

[Cite as *State v. Hill*, 2015-Ohio-1456.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101755

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KAREEM I. HILL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-582211-E

BEFORE: Laster Mays, J., Celebrezze, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: April 16, 2015

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant Kareem I. Hill (“Hill”) appeals from his convictions for aggravated burglary with repeat violent offender specifications (“RVOs”) and notices of prior conviction (“NPCs”); felonious assault with a one-year firearm specification, RVOs and NPCs; and having a weapon while under disability, with one- and three-year firearm specifications.

{¶2} Hill presents three assignments of error. He first argues that the trial court abused its discretion in denying his request for a special jury instruction because the lineup procedure the police utilized with the witnesses violated R.C. 2933.83. He also argues his convictions are not supported by either sufficient evidence or the manifest weight of the evidence.

{¶3} Upon a review of the record, this court finds that the trial court committed no abuse of its discretion and Hill’s convictions are supported by both sufficient evidence and the manifest weight of the evidence. His convictions are therefore affirmed.

{¶4} Hill was indicted in this case with four codefendants, viz., Charles A. Herrod (“Herrod”), Richard L. Davis (“Davis”), Davon M. Walker Hardy (“Walker Hardy”) and Moses R. Fayne (“Fayne”). Hill was charged with one count of aggravated burglary, two counts of felonious assault, and one count of having a weapon while under disability. The first two counts carried one- and three-year firearm specifications, NPCs, and RVOs.

The third count contained a one-year firearm specification, NPCs, and RVOs. The weapons count carried one- and three-year firearm specifications.

{¶5} The charges against Hill stemmed from an incident that began just before midnight on November 4, 2013, in Mayfield Heights, Ohio. In his testimony at Hill's trial, the victim, Montino Bradley ("Bradley"), described the incident as follows.

{¶6} After watching a basketball game, Bradley left his house located at 1330 East Miner Road to drive his cousin home. He returned to find that the lock on his side door was not as he had left it. When he entered his house, he saw that his things had been strewn around.

{¶7} Bradley understood that someone had broken in; he turned and left, proceeding to run across his front lawn to his next door neighbor's driveway, yelling that his house had been invaded. At that point, he noticed that two men were jumping the fence that separated his backyard from his rear neighbor's. Bradley turned back to his house and saw "a guy coming out of [his front] window." Despite the fact that the intruder "pulled a gun out" as he hit the ground, Bradley rushed at him.

{¶8} Bradley wrestled with the man and pushed him to the pavement, seeking to get the gun away. As the man struggled beneath Bradley, the man's "mask came down" and he began to call for help. Bradley later identified the man as Hill's codefendant, Herrod. Bradley heard several gunshots, then heard Herrod scream that he was "on the bottom, Bro." Bradley looked up to see another man, he later identified as Hill, standing

over him with a gun pointed at him. Bradley tried to “cover” himself, but Hill shot him in the back.

{¶9} When Bradley was incapacitated, Herrod extricated himself, then Hill “pistol-whipped” Bradley, kicked him, and went into his pockets. Bradley estimated that he carried approximately \$3,000. Both men then fled toward the street and jumped into a small blue SUV, which drove away. The gunshot left Bradley partially paralyzed.

{¶10} Michael Clark (“Clark”), Bradley’s next door neighbor, testified that he heard a “ruckus” outside his house that night, called 911, and then heard several gunshots.

Clark turned his garage light on. He heard his rear fence breaking as he approached a rear window, and looked outside to see “people running” away. When the police arrived, Clark went outside, identified Bradley, and noticed that “there was stuff * * * scattered all over [his] driveway.”

{¶11} Alisa Bossard (“Bossard”) testified that she lived in a house on Commonwealth Avenue; Commonwealth Avenue was the next parallel street east of Miner Road. She was outdoors in her backyard just after midnight smoking a cigarette and heard a loud sound from the direction of Miner Road that sounded like a gunshot. Bossard went inside to alert her father. By the time her father came outside, additional shots had been fired. Bossard’s father told her to stay there while he went to investigate.

