

[Cite as *State v. Ealom*, 2011-Ohio-70.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94127

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEVERE EALOM

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-502833

BEFORE: Cooney, J., Rocco, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: January 13, 2011

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Devere Ealom (“Ealom”), appeals his aggravated robbery, kidnapping, and having a weapon under disability convictions. Finding no merit to the appeal, we affirm.

{¶ 2} In November 2007, Ealom was charged in a three-count indictment. Count 1 charged him with kidnapping with one- and three-year firearm specifications, notice of prior conviction, and a repeat violent offender specification. Count 2 charged him with aggravated robbery with one- and three-year firearm specifications, notice of prior conviction, and the repeat violent offender specification. Count 3 charged him with having a weapon while under disability.

{¶ 3} Ealom pled guilty to Count 1, with a three-year firearm specification, and was sentenced to 11 years in prison, with five years of postrelease control. In March 2009, his plea was vacated and the case remanded by this court, based on the trial court's failure to inform him of judicial release eligibility. *State v. Ealom*, Cuyahoga App. No. 91455, 2009-Ohio-1365.

{¶ 4} In September 2009, the case proceeded to a jury trial on Counts 1 and 2 and a bench trial on Count 3. John Block ("Block") testified that he was working at the York Video store on Broadway Ave. on October 21, 2007. Block received numerous phone calls that day from Eric Ealom, an employee of the store and nephew of Devere Ealom, inquiring about the day's schedule of shifts and employees. Block testified that at approximately 4:55 p.m., while cleaning the store, he heard someone enter. Devere Ealom approached Block while smoking a cigarette. Before Block could inform Ealom of the nonsmoking policy in the store, Ealom pulled out a gun, cocked it, and pointed it at Block's face,

ordering him to the ground. While Ealom ordered Block to empty his pockets, an accomplice emptied the register.

{¶ 5} As Ealom looked through Block's pockets, Ealom told Block that "he'd like to blow [Block's] white ass to shit." Block heard the accomplice say "we're good — let's roll," and both men left the store. Block contacted the police.

Before the police arrived, Reginald Worley ("Worley"), another employee of York Video, arrived at the store to begin his shift. Block explained what happened and described the gunman. From this description, Worley immediately identified the gunman as Devere Ealom.

{¶ 6} Officer John Franko ("Franko") testified that when police arrived at the store, Worley gave them the name of the suspect. The police were then able to show Block photos on the computer in their car. Block identified Ealom from one of the photos. Police went in search of Ealom and apprehended him approximately an hour after the robbery. Police returned with Ealom to the store to conduct a cold-stand identification. Block positively identified Ealom.

{¶ 7} Video surveillance from the store was given to police. Police took still photographs of the video and presented them to Ealom's sister, Sherdina Ealom. Sherdina told the police that the man in the photos was her brother and that she recognized the sweater he was wearing as belonging to Ealom.

{¶ 8} Ealom was found guilty on all three counts and sentenced to a total of 13 years' incarceration and five years of postrelease control.

{¶ 9} Ealom now appeals, raising two assignments of error.

Sufficiency

{¶ 10} In the first assignment of error, Ealom challenges the sufficiency of the evidence supporting his conviction for having a weapon while under disability, as well as the firearm specifications.

{¶ 11} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 12} In the instant case, Ealom was convicted of having a weapon under disability, as well as a three-year firearm specification for the charges of robbery and kidnapping. R.C. 2923.12(A)(2) provides that no person shall knowingly have, carry, or use any firearm if that person has been convicted of any felony. R.C. 2941.145 states that a three-year mandatory prison term shall be imposed if the “offender had a firearm on or about the offender's person or under the

offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense."

{¶ 13} R.C. 2923.11 defines a firearm as "any deadly weapon capable of expelling or propelling one or more projectiles by the action of any explosive or combustible propellant." This definition includes an "unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable." R.C. 2923.11(B)(1).

{¶ 14} Ealom claims that there is insufficient evidence that he had an operable gun on his person at the time of the robbery. This court previously addressed this issue in *State v. Nicholson*, Cuyahoga App. No. 85977, 2006-Ohio-1569, and found the following:

"According to the Ohio Supreme Court, a firearm specification can be proven beyond a reasonable doubt by circumstantial evidence. That evidence may consist of the testimony of lay witnesses who were in a position to observe the instrument and the circumstances of the crime.

