

[Cite as *State v. Smith*, 2011-Ohio-924.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94545**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DEMARKUS SMITH**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CR-523015 and CR-523032

**BEFORE:** S. Gallagher, P.J., Rocco, J., and Keough, J.

**RELEASED AND JOURNALIZED:** March 3, 2011

## **ATTORNEY FOR APPELLANT**

Fred D. Middleton  
815 Superior Avenue, East  
1717 Superior Building  
Cleveland, OH 44114

## **ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor

BY: Nathaniel Tosi  
Assistant Prosecuting Attorney  
The Justice Center, 8th Floor  
1200 Ontario Street  
Cleveland, OH 44113

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant Demarkus Smith brings this appeal challenging his conviction by the Cuyahoga County Court of Common Pleas. For the reasons set forth herein, we affirm.

{¶ 2} On April 8, 2009, in Cuyahoga County Common Pleas Court Case No. CR-523015, the grand jury indicted Smith on one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), and one count of robbery, in

violation of R.C. 2911.02(A)(2), both with one- and three-year firearm specifications. On April 21, 2009, in Cuyahoga County Common Pleas Court Case No. CR-523032, Smith was indicted on one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), and one count of kidnapping, in violation of R.C. 2905.01(A)(2), both with one- and three-year firearm specifications.

{¶ 3} On December 15, 2009, the state moved for joinder, which the trial court granted. Smith objected and moved to have the two cases tried separately; the court denied his motion. Smith also filed a motion to suppress identification testimony generated from a cold stand, which the trial court denied. On that same date, a jury trial commenced.

{¶ 4} The evidence presented in Case No. CR-523015 (the “RTA case”) is as follows: On March 31, 2009, at approximately 5:00 a.m., Antonio Miles was robbed at gunpoint after he exited an RTA bus near the 55<sup>th</sup> Street rapid station. He described three assailants, one of whom wore a ski mask over his face and held a .32 caliber chrome revolver. The assailants made Miles lie on the ground, while they went through his pockets. He also testified that the gunman ordered him to remove the diamond earring he was wearing.

{¶ 5} The police apprehended Delfonte Fortune in connection with the robbery shortly after it occurred. Miles identified Fortune as one of the assailants, and also stated that Fortune was the person who went through his pockets. Fortune was arrested, and ultimately pleaded guilty to robbery in

exchange for his testimony against the other suspects. Fortune told police Smith was the masked gunman who had robbed Miles, but he could not identify the other assailant with anything more than a first name.

{¶ 6} The evidence presented in Case No. CR-523032 (the “Shaker case”) is as follows: On April 6, 2009, at approximately 11:00 p.m., Natalie Cody got on a bus near East 125<sup>th</sup> Street and Kinsman Avenue. Two young black males got on the bus at the same location. She mistakenly rang for her stop one stop before her actual stop, and when she stood to exit the bus, the two males stood also. Ms. Cody sat back down, and so did the two males. When she exited the bus at Chagrin Boulevard and Lynnfield Road, the two males exited as well.

{¶ 7} Ms. Cody crossed the street, and the two males followed her. One of them pointed a silver revolver at her, while the other one grabbed at her backpack and pushed her to the ground. She testified that the entire incident lasted two or three minutes, before the males ran off, heading west on Chagrin. The assailants took her backpack, which contained CDs and CD cases, a wallet, money, clothing, a cell phone, and a credit card. Ms. Cody ran immediately to her mother’s house, which was less than a minute from the bus stop, and called the police.

{¶ 8} The Shaker Heights police responded to Ms. Cody’s call and reached her mother’s house in approximately two minutes. Ms. Cody

described her assailants as black males wearing dark “hoodies” and pants. She also described the gunman as being approximately 5’10.”

{¶ 9} When Lieutenant James Mariano was responding to the call, he saw two males heading westward down Chagrin on opposite sides of the street. He pursued the male on the north side of the street, who fled through backyards toward Winslow Road, the street that runs parallel to Chagrin and is one block north. Lt. Mariano called for backup, and other police officers discovered a black male, later identified as Smith, lying underneath a car in a garage on Winslow. The male who was heading down the south side of Chagrin was also apprehended.

{¶ 10} Within 15 minutes of the robbery, and based on Ms. Cody’s description of her assailants, the police conducted two separate cold stands. Ms. Cody identified the first male as the one who grabbed her backpack and pushed her to the ground. She was then driven to where the police had apprehended Smith. There Ms. Cody identified the second male the gunman. She stated that she had seen Smith in her neighborhood prior to this incident.