{¶12} Bossard obeyed, but only “a couple minutes” passed before she “saw a guy coming through the backyards on Commonwealth [from Miner Road] and he jumped over [her] fence and he ran into [her].” The encounter caused the man to pause “to catch his

breath.” Bossard thought that “[h]e seemed really scared,” and Bossard wondered “if he was hurt,” so she “asked if he was okay.” After a moment, he told her he was fine. Bossard’s father returned to their backyard in time for both of them to watch the man as he left; he “ran across the fence to an SUV that was parked on” Miner Road. Bossard and her father later identified the man as Herrod.

{¶13} A Mayfield Heights police car driven by officer Peter Greisl (“Greisl”) arrived on East Miner Road just as “a blue SUV [was] coming up the road” toward it. Greisl testified that “dispatch came on the radio and said people were leaving in a blue truck heading south on East Miner that were possibly involved with the shooting.” Geisel attempted to stop the SUV, but it simply “proceeded to head north on West Miner.” Another officer joined the pursuit. By the time both officers came to it, the SUV had been abandoned “right in the middle of the road.” The doors were open, and two men were running from it. Because the men were too far away to capture, both officers stayed with the SUV. Analysis of fresh bloodstains, a “skull cap,” and cell phones that the officers found in the SUV eventually led them to Hill’s codefendants Davis and Walker Hardy.

{¶14} Mayfield Heights police searched the area around the abandoned SUV and Bradley’s home. A Volkswagen Passat was parked in front of 1304 East Miner Road that did not belong to any of the residents. In “plain view,” the officers saw “an ID in the cup holder.” It belonged to Herrod. The car belonged to a woman whom the officers later found out was Herrod’s girlfriend. On West Miner Road, the officers recovered

several personal documents that appeared to have fallen from one of the suspects' pockets. In this way, they obtained the name and address of Hill's codefendant Fayne.

{¶15} Fayne admitted at Hill's trial that he provided a written statement to the police after he was arrested in which he acknowledged taking part in the November 4-5, 2013 incident. In his statement, Fayne explained that Hill had picked him up, "said he had a move to hit that was gone to put some money in our pockets," and needed Fayne to "be a lookout." Fayne stated that Hill took him to 1330 Miner Road in Mayfield Heights, where they met with "the other guys." While they were in the house, the homeowner returned. They "scattered like cockroaches" when the owner came inside. Fayne also stated that the homeowner "grabbed * * * one of [Hill's] dudes that met him there. * * * [Hill] turned around and shot the man and said, I think I killed him." Fayne also admitted he lost his "belongings" that night on West Miner Road.

{¶16} Based upon Fayne's written statement and on Herrod's known associates, Mayfield Heights Det. Lt. Steven Brown ("Brown") testified that he prepared a photo lineup that contained Hill's photo. On November 20, 2013, Brown gave the lineup to Det. Anthony Rotunno ("Rotunno") and then accompanied him to the rehabilitation facility where Bradley was undergoing treatment for his injuries. Rotunno administered the lineup to Bradley.

{¶17} After reviewing the photos, Bradley chose one and stated that he was "70 percent" sure the person was one of his assailants. He handed the folders that contained the photos back to Rotunno. Rotunno looked at Brown and asked whether Bradley

“pick[ed] the guy.” Before Brown could reply, Bradley asked Rotunno if he could view the photos a second time. Brown informed Bradley that he “had to be very sure on his picking out a person,” because his choice “could be putting an innocent person’s life on the line.”

{¶18} Bradley then reviewed the photos again. This time, he chose another person’s photo and stated that he was “one hundred percent sure” that the person in the photo was the one who had shot him. Brown subsequently determined that Bradley had chosen Hill’s photo.

{¶19} After they were indicted in this case, Hill’s codefendants entered into plea agreements with the state. Herrod did so just as the trial was commencing. As part of his bargain to obtain reduced charges, Herrod agreed to testify as a state’s witness against Hill.

