[Cite as *State v. Brown*, 2011-Ohio-1040.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 25205
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DEADRIC VERDELL BROWN	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 09 07 2213

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

WHITMORE, Judge.

{¶1} Defendant-Appellant, Deadric V. Brown, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} On the evening of July 19, 2009, Jamie Hundley was dispatched to Roush's Market in Akron in response to a cab request. Hundley's passenger got in the cab and directed him to make a series of turns, which ultimately led him to a dead end street. The passenger then robbed Hundley at gunpoint and fled through the nearby woods. Hundley went to a neighboring house to call 911. When police arrived on the scene, they had a tracking dog who was able to follow the fresh scent of the passenger through the woods. The dog tracked the scent to a home on Taylor Street where Brown's girlfriend lived, and police found Brown inside. Police brought Hundley to the house, where he identified Brown as the passenger who had robbed him moments earlier. Throughout trial, Brown maintained that he was at his girlfriend's Taylor Street house

with his girlfriend, their children, and several other friends at the time the offense took place. Brown had several witnesses testify that he was at the house playing basketball and had not left the house at any point that night.

{¶3} A jury found Brown guilty of aggravated robbery, in violation of R.C. 2911.01(A)(1), a first-degree felony, with a firearm specification under R.C. 2941.145; robbery, in violation of R.C. 2911.02(A)(2), a second-degree felony; and having a weapon under disability, in violation of R.C. 2923.13, a third-degree felony. The trial court noted that the aggravated robbery and robbery counts merged for the purposes of sentencing, and therefore, sentenced Brown on the aggravated robbery count only. The trial court sentenced Brown to a total of nine years in prison. Brown timely appeals, asserting one assignment of error for our review.

II

Assignment of Error

"APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶4} In his sole assignment of error, Brown argues that his convictions are against the manifest weight of the evidence based on the testimony of his four alibi witnesses who consistently stated that he was at his girlfriend's house at the time the offenses occurred. He further asserts that police were unable to recover several of the items critical to his convictions, including the cash taken from the cab driver and the gun used in the offense, despite having conducted a thorough search of the residence where he was found shortly after the robbery. Additionally, Brown points to "[e]vidence *** that there [had been] a series of robberies of cab drivers in the area after [he] was incarcerated" in support of his assertion that he his convictions should be reversed. We disagree.

{¶5} In determining whether a conviction is against the manifest weight of the evidence, an appellate court:

> "[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine 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 conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶6} Under R.C. 2911.01(A)(1), a person commits aggravated robbery if he "attempt[s] or commit[s] a theft offense, *** or in fleeing immediately after the attempt or offense, *** [has] a deadly weapon on or about [his] person or under [his] control and either display[s] the weapon, brandish[es] it, *** or use[s] it[.]" A person who commits the foregoing offense is guilty of aggravated robbery, a felony of the first degree. R.C. 2911.01(C). The firearm specification under R.C. 2941.145 requires the court to impose an additional three year prison term upon any offender who "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." R.C. 2941.145(A). Under R.C. 2923.13(A)(2)/(3), "no person shall knowingly acquire, have, carry, or use any

firearm or dangerous ordnance, if *** [he] *** has been convicted of any felony offense of violence *** [or] [he] *** has been convicted of any offense involving *** trafficking in any drug of abuse[.]" Any person who does so is guilty of having a weapon under a disability, a felony of the third degree. R.C. 2923.13(B).

{¶7} At trial, Hundley testified that at approximately 9:30 p.m. on July 19, 2009, he had responded to a request from "Todd" for cab service at Roush's Market. When he arrived, he did not find anyone waiting. Hundley stayed in the parking lot for a few minutes and about the time he had decided to leave, a man approached his cab, indicating he was "Todd," and got into the cab. The passenger told Hundley that he needed to go to a nearby drive-thru, but that he wanted to stop by a friend's house on the way. He directed Hundley to make a series of turns and had him stop at the last house on the dead-end portion of Scheck Street, facing an empty wooded lot. Hundley stopped the car in front of an unoccupied house and turned toward the passenger, who he later identified as Brown, to find Brown pointing a semi-automatic handgun at Hundley's head. Brown directed Hundley to turn over his keys, money, cell phone, and cab radio and told Hundley to put his head down and count to twenty. Hundley complied, and Brown fled from the cab, heading into the woods at the end of the street. Once Brown left, Hundley approached nearby homes trying to a find phone to use to call 911 and report the robbery. Tapes from the 911 call indicate the call was received at 9:39 p.m., which Hundley stated was less than five minutes after the robbery had occurred. Hundley informed police that his assailant was wearing a hat, dark shirt, dark shorts, dark jacket, and had on light blue latex gloves. When police arrived, Hundley confirmed that no one else had been on the street or in the wooded lot since the robbery had occurred minutes earlier.