{¶ 11} The police found two CD cases and a brown jacket inside the garage and close to where Smith was discovered underneath a car. They recovered Ms. Cody’s backpack. They found a silver .38 caliber revolver in a driveway on Chagrin Blvd. that Lt. Mariano had seen Smith run up. Ms.

Cody identified the CD cases as hers. She also identified the brown jacket as the one the gunman was wearing when she was robbed, and the gun as the one he used to rob her.

{¶ 12} In the defense's case, Smith's mother testified that her son was home at 5:00 a.m. on March 31, 2009.

{¶ 13} The jury acquitted Smith on all counts in the RTA case. The jury found Smith guilty on all counts in the Shaker case; the court merged the aggravated robbery and kidnapping convictions as well as the firearm specifications. Smith was sentenced to four years for aggravated robbery with a three-year sentence for the firearm specification, to be served prior to and consecutive to the four-year term.

{¶ 14} Smith filed this appeal, raising three assignments of error for our review.

{¶ 15} Smith's first assignment of error provides: "The trial court's decision overruling the motion to suppress identification caused reversible error and denied appellant due process of law because the confrontation conducted was unnecessarily suggestive and conducive to irreparable mistaken identification."

{¶ 16} In reviewing a trial court's ruling on a motion to suppress, the reviewing court must keep in mind that weighing the evidence and determining the credibility of witnesses are functions for the trier of fact.

*State v. DePew* (1988), 38 Ohio St.3d 275, 277, 528 N.E.2d 542. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. See *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172, citing, *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54.

The reviewing court, however, must decide de novo whether, as a matter of law, the facts meet the appropriate legal standard. *Id.*; see, also, *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906.

{¶ 17} Smith argues that the cold stand conducted by Shaker Heights police officers was unreliable and unduly suggestive. We acknowledge that the practice of showing suspects alone to persons for the purpose of identification, and not as part of a lineup, has been condemned. *State v. Broom* (1988), 40 Ohio St.3d 277, 284, 533 N.E.2d 682, citing *Stovall v. Denno* (1987), 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199. However, an identification of this nature violates due process only if the circumstances surrounding the identification are unnecessarily suggestive and unreliable after evaluating the totality of the circumstances. *Manson v. Brathwaite* (1977), 432 U.S. 98, 112-113, 97 S.Ct. 2243, 53 L.Ed.2d 140.

{¶ 18} We have also said that, “although the presentation of a single suspect for identification is ordinarily discouraged, an exception is recognized when the suspect is apprehended at or near the scene of the crime and is presented to the victim or witness shortly thereafter.” *State v. Davis*,

Cuyahoga App. No. 83033, 2004-Ohio-1908, citing *State v. Madison* (1980), 64 Ohio St.2d 322, 332, 415 N.E.2d 272, and *State v. Williams* (Oct. 4, 2001), Cuyahoga App. No. 78961.

{¶ 19} The focus, under the “totality of the circumstances” approach, is upon the reliability of the identification, not the identification procedures. *State v. Jells* (1990), 53 Ohio St.3d 22, 26, 559 N.E.2d 464. In determining reliability, the court must consider (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of the witness’s prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Neil v. Biggers* (1972), 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401.

{¶ 20} It is the defendant’s burden to show that the identification procedure was unduly suggestive. *State v. Freeman*, Cuyahoga App. No. 85137, 2005-Ohio-3480, reversed on other grounds by *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174. If the defendant is able to meet this burden, then the court must consider whether the procedure was so unduly suggestive as to give rise to irreparable mistaken identification. *Id.* Moreover, the ultimate focus in determining whether reversible error exists is not just on whether the practice was used, but on whether it was so suggestive as to create “a very



substantial likelihood of irreparable misidentification.” *State v. Broom*, supra at 284, 533 N.E.2d 682, quoting *Neil*, at 198.

{¶ 21} In this case, the victim testified that Smith was on the bus with her for 10 or 15 minutes, and she saw his face as she was being robbed. She clearly stated that although she was ultimately pushed to the ground, she kept her eyes on Smith because he was the one who had the gun pointed at her face. When the police arrived to question her, the victim described Smith’s clothing and the direction in which he ran off after the robbery. The cold stand was conducted within 15 minutes of the robbery, and the victim did not waver at all in her confidence that Smith was the man who robbed her at gunpoint.

{¶ 22} Furthermore, the victim testified the police never told her that they had caught the man who robbed her. The police did, however, apprehend Smith within two blocks of the robbery, and they located a dark-colored coat, which the victim identified as the one the man who robbed her was wearing, in the garage where Smith was hiding.

