence."**

"IV. Appellant was denied the effective assistance of counsel in violation of Amendments VI and XIV, United States Constitution; and Article I, Section 10, Ohio Constitution."

{¶ 2} Having reviewed the record and pertinent law, we affirm Smith's convictions. The apposite facts follow.

{¶ 3} On October 29, 2008, a Cuyahoga County Grand Jury indicted Smith on two counts of aggravated robbery. Both counts had one and three-year firearm specifications attached. On October 31, 2008, Smith pleaded not guilty to the charges. After several pretrials were conducted, the matter proceeded to a jury trial that commenced on June 30, 2009.

Jury Trial

{¶ 4} At trial, the state presented the testimony of five witnesses including David Jacobs, one of the victims of the robbery. Jacobs testified that at approximately 3:30 a.m. on October 18, 2008, he and his friend, Brandon Bolden, were leaving the Flats in Cleveland, Ohio, where they had been celebrating Bolden's birthday.

{¶ 5} As they were walking to Jacobs's car and were about to enter, two men approached the passenger's side of the vehicle. Jacobs initially thought the men knew Bolden, but one of the men came around to the driver's side and pointed a gun at Jacobs's face and told him to "give it up, give up the money." Jacobs instinctively put his hands up, but the man told him to put them down.

He complied and emptied his wallet and gave the money to the gunman. Bolden also handed over his cash to the gunman's accomplice.

{¶ 6} After Jacobs and Bolden had handed over their cash, the gunman instructed them to count to 100 before turning around. Jacobs and Bolden began counting, but stopped at 12, turned around, and saw the two men fleeing on foot up the hill. At Bolden's urging, they jumped in the car and proceeded to follow the two men, who entered a white Ford Mustang automobile.

{¶ 7} As they were following the Mustang, they saw a patrol car. Jacobs pulled alongside the patrol car and informed the officers that the individuals in the Mustang, that was now stopped at the traffic light, had just robbed them at gunpoint. The officers initiated pursuit of the Mustang; Jacobs followed behind the patrol car, and the officers stopped the Mustang a short distance away.

{¶ 8} After the officers stopped the Mustang, Jacobs and Bolden identified Smith as the individual who had just robbed them at gunpoint, and also identified Smith's accomplice. Jacobs never lost sight of Smith from the moment he and his accomplice were running up the hill until they were stopped by the police.

{¶ 9} After Officer Roland Brown of the Cleveland Police Department received the victims' account of the robbery, he began pursuing the Mustang.

Officer Brown testified that when the second patrol car arrived, he initiated a felony stop of the Mustang. Once the occupants of the vehicle were removed and secured in the patrol cars, Officer Brown spoke with Jacobs and Bolden about the details of the robbery. Officer Brown testified as follows about the ensuing events:

> **"Q. Okay. And after you learned this information, what did you do next?**
>
> **"A. Well, after we learned this information, we needed to make sure that they could possibly ID these as being the individuals that did indeed rob them.**
>
> **"Q. Okay. And so what did you do? What was that process like?**
>
> **"A. That process is what we call a cold stance [sic] in police terminology. Basically what that means is we get the individuals out, put the lights on them, and say hey, with the spotlight, is this the individual that robbed you? Were these people involved? Two out of the three people they identified as being involved in the robbery.**
>
> **"Q. And the two out of the three people that they said were involved, who were the two people?**
>
> **"A. Delonte Heath and Rodney Smith"** Tr. 24.
>
> **"* * *"**
>
> **"Q. And the two he named, one of them did not include the driver of the car?**
>
> **"A. Correct.**
>
> **"Q. And when he was making the identification to you as to who was holding the gun, did he waiver [sic] at all?**

"A. No. He was adamant. In fact, before I could ask is this the gentleman, that's the one, that's the one. He was adamant about that.

"Q. And that's the one was referring to Rodney Smith?

"A. Correct." Tr. 249.

{¶ 10} Officer Brown testified that they recovered a .357 Magnum Don Wesson revolver in the glove box and also found a toy plastic gun in the trunk of the vehicle. The toy gun was painted black to make it look real.

{¶ 11} Smith testified in his own defense and denied involvement in the robbery. On the evening of October 17, and into the morning of October 18, 2008, Smith and two friends went to Club Alchemy in the Flats. Smith drank a lot of vodka and got drunk. On the way home, Heath, who had been holding Smith's cell phone, dropped the cell phone out the car window. Smith and Heath exited the vehicle to look for the phone. After locating the phone, Smith and Heath reentered the vehicle that was subsequently stopped by the police, and Smith was eventually arrested.