{¶8} Officer Kevin Cooper testified that he was less than a mile away from the crime scene when he received the dispatch call. Upon arriving on the scene and speaking to Hundley, Officer Cooper called the K-9 Unit to assist in searching the area, because the scene was "fresh" and uncontaminated by other individuals, creating optimal conditions for canine tracking. Officer Nevin Webb testified that he arrived within five to seven minutes of receiving the call and began tracking with Liberty Joe, a German Shepherd certified by the State of Ohio in human scent detection. Officer Webb described the conditions as "ideal" for tracking a scent because: (1) there was a very short time lapse between the time the incident occurred and the time police began to search the area; (2) no other people had entered the wooded area since the assailant; and (3) the track started in a wooded, grassy area which holds human scent very well. Officer Webb testified that, based on his experience, it was a "good track" because the dog kept his head down and was proceeding quickly in a definite direction, versus pulling his head up and sniffing around to determine where the scent went next. Approximately 35 feet into the wooded lot, police following Officer Webb found Hundley's cell phone, cab radio, and car keys. The dog continued to track the scent to the side door of a house on Taylor Street. Officer Tim Wypasek, who had been following Officer Webb on the track, stated that, as he knocked on the side door, it came open and a small child appeared. He told the child to go get his mother, at which point Edna Chandler, the homeowner, appeared. When Officer Wypasek asked her who was in the house, Edna responded that only she and her two children were there. When questioned again, Edna hesitated, looked over her shoulder, and again stated that just she and her children were home. Seconds later, Brown appeared in the doorway, at which point she added "and my boyfriend." Officer Wypasek recalled Hundley telling him at the scene that his assailant also had a goatee, which Brown did, and he saw that Brown's clothing matched the description that

Hundley had given to police. Consequently, Officer Wypasek asked Edna if some officers could search the house while others spoke to Brown. She complied, and Brown cooperated as police took him outside for further questioning.

{¶9} At the same time, police brought Hundley to the Taylor Street house for purposes of identification. Though Brown was not wearing a coat or hat at the time police found him, Hundley was able to positively identify Brown as the man who had robbed him at gunpoint just minutes before. Brown was taken into police custody at approximately 10:00 p.m. according to the police report. Police searched the Taylor Street home and were unable to find the hat or coat Hundley described on his assailant, nor did they recover a gun or the $140 taken from Hundley. Police did, however, find a box of blue latex gloves in the kitchen of the house.

{¶10} The parties had stipulated to the use of a polygraph examination, which was conducted by certified polygraphist, Sergeant Ken Butler. Sergeant Butler testified that he asked Brown the following questions relevant to the underlying case: (1) do you know for sure who robbed the cab driver?; (2) did you rob the cab driver?; and (3) are you the person who robbed that cab driver on Scheck Street? Sergeant Butler concluded that Brown's "no" response to all three of the foregoing questions indicated that he was being deceptive; that is, Brown's responses were not truthful. Additionally, the parties stipulated to Brown's prior convictions, which include a 1999 felony conviction for trafficking in cocaine and a felony conviction for domestic violence in 2003.