{¶ 23} A review of the totality of the circumstances demonstrates that the cold stand was not unduly suggestive and the victim’s identification was not unreliable. Any challenge to her testimony goes to the weight of the evidence, not whether the cold stand was unduly suggestive. Smith’s first assignment of error is overruled.

{¶ 24} Smith's second assignment of error provides as follows: "The trial court's order to try both cases together violated the appellant's right not to testify under the Fifth Amendment and presented coerced testimony by a convicted felon to be used in a separate case."

{¶ 25} Crim.R. 8 allows for the joinder of two or more offenses when the offenses "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Generally, the law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged are of the same or similar character. *State v. Lott* (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293. Joinder and the avoidance of multiple trials is favored for many reasons, among which are conserving time and expense, diminishing the inconvenience to witnesses, and minimizing the possibility of incongruous results in successive trials before different juries. *State v. Torres* (1981), 66 Ohio St.2d 340, 421 N.E.2d 1288.

{¶ 26} An accused may move to sever the charges under Crim.R. 14, but he has the burden to affirmatively demonstrate that his rights will be prejudiced by the joinder. *Lott*, 51 Ohio St.3d at 163. A showing by the state that the evidence relating to each crime is simple and direct negates any claims of prejudice and renders joinder proper. *Lott*; *State v. Roberts* (1980),

62 Ohio St.2d 170, 405 N.E.2d 247; *Torres*. It is the defendant who bears the burden of demonstrating prejudice and that the trial court abused its discretion in denying severance. *State v. Hill*, Cuyahoga App. No. 80582, 2002-Ohio-4585, citing *State v. Coley*, 93 Ohio St.3d 253, 2001-Ohio-1340, 754 N.E.2d 1129.

{¶ 27} Upon Smith’s motion to sever the two cases, the court found that the modus operandi were similar, and that Evid.R. 404(B)<sup>1</sup> may ultimately allow evidence from each crime admitted to prove the other.<sup>2</sup> We find it compelling that, in the end, the jury acquitted Smith of the RTA robbery, leading us to conclude that the jury was not persuaded by Fortune’s testimony to convict Smith in the RTA case because the evidence did not support a guilty verdict.

{¶ 28} We do not find that the trial court abused its discretion by denying Smith’s motion to sever. Smith’s second assignment of error is overruled.

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<sup>1</sup> Evid.R. 404(B) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

<sup>2</sup> “[W]hen simple and direct evidence exists, an accused is not prejudiced by joinder regardless of the nonadmissibility of evidence of these crimes as ‘other acts’ under Evid.R. 404(B).” *Lott*.

{¶ 29} Smith’s third assignment of error provides: “The conviction is against the manifest weight of the evidence.” He argues that Delfonte Fortune’s testimony was contradictory; he further argues that the state failed to prove that the gun was used by Smith or that it was the same gun used in both robberies.

{¶ 30} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we 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.” (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 81.

{¶ 31} First, Smith argues that “the evidence presented through the convicted felon was ‘bought’ for a plea bargain, and it was fragmented, uncertain and contradictory.” We find it difficult to follow the relevance of this argument since the jury found Smith not guilty of the RTA robbery, the only evidence of which was founded on Fortune’s testimony.

{¶ 32} Second, Smith contends that there was conflicting testimony about the type of gun used in the two robberies, and Smith's fingerprints were not found on the gun. Nonetheless, Ms. Cody testified that Smith pointed a silver revolver at her while he robbed her. She also testified that she could not remember if the gunman was wearing gloves or not. A gun matching the description Ms. Cody provided was found near where Smith was apprehended. The caliber of the gun found was different from that of the gun described by the victim in the RTA case.

{¶ 33} Ms. Cody's identification of Smith as the gunman and the testimony of several Shaker Heights officers who were instrumental in apprehending Smith from a nearby garage shortly after the robbery lead us to conclude the jury did not lose its way when it convicted Smith of aggravated robbery. The fact that Smith, who is actually 5'7," is shorter than Ms. Cody remembered and that he was no longer wearing the dark coat when he was discovered underneath a car are not enough to demonstrate the verdict was against the manifest weight of the evidence.

{¶ 34} Smith's third assignment of error is overruled.<sup>3</sup>

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

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<sup>3</sup> Smith concludes his brief with the statement, "The case should be dismissed, as the evidence is not sufficient[.]" although he did not present a sufficiency argument. We find the state

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.

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and  
KATHLEEN ANN KEOUGH, J., CONCUR