[Cite as *State v. Coleman*, 2011-Ohio-709.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94730

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CLAUDE COLEMAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516497

BEFORE: Kilbane, A.J., Sweeney, J., and Keough, J.

RELEASED AND JOURNALIZED: February 17, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, Claude Coleman, appeals from his conviction for aggravated robbery and having a weapon while under disability. For the reasons set forth below, we affirm.

{¶ 2} On October 16, 2008, defendant was indicted for one count of aggravated robbery, with one- and three-year firearm specifications; one count of receiving stolen property; and one count of having a weapon while under disability.

{¶ 3} Defendant pled not guilty to all charges. Defendant then moved for a voir dire examination of eyewitnesses and to suppress the pretrial identifications made in this

matter. The trial court heard testimony from the complaining witness, Charles Johnson, and his identification of defendant in a "cold stand" or "show-up" following the incident at issue. The trial court then denied the motion to suppress the pretrial identification. Defendant waived his right to a jury trial with regard to the offense of having a weapon while under disability, and stipulated that on June 5, 2008, he was convicted of drug possession, in violation of R.C. 2925.11. He also stipulated that a Ruger semiautomatic handgun found in connection with this matter is operable. The matter proceeded to trial on December 14, 2009.

{¶ 4} Cleveland Police Sergeant Michael Donegan testified that on July 30, 2008, he and his partner, Sergeant Joseph Rini, were patrolling in the area of West 45th Street and Detroit Avenue. At around 1:00 a.m., as they proceeded to West 33rd Street and Detroit Avenue, a motorist flagged them down and reported that someone was being robbed further west on Detroit Avenue. Sergeant Donegan next observed one man walking on the north side of the street and two men walking on the south side of the street, near the area of the Harp restaurant.

{¶ 5} One of the two men on the south side of the street looked over his shoulder and said something to the other man. Both men began to run southward and then headed eastward down a side street. At the same time, the man on the north side of the street frantically waved at the officers and screamed that the two men who were fleeing had just robbed him.

{¶ 6} Sergeants Donegan and Rini pursued the fleeing men in their zone car and called for assistance from other police units. Another unit was instructed to remain with the complaining witness (Johnson). According to Sergeants Donegan and Rini, the men jumped over a fence a short distance away, at Clinton Avenue near West 45th Street. Sergeant Rini found a loaded Ruger semiautomatic handgun at this location. Responding units subsequently found defendant hiding in a back yard one house away. The other suspect, a juvenile, Carvin Catron ("Catron"),[1] was found hiding in the back of an adjoining property. Approximately five minutes later, the officers conducted a cold stand with the complaining witness near the Harp restaurant. Thereafter, the suspects were arrested. Johnson's money was not recovered. According to Sergeant Donegan, the men who fled from him on Detroit Avenue were the same men who were arrested.

{¶ 7} On cross-examination, Sergeant Donegan acknowledged that the officers did not get the name of the motorist who had initially flagged them down.

{¶ 8} Officer John Kubas testified that he and Officer John Lally responded to a call for assistance in apprehending robbery suspects in the area of West 45th Street and Detroit Avenue. Officer Kubas learned that the suspects were last seen in the area of West 44th Street and Clinton Avenue. He and Officer Lally exited their vehicle and searched the back yards in that area. A few minutes later, Officer Kubas and other officers on the scene apprehended a juvenile (Catron) in a back yard on Clinton Avenue.

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[1]Catron was a juvenile at the time of his arrest, but turned 18 by the time this matter came to trial.

{¶ 9} On cross-examination, Officer Kubas stated that the cold stand occurred on Clinton Avenue, rather than near the Harp.

{¶ 10} Catron was called as a witness for the State. He testified that he had entered into a plea agreement in connection with this matter, and pled guilty to a charge of robbery with a one-year gun specification. He denied making a written statement in this matter and stated that he had signed a blank statement. He further testified that the police had tricked him into entering a guilty plea by falsely promising that he would receive probation, and stated that he did not agree as part of the plea agreement to testify against defendant. Catron stated that he was buying marijuana from defendant on July 30, 2008, and that he and the other man fled when they saw police. He denied robbing Johnson, denied having a gun, and denied knowing defendant. He also stated that during the cold stand, Johnson indicated that Catron was not the assailant. At this point, the police pulled Johnson away and spoke to him, and Johnson then identified him.

{¶ 11} Johnson testified that on July 30, 2008, he was at his cousin's house at West 85th Street and Detroit. They watched a baseball game on television and had a few beers. Johnson then proceeded to walk to his girlfriend's house at West 28th Street and Detroit Avenue. Near the intersection of West 45th Street and Detroit Avenue, near a restaurant, Johnson stopped to light a cigarette. At this time, two men on the opposite side of the street ran up to him, and one of the men held a gun to his head. According to Johnson, there were no other pedestrians on the street.