"Furthermore, in *Thompkins* the Ohio Supreme Court rejected the view that the circumstantial proof of operability must consist of certain recognized indicia, such as bullets, the smell of gunpowder, bullet holes, or verbal threats by the user of the weapon that he or she would shoot the victim."
(Citations omitted.)

{¶ 15} Ealom argues that the surveillance video does not reveal a firearm. Block's testimony that Ealom was brandishing a gun throughout the robbery contradicts this claim, and it is not this court's duty, on a review for sufficiency, to weigh the credibility of a witness. Ealom also argues that no gun was ever discovered after he was apprehended. This argument is not persuasive because Ealom could have disposed of the firearm during the hour between leaving the store and being apprehended by police. It is also possible that Ealom's accomplice took the gun after the robbery.

{¶ 16} In regard to operability, Block testified that Ealom stood over him with the gun cocked, and pointed it at Block's head. When asked how he knew it was cocked, Block said that he had some knowledge of firearms. He also stated that Ealom told him "he'd like to blow [Block's] white ass to shit." A victim's belief that the weapon is a gun, together with the intent on the part of the accused to create and exploit that belief for his own criminal purposes, is sufficient to prove a firearm specification. *State v. Greathouse*, 2nd Dist. No. 21536, 2007-Ohio-2136 (sufficient evidence supported a firearm specification even though the victim never saw the gun, when the defendant told the victim that he had a gun and would kill her if she did not comply).

{¶ 17} After viewing the evidence in a light most favorable to the prosecution, we find sufficient evidence to establish, beyond a reasonable doubt,

that Ealom possessed an operable firearm at the time of the robbery, thus supporting his convictions involving a firearm.

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

Manifest Weight of the Evidence

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

{¶ 20} A challenge to the manifest weight of the evidence attacks the verdict in light of the State’s burden of proof beyond a reasonable doubt. *Thompkins* at 386-87. When inquiring into the manifest weight of the evidence, the reviewing court sits as the “thirteenth juror and makes an independent review of the record.” *Id.* at 387; *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652. The appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of all witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new proceeding ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Where a judgment is supported by competent, credible evidence going to all essential elements to be proven, the judgment will not be reversed as being against the manifest weight of the evidence. *State v. Mattison* (1985), 23 Ohio App.3d 10, 14, 490 N.E.2d 926. Accordingly, reversal on manifest weight grounds is reserved for “the

exceptional case in which the evidence weighs heavily against the conviction.”

Martin at 175.

{¶ 21} Ealom claims that the convictions are against the manifest weight of the evidence because the evidence does not establish beyond a reasonable doubt that he was present in the store at the time of the robbery. Ealom argues that Block’s trial testimony occurred more than two years after the robbery and, therefore, is not reliable. Regardless of Block’s trial testimony, the evidence shows that Block identified Ealom immediately after the robbery from photos shown him on the computer in the police car. Block then identified Ealom in person immediately after he was apprehended within one hour of the robbery. In addition, Worley provided Ealom’s name based on Block’s description of the gunman immediately after the robbery. Moreover, only days after the robbery, Ealom’s sister identified the man in the surveillance video (via still photos furnished by the police) as her brother, Devere Ealom.

{¶ 22} Ealom also argues that when he was apprehended, he was wearing different clothes than those seen in the surveillance video, and that no gun or cash was found on his person. This argument is unconvincing because Ealom had approximately one hour between the robbery and the time he was apprehended to change his clothing and dispose of the gun and cash.

{¶ 23} Substantial evidence exists that Ealom was in the video store at the time of the robbery. Based on the aforementioned facts and circumstances, we

find that the convictions are not against the manifest weight of the evidence. We cannot say that the factfinder lost its way and created a manifest injustice in convicting Ealom.

{¶ 24} Therefore, the second 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.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, JUDGE

KENNETH A. ROCCO, P.J., and
MELODY J. STEWART, J., CONCUR