{¶20} Hill signed a waiver of his right to a jury trial with respect to the NPCs, RVOs, and weapons disability charge. The jury decided the remaining charges. After considering the evidence, the jury found Hill guilty of aggravated burglary, but not guilty on the attached firearm specifications, guilty of felonious assault in violation of R.C. 2903.11(A)(2) with the firearm specifications, guilty of felonious assault in violation of R.C. 2903.11(A)(1) with the one-year firearm specification, and not guilty on the two counts of aggravated robbery. The trial court found Hill guilty of the NPCs, RVOs, and weapons disability charge. The trial court ultimately imposed a prison sentence on Hill that totaled 17 years.

{¶21} Hill appeals from his convictions with three assignments of error, as follows:

I. The trial court committed error by not giving a jury instruction concerning a photo lineup which was not done as proscribed (sic) by Ohio Revised Code Section 2933.83.

II. The trial court erred in denying appellant's motion for acquittal where the evidence is not sufficient to support conviction.

III. The verdict of the jury finding Kareem Hill guilty is against the manifest weight of the evidence.

{¶22} In his first assignment of error, Hill argues that the Mayfield Heights police department failed to comply with R.C. 2933.83(A)(6)(I) in showing Bradley the photo lineup on November 20, 2013; therefore, the trial court should have provided a jury instruction pursuant to R.C. 2933.83(C)(3). The record reflects, however, that Hill requested such a jury instruction only at the commencement of trial. He did not repeat his request when the trial court discussed the jury instructions at the conclusion of the evidence.

{¶23} Hill's failure to object at the appropriate time deprived the trial judge of the opportunity to reconsider this issue. As a result, he has waived all but plain error. *State v. Harris*, 8th Dist. Cuyahoga No. 99817, 2013-Ohio-5733, ¶ 13; Crim.R. 30(A). Under Crim.R. 52(B), plain error affecting a substantial right may be noticed by an appellate court even though it was not brought to the attention of the trial court. An error rises to the level of plain error only if, but for the error, the outcome of the proceedings would have been different. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912

N.E.2d 1106, ¶ 61; *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978). Notice of plain error “is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice.” *Id.* That test is not met in this case.

{¶24} The following analysis applies to the issue Hill presents in his first assignment of error:

We begin our review with a background discussion on identification testimony in general. The courts have adopted a two-prong test for the admissibility of identification testimony. “An identification derived from unnecessarily suggestive procedures, which have a likelihood of leading to a misidentification, violates a defendant’s right to due process.” *State v. Fields*, 8th Dist. Cuyahoga No. 99750, 2014-Ohio-301, ¶ 10, citing *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). The burden of demonstrating that the procedures utilized were unnecessarily suggestive is upon the defendant. *State v. Quarterman*, 8th Dist. Cuyahoga No. 99317, 2013-Ohio-4037, ¶ 26.

* * *

R.C. 2933.83, effective July 2010, governs the administration of photo lineups and is aimed at preventing the use of unnecessarily suggestive procedures. *Fields* at ¶ 11. R.C. 2933.83 requires any law enforcement agency that conducts live and photo lineups to adopt specific procedures for conducting the lineups. Such procedures must provide, at minimum, the use of a “blind” administrator for the photo array. R.C. 2933.83(B). “‘Blind administrator’ means the administrator does not know the identity of the suspect. ‘Blind administrator’ includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.” R.C. 2933.83(A)(2).

Furthermore, the administrator conducting the lineup must make a written record of the lineup that includes all results obtained during the lineup, the names of all persons at the lineup, the date and time of the lineup, and the sources of the photographs used in the lineup. R.C. 2933.83(B)(4). The administrator is also required to inform the eyewitness

that the suspect may or may not be in the lineup and that the administrator does not know the identity of the suspect. R.C. 2933.83(B)(5).

As to the folder system set forth in the statute, it provides for the suspect's photograph, five filler photographs, and four dummy folders. The blind administrator does not know which photo the witness is viewing. R.C. 2933.83(A)(6). * * *

Finally, * * * evidence of noncompliance is admissible at trial. R.C. 2933.83(C)(2). If such evidence of noncompliance is admitted at trial, the court shall instruct the jury that such noncompliance may be considered in determining the credibility of the witness identification. R.C. 2933.83(C)(3).