{¶ 12} Johnson further testified that the older, taller man held a black gun to the back of his head, while the younger, shorter assailant went through his pockets and took $15.[2] After about a minute, the older man stated that they were going to take Johnson behind the restaurant. When they got behind the restaurant, they took off Johnson's shoes and checked his socks for more money. When they failed to find any additional money, they walked away. Then, according to Johnson, the older, taller man came back and searched him again for money. After he failed to find any more money, he stated that he should have "popped" Johnson.

{¶ 13} Johnson stated that immediately after the men left, he saw a police car. Johnson told the officers that he had been robbed and pointed out his assailants to the officers. He watched as the assailants ran to the area of West 44th Street and Detroit Avenue, but lost sight of them after they jumped over a fence.

{¶ 14} After about five to ten minutes, two zone cars returned with two men, and Johnson identified them as the men who had just robbed him. He identified the defendant as the older, taller assailant. He stated that the area was well lit and observed that the men were wearing white tee shirts and blue jean shorts. Johnson said that he paid particular attention to the older man's earring and Michael Jordan tennis shoes. Johnson, a barber, also took note of this man's hair, noting that it was shorter. He also

[2] In his statement to Detective David Santiago during the follow-up investigation, Johnson stated that they had taken $23.

noticed that the man had no facial hair. He identified the taller, older man as defendant again in court.

{¶ 15} Johnson admitted that he has a conviction for aggravated assault. He admitted that the entire incident lasted only about five minutes, and he made his identification of the men only after the officers returned with the suspects in handcuffs. He also wavered as to whether defendant is an inch taller or an inch shorter than he.

{¶ 16} Cleveland Police Officer Brian Pfeuffer testified that he and his partner, Officer Anderson, responded to the area of West 45th Street and Clinton Avenue, after receiving a police broadcast for assistance. They parked their cruiser and walked about the back yards in that area. Officer Pfeuffer subsequently observed a man hiding against the side of a house, and he and Officer Edward Lentz ("Lentz") arrested him. Both officers identified this man in court as the defendant. He had no money at the time of his arrest, but had a bag of marijuana. Officer John Lally arrested a second man hiding nearby. This man, identified in court as Catron, had no money but was in possession of two rocks of crack cocaine.

{¶ 17} On cross-examination, Officer Lentz admitted that no fingerprints were obtained from the weapon recovered in this matter.

{¶ 18} Xenophon Middlebrooks testified that he was the owner of the Ruger handgun that was recovered in this matter, and that he had reported it stolen in December 2007. He further indicated that he does not know the defendant or Catron, and that he did not give them permission to have the weapon.

{¶ 19} Detective Santiago testified that he spoke with defendant and recorded the interview, which was played for the jury. In the recording, defendant stated that he accompanied his friend, J.R., to the west side to visit a woman who was having a small party. From there, he walked to a nearby store. On his way back to the party, he saw a man who appeared to be upset. When he saw the police arrive, defendant stated that he fled because he had marijuana. He was apprehended, arrested, and placed in a zone car. While defendant was seated in the zone car, the man defendant had seen earlier looked at him briefly and identified him as the individual who had just robbed him, then identified a second man who was seated in another zone car. Defendant denied robbing Johnson, denied having a gun, and denied knowing the other man who had been apprehended. He also stated that he had no additional information concerning J.R. or the woman he had visited.

{¶ 20} Detective Santiago further testified that Catron was required, in connection with his plea agreement, to make a proffer or statement describing his knowledge of the robbery. Detective Santiago obtained Catron's statement with a prosecuting attorney and Catron's defense counsel present. Catron did not want to write a narrative, and instead asked Detective Santiago to write as Catron narrated. This written statement, which was both read to the jury and admitted into evidence over defense counsel's objection, provided in relevant part as follows:

> **"We were on the westside on Detroit and we seen the dude walking and we ran up on him, me and Claude, Claude had the gun. It was a black handgun and like I was searching his pockets, searched his pockets, and his money and I ran, Claude went back and did whatever the**

victim said he did. We left and that's when the police came up on us and we ran. We ended up hear [sic].

*** ***

"I took like $23.00 [or] $24.00."

{¶ 21} At the close of the State's case, the trial court granted defendant's Crim.R. 29 motion for acquittal on the charge of receiving stolen property. The jury subsequently found defendant guilty of aggravated robbery with firearm specifications, and the trial court found defendant guilty of having a weapon while under disability. He was sentenced to a total of seven years of imprisonment, plus five years of mandatory postrelease control.[3]

{¶ 22} Defendant now appeals and assigns two errors for our review.

Assignment of Error One:

"The trial court erred by allowing inadmissible hearsay into evidence."