{¶ 12} The jury found Smith guilty of both counts of aggravated robbery with the firearm specifications attached. The trial court imposed six-year consecutive sentences for the two counts of aggravated robbery, plus an additional three years for the firearm specifications.

Sufficiency

{¶ 13} Where appropriate, we will address the assigned errors out of sequence. In the first assigned error, while essentially conceding the conviction of aggravated robbery against Jacobs, Smith argues the state failed to present sufficient evidence that he committed aggravated robbery against Bolden, who did not testify at trial.

{¶ 14} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus as follows:

> **"Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment 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."**

{¶ 15} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. (*Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"**

{¶ 16} In the instant case, the jury found Smith guilty of aggravated robbery in violation of R.C. 2911.01(A)(1), that states in pertinent part as follows:

> **"(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; * * *."**

{¶ 17} Although Bolden did not testify at trial, the testimony that was presented established that Smith was the gunman. The testimony also established that Smith pointed the gun at Jacobs's face as he stood by the driver's side of the car. In addition, the testimony established that Bolden was a passenger of Jacobs's and Smith held the gun to Jacobs's face and demanded money. Further, the testimony established that Jacobs handed over his cash to Smith and Bolden handed his cash to Smith's accomplice. Finally, the testimony established that prior to fleeing, Smith, with gun in hand, ordered both Jacobs and Bolden to count to 100 before turning around.

{¶ 18} Moreover, the testimony established that Jacobs and Bolden were visibly shaken after the incident. Officer Brown testified in pertinent part as follows:

> **"Q. When the victims stopped you and you were giving out the traffic citation, Jacob Davis, what was his demeanor?**

"A. Very emotional. Yelling, screaming, demanding that we help them. The guys that just robbed them was [sic] right there in front of us.

"Q. And do you remember what Brandon's demeanor was?

"A. Verge of crying, almost.

"Q. He was on the verge of crying?

"A. Yes. Just real emotional. They were just real emotional." Tr. 248.

{¶ 19} Consequently, viewing the evidence in the light most favorable to the state, any rational trier of fact could have found that the state proved all of the essential elements of the instant charges beyond a reasonable doubt. Thus, the trial court properly denied Smith's motion for acquittal. Accordingly, we overrule the first assigned error.

Manifest Weight of the Evidence

{¶ 20} In the third assigned error, Smith argues his convictions were against the manifest weight of the evidence.

{¶ 21} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these**

> **concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. 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, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive - the state's or the defendant's? We 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, 678 N.E.2d 541. '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, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."**

{¶ 22} In the instant case, Smith argues Jacobs's identification of him as the robber should be viewed with the utmost scrutiny. At trial, Officer Brown testified as follows:

> **"Q. You said this seemed to be open and shut?**
>
> **"A. Yes.**
>
> **"Q. Can you explain to the ladies and gentlemen of the jury what you meant by that?**
>
> **"A. It's very rare where a situation happens where a robbery occurs within 100 or 200 yards of a police officer and the victim is able to say, that car right there, and it's the only car on the street and you are able to pull them over and not chase them through 30 yards and loose [sic] sight of them, and then get them out of the car, and everything, without incidents. That is very rare.**
>
> **"Q. And in addition to that, is it safe to say that their ability to identify the defendant right there on the scene and be**

adamant about it, does that also go into the open and shut analysis?

"A. Yes." Tr. 250.

{¶ 23} As reflected in the excerpt above, and elsewhere in the record, the circumstances of the instant case were rare, because the offenders were apprehended and identified within moments after the crime was committed. Officer Brown testified that Jacobs identified Smith before he could even ask the question and that both victims identified Smith as the one with the gun.

{¶ 24} Nevertheless, Smith argues that Jacobs's testimony should be scrutinized because he could not identify the gun pointed at him, leaving the possibility that the very "real" looking toy gun was used and not the real gun. We are not persuaded.

{¶ 25} Whether the "real" looking toy gun or the real gun was used to commit the crime is not dispositive. The evidence established that the fear of the victims was of such a nature that they were induced to part with their property against their will. Thus, whether Smith pointed the toy gun or the real gun in Jacobs's face, both victims temporarily suspended their power to exercise their will by virtue of the influence of the terror impressed by the presence of the gun. See *State v. Brooks*, 2d Dist. No. 21531, 2007-Ohio-1029.

{¶ 26} The determination of credibility of the evidence is for the trier of fact. *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, citing

State v. DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimonies are credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503. Further, the trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, we are not persuaded that the fact-finder lost its way in evaluating Jacobs's testimony about the gun. Accordingly, Smith's third assigned error is overruled.

Confrontation Clause

{¶ 27} In the second assigned error, Smith argues he was denied his constitutional right to confront his accuser because Bolden did not testify at trial.