State v. Howard, 8th Dist. Cuyahoga No. 100094, 2014-Ohio-2176, ¶ 16-21.

{¶25} The record of this case demonstrates that Hill's premise is flawed; the officers followed the statutory procedures in showing Bradley the photo lineup and did not violate R.C. 2933.83(A)(6)(I). Hill raised this issue prior to trial and requested a voir dire hearing of the witnesses, which the trial court conducted.

{¶26} Brown testified that on November 20, 2013 he prepared the lineup folders in accordance with the procedure set forth in R.C. 2933.83. He placed Hill's photo in one, shuffled the folders, then gave them to Rotunno, who acted as the blind administrator. Brown testified that he did not know which of the folders contained Hill's photo, consequently, Rotunno also remained unaware.

{¶27} Rotunno verified that Brown prepared the folders. Rotunno stated that, as the blind administrator of the lineup, he went through each of the items on his procedural "checklist," he did not look at the photos inside the folders before he handed them to Bradley, and he made his notations on the checklist, all in accordance with the

requirements put forward by the Ohio Attorney General's office. After Bradley made his choice and Rotunno made his notes and gathered the folders, although Brown did not have any way of knowing, Rotunno nevertheless asked him if Bradley chose the suspect's photo. R.C. 2933.83(A)(6)(I) states that the administrator:

shall not say anything to the eyewitness or give any oral or nonverbal cues as to whether or not the eyewitness identified the "suspect photograph" until the administrator documents and records the results of the procedure described in divisions (A)(6)(a) to (g) of this section and the photo lineup has concluded.

{¶28} Both Brown and Rotunno testified that, at that point, they believed the lineup had concluded. Then, before Rotunno received an answer, Bradley asked to see the folders again. Their testimony also proved that neither officer provided Bradley with any clues before he viewed the photos a second time. A second viewing by a victim witness, by itself, does not constitute a violation of the procedures put in place pursuant to R.C. 2933.83. *State v. Reed*, 9th Dist. Wayne No. 12CA0051, 2013-Ohio-3970, ¶ 51. Indeed, Rotunno's question whether Bradley had chosen the "right guy" and the fact that it remained unanswered actually supports the trial court's conclusion that no violation of the statute occurred prior to the second viewing. *State v. Simpson*, 2d Dist. Montgomery No. 25163, 2013-Ohio-1696, ¶ 13.

{¶29} Compliance with R.C. 2933.83 demonstrates that Bradley's choice of Hill's photo did not result from improper procedures and therefore was not unnecessarily suggestive. *Howard*, 8th Dist. Cuyahoga No. 100094, 2014-Ohio-2176, at ¶ 33. As this court observed:

If * * * the pretrial procedures were not unnecessarily suggestive, “any remaining questions as to reliability go to the weight of the identification, not its admissibility, and the identification is admissible.” *Fields* at ¶ 10, citing *State v. Wills*, 120 Ohio App.3d 320, 324, 697 N.E.2d 1072 (8th Dist.1997).

Id. at ¶ 17.

{¶30} In addition, the rule regarding jury instructions is that requested instructions in a criminal case must be given if they are correct and pertinent. *State v. Joy*, 74 Ohio St.3d 178, 181, 657 N.E.2d 503 (1995). The giving of jury instructions is within the sound discretion of the trial court; thus, the trial court’s decision is reviewed only for an abuse of discretion. *State v. Martens*, 90 Ohio App.3d 338, 629 N.E.2d 462 (3d Dist.1993). R.C. 2933.83(C)(3) requires the trial court to instruct the jury that noncompliance may be considered in determining the credibility of the witness identification, but because a review of the record indicates the statute was complied with, no jury instruction to that effect was warranted. *Howard* at ¶ 35. Under these circumstances, the trial court neither committed plain error nor abused its discretion.

{¶31} Hill’s first assignment of error is overruled.