{¶ 23} In this assignment of error, defendant asserts that Catron's statement was erroneously admitted as substantive evidence because it does not meet the requirements of Evid.R. 801(D)(1)(a) since it was not given under oath, and does not meet the requirements of Evid.R. 801(D)(2) since it was not made in furtherance of a conspiracy and following independent proof of a conspiracy. In opposition, the State maintains that Catron's statement was properly admitted impeachment evidence pursuant to Evid.R.

[3]The trial court also ordered that this sentence be served concurrently with the sentence imposed in Case Nos. CR-519269 and CR-519489.

607, in accordance with *State v. Dearmond*, 179 Ohio App.3d 63, 2008-Ohio-5519, 900 N.E.2d 692.

{¶ 24} Evid.R. 607 prohibits the use of prior inconsistent statements to impeach one's own witness absent a showing of surprise and affirmative damage. *Dayton v. Combs* (1993), 94 Ohio App.3d 291, 299, 640 N.E.2d 863.

{¶ 25} The *Dearmond* court noted that it is well settled in Ohio that under Evid.R. 607, a prior inconsistent statement is only admissible for impeachment of the declarant and not as substantive evidence offered to prove the truth of the matter asserted. Id., quoting *State v. Dick* (1971), 27 Ohio St.2d 162, 165, 271 N.E.2d 797.

{¶ 26} In this matter, we cannot say that Catron's statement was simply used as impeachment. Beyond simply using the statement to question Catron, the State had Detective Santiago testify to the content of the statement, and the statement itself was admitted into evidence as an exhibit. The statement was plainly "offered in evidence to prove the truth of the matter asserted." Accord *State v. Blalock*, Cuyahoga App. Nos. 80419 and 80420, 2002-Ohio-4580. Further, the trial court provided the "grave suspicion" instruction as required R.C. 2923.03(D), and did not give a limiting instruction that the prior inconsistent statement was only to be used for impeachment and could not be considered as substantive evidence of appellant's guilt. Cf. *State v. Flowers* (Dec. 21, 1992), Stark App. No. CA-8812.

{¶ 27} Viewing the statement as substantive evidence, we must then determine whether the statement was properly admitted under any of the exceptions to the rule

against hearsay. *State v. Clay*, 187 Ohio App.3d 633, 2010-Ohio-2720, 933 N.E.2d 296. As to whether the statement meets the requirements of Evid.R. 801(D)(1)(a), it is undisputed that the statement was not given under oath, so it fails to meet this rule. *Blalock.*

{¶ 28} As to whether the statement meets Evid.R. 801(D)(2)(e), we note that the Supreme Court has held that a confession to police by one co-conspirator implicating a second co-conspirator is not made "during the course and in furtherance of the conspiracy" within the scope of Evid.R. 801(D)(2)(e), as such a statement is made at a point in time when the confessor is no longer attempting to conceal the crime and has abandoned the conspiracy. *State v. Carter*, Ohio St.3d 545, 1995-Ohio-104, 651 N.E.2d 965,paragraph four of the syllabus.

{¶ 29} Finally, although it was a statement against penal interest, Catron was not unavailable and testified at trial, so the statement was not properly admitted under Evid.R. 804. *Blalock.*

{¶ 30} Nonetheless, we conclude that admission of the statement was harmless beyond a reasonable doubt in light of Johnson's clear, certain, and detailed evidence identifying defendant as one of the men who robbed him, and the evidence demonstrating that the police quickly located defendant minutes after seeing him flee from the scene. *Carter*.

{¶ 31} The first assignment of error is without merit and overruled.

Assignment of Error Two:

"Mr. Coleman's convictions for aggravated robbery with firearm specifications and having a weapon while under disability are against the manifest weight of the evidence."

{¶ 32} In determining whether a conviction is against the manifest weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 54, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652. The reviewing court must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. " Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 33} The appellate court may not merely substitute its view for that of the jury, and reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id., quoting *Martin*.

{¶ 34} In this matter, after examining the entire record, weighing the evidence and all reasonable inferences, we are unable to conclude that the jury clearly lost its way and created such a manifest miscarriage of justice in convicting defendant of the offenses. The evidence demonstrated that Johnson made detailed observations of defendant during the incident, taking particular note of defendant's shoes, his earring, and hair. When police approached, Johnson indicated that the two men across the street had just robbed

him. The police then followed these men and apprehended them less than ten minutes later in nearby back yards. Accordingly, we find that the convictions are not against the manifest weight of the evidence.

{¶ 35} The second assignment of error is without merit and is overruled.

Judgment affirmed.

It is ordered that appellee recover from 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.

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

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

JAMES J. SWEENEY, J., and
KATHLEEN ANN KEOUGH, J., CONCUR