{¶ 28} The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Crawford v. Washington*, (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the United States Supreme Court held that the Confrontation Clause bars "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross-examination."

{¶ 29} The Court distinguished between testimonial and nontestimonial hearsay and held that only testimonial statements implicate the Confrontation Clause. Id. According to *Crawford*, the initial analysis to be made in determining whether a defendant's right to confrontation has been violated by the admission of out-of-court statements that are not subject to cross-examination "is not whether [the statements] are reliable but whether they are testimonial in nature." *Toledo v. Sailes*, 180 Ohio App.3d 56, 2008-Ohio-6400, 904 N.E.2d 543, at ¶13, citing *Crawford*, supra, at 61, 124 S.Ct. 1354, 158 L.Ed.2d 177.

{¶ 30} "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution." *Davis v. Washington* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224.

{¶ 31} Thus, to determine whether a statement is testimonial or nontestimonial, we inquire "whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the case." *United States v. Cromer* (C.A.6, 2004),

389 F.3d 662, 675; see, also, *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, paragraph two of the syllabus.

{¶ 32} In the instant case, Smith argues the only evidence against him pertaining to the robbery of Bolden was Jacobs's hearsay testimony. We are not persuaded.

{¶ 33} Jacobs's testimony as discussed in the preceding assigned errors does not run afoul of *Crawford*. Jacobs testified that Smith robbed both him and Bolden. He gave details as to what was said to them. Smith had full opportunity to cross-examine Jacobs. In addition, Jacobs testified that both he and Bolden started to comply with Smith's instructions to count to 100 before turning around. Jacobs's entire testimony involves his first-hand observation as a victim of a robbery.

{¶ 34} Further, despite Bolden's absence from trial, his statement to the police that Smith robbed them at gunpoint falls under one of the firmly established exceptions to the hearsay rule, namely, an excited utterance. *State v. Richardson*, 6th Dist. No. L-07-1214, 2010-Ohio-471. An "excited utterance" is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2).

{¶ 35} For an alleged excited utterance to be admissible, four prerequisites must be satisfied: (1) a startling event produced a nervous

excitement in the declarant, (2) the statement was made while still under the stress of excitement caused by the event, (3) the statement related to the startling event, and (4) the declarant personally observed the startling event. See *State v. Ray*, Cuyahoga App. No. 93435, 2010-Ohio-2348, citing *State v. Brown* (1996), 112 Ohio App.3d 583, 601, 679 N.E.2d 361.

{¶ 36} Here, the robbery at gunpoint was the startling event that provided the nervous excitement in both victims. In fact, Officer Brown testified that Bolden was on the verge of tears and Jacobs was begging him to help them because they had just been robbed. These statements were made moments after the robbery, pertained to the robbery, and both Jacobs and Bolden were victims of the robbery.

{¶ 37} Based on the foregoing, we conclude that Smith's right of confrontation was not violated. Thus, the complained of testimony was properly before the jury. Accordingly, we overrule the second assigned error.

Ineffective Assistance of Counsel

{¶ 38} In the fourth assigned error, Smith argues he was denied the effective assistance of counsel because trial counsel failed to request a lesser included jury instruction of robbery without a gun.

{¶ 39} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not

deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus.

{¶ 40} To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. Id. at paragraph two of the syllabus. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Moon*, Cuyahoga App. No. 93673, 2010-Ohio-4483, citing *State v. Sallie*, 81 Ohio St.3d 673, 1998-Ohio-343, 693 N.E.2d 267.

{¶ 41} In the instant case, Smith argues that trial counsel should have requested a lesser included offense of robbery because of evidence that a toy gun was used. There was no evidence that a toy gun was used. The evidence was that a .357 Magnum was in the glove compartment and a toy gun that was painted black was found in the trunk. Moreover, in the third assigned error, we concluded that it was immaterial whether a real gun or a toy gun was used. The major factor is that the presence of a gun produced fear in the victims of such a nature that they were induced to part with their property against their will. Also, a .357 Magnum was found in the glove compartment, which we find is sufficient evidence of an aggravated robbery.

{¶ 42} Moreover, we note that failure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel. *State v. Barb*, Cuyahoga App. No. 94054, 2010-Ohio-5239, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 402 N.E.2d 1189, certiorari denied (1980), 449 U.S. 879, 101 S.Ct. 227, 66 L.Ed.2d 102. Consequently, trial counsel's decision not to request a lesser included jury instruction of robbery, did not deprive Smith of his right to the effective assistance of counsel. Counsel's strategy was that Smith was not involved. Accordingly, we overrule the fourth assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS;
COLLEEN CONWAY COONEY, J.,

CONCURS IN JUDGMENT ONLY