{¶32} Hill presents intermingled arguments in his second and third assignments of error. He argues that the trial court should have granted his motions for acquittal of the aggravated burglary and felonious assault charges against him, contending that the state presented insufficient evidence of his participation in the incident. He claims that the

witnesses who implicated him were unworthy of belief. On this basis, he also asserts that his convictions are not supported by the manifest weight of the evidence.

{¶33} This court's review of the sufficiency of the evidence and of the manifest weight of the evidence are separate and legally distinct determinations. While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶34} When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court's function is to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶35} Hill was charged with aggravated burglary in violation of R.C. 2911.11(A)(1), which prohibits a person, by force, stealth, or deception, from trespassing in an occupied structure, with purpose to commit therein any criminal offense, if the offender inflicts physical harm on another. He was also charged with felonious assault in violation of R.C. 2903.11(A)(2), which prohibits a person from knowingly causing or attempting to cause physical harm to another by means of a deadly weapon or dangerous ordnance. Both of these offenses carried firearm specifications.

{¶36} Herrod testified that he was with Walker Hardy and Davis when Hill asked to use Herrod's girlfriend's car. Herrod stated that, after Hill obtained the car, he left in it with Fayne. Herrod further testified that one of those two called Walker Hardy and told him that the rest of them should come to 1330 Miner Road in Mayfield Heights because they "had something sweet" to do. Herrod testified that, when they arrived in the SUV and parked a few doors down the street, Hill already was inside the victim's house. Herrod asserted that when Bradley showed up, the men in the house tried to escape, but Bradley ran to the person "hopping out the window" and began to struggle with him. Although Herrod refused to admit that he was that person, he nevertheless testified that Hill came out of the house with a gun and shot Bradley.

{¶37} Fayne's unsolicited written statement provided the same main points of Herrod's version of the incident. According to Fayne's statement, which by the time of Hill's trial he claimed was untrue, Hill planned the burglary, he went with Hill, and "the other guys" met them at the victim's house. When the victim came home, all of them scattered. The victim "grabbed * * * one of Kareem's dudes," so "Kareem turned around and shot the man and said, 'I think I killed him.'"

{¶38} When viewed in a light most favorable to the prosecution, any rational trier of fact could determine from this evidence that the state proved Hill committed each element of the crimes of aggravated burglary and felonious assault with a firearm. *State v. Clements*, 5th Dist. Licking No. 2006-CA-0121, 2007-Ohio-2617. Hill's convictions, therefore, were supported by sufficient evidence.

{¶39} Hill's argument that his convictions are against the manifest weight of the evidence is essentially based on an assertion that no physical evidence corroborated Herrod's and Fayne's claims that he was involved. Hill points out that Herrod tried to minimize his own involvement, and that Fayne refused to verify the truth of most of his written statement. Hill further asserts that Bradley's identification of him as the gunman was unreliable.

{¶40} In considering a claim that the judgment was against the manifest weight of the evidence, the test is much broader. *Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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.* The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.* This is because the credibility of the witnesses and the weight of the evidence are matters primarily left to the jury to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶41} In light of the record in its entirety, this court cannot find that the jury clearly lost its way in concluding that Hill committed the offenses of aggravated burglary and felonious assault with a firearm. The jury acted within its prerogative to discount portions of the witnesses' testimony while concluding that they were truthful when they

indicated that Hill trespassed into Bradley's house intending to commit a robbery, and that Hill used a gun to shoot Bradley when Bradley managed to wrestle Herrod onto the ground. *State v. Ribbans*, 10th Dist. Franklin No. 14AP-365, 2014-Ohio-5528; *State v. Cason*, 8th Dist. Cuyahoga No. 86413, 2006-Ohio-1561.

{¶42} Because Hill's convictions for aggravated burglary and felonious assault are supported by sufficient evidence and the manifest weight of the evidence, his second and third assignments of error are overruled.

{¶43} Hill's convictions are 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.

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

ANITA LASTER MAYS, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MARY EILEEN KILBANE, J., CONCUR