{¶11} Brown had several witnesses testify in his defense. Kimberly Chandler, sister to homeowner, Edna, testified that she had known Brown for over ten years, as he is the father of her sister's two children. According to Kimberly, she, her boyfriend, Shawn Brathwaite, and her daughter went to her sister's house at approximately 3:00 p.m. on the day in question. She and

others at the house spent the day playing basketball in the street outside the house and visiting on the front porch. She indicated that she was the last person to leave the house and did not do so until approximately 10:45 p.m. When she left, Brown had just come in the house to start dinner for Edna and their children, and there were no police at the house. She received a call from her sister at approximately 11:15-11:30 p.m. informing her that Brown had just been arrested. Kimberly was certain Brown was at the house at approximately 9:40 p.m. when the robbery had occurred and believed that the police must have shown up after 10:45 p.m., because she was at the house until that point and the police were not there. Kimberly's boyfriend, Shawn Brathwaite, testified that he had played basketball with Brown throughout the day and left the house at approximately 10:30 p.m. Brathwaite recalled getting a call just before 11:00 p.m., stating that the police were at Edna's house and had Brown in handcuffs. Brathwaite was also certain that Brown had a white shirt on that day.

{¶12} Two other witnesses, Melissa Helsel, a friend of Edna's, and Andrea Sherfield, a neighbor of Edna's, testified in similar fashion, asserting that they recalled seeing Brown at the house at the time police records evidence the robbery occurred. Helsel testified that she left the house just before 10:00 p.m. and that Brown had been on the porch or playing basketball until then. Sherfield stated that when she returned from the grocery store at approximately 9:30 p.m., she saw Brown on the front porch with several others still at the house. Sherfield was certain she didn't return home any earlier or later than 9:30 p.m., despite the fact that she had not written anything down from that day and over five months time had passed since then. All of the foregoing witnesses admitted upon cross-examination that they never called police or the prosecutor's office to inform either party that they were with Brown at the time the robbery occurred.

{¶13} Edna Chandler, Brown's girlfriend and the mother of two of his children, indicated that she and Brown had several friends and family members over throughout the day to visit. According to Edna, she had just moved to the Taylor Street house approximately one week prior to the night in question. She testified that everyone left her house that day at approximately 10:35 p.m. Approximately fifteen minutes later, she and Brown sat down to eat the dinner he had just prepared. At that point, she heard the side door open, so she and Brown both went to the door together, with their two children. Police asked if they could search her home, and she complied. She recalled seeing the time as 11:07 p.m. at some point during the police's half-hour search of her home, which she stated occurred before police took Brown into custody. Edna testified that Brown was "in [her] sight the whole time" that day, other than when she went to the grocery store mid-day.

{¶14} Brown testified on his own behalf, stating that he had never left his girlfriend's house on the day of the robbery. He similarly denied being at Roush's Market or in the wooded lot at the end of Scheck Street. Consistent with the testimony of his alibi witnesses, he stated he was playing basketball at the Taylor Street home throughout the day. Unlike the other witnesses, however, Brown testified that everyone left the house around 9:30 p.m., and he and Edna went inside to eat dinner about five minutes later. Brown stated that police arrived approximately five to seven minutes after that and took him outside. He testified that it was not until he arrived at the police station that he was asked where he had been that night and was informed why he was there. Upon cross examination, Brown admitted that the timeframes established by the police records and 911 calls were accurate, and that his friends had testified incorrectly as to the timing of the night's events. He further admitted that he had talked to another inmate in jail who told

him that he had taken a polygraph examination and passed it, even though the inmate had lied in response to the questions.

{¶15} Based on the foregoing evidence, we do not consider this case to be one in which the evidence weights heavily against Brown's convictions. Instead, we conclude that the jury could have reasonably believed that Brown robbed Hundley at gunpoint on Scheck Street, then fled through the woods to his girlfriend's home on Taylor Street, discarding several stolen items on the way. The evidence demonstrated that a police dog tracked a human scent from the scene of the robbery to the door of the house in which Brown was found, and that when Hundley was brought to the house, he identified, without hesitation, that Brown was the man who had robbed him less than half an hour earlier. Additionally, a polygraph examination indicated that Brown was untruthful when responding to questions denying any involvement in the robbery. Finally, the parties stipulated that Brown had prior felony convictions for domestic violence and trafficking in cocaine.

{¶16} Though Brown presented several witnesses attesting to the fact that he was with them at the time that the offenses occurred, even Brown admitted that their recollection of the timeline of events from that night was inaccurate. Moreover, the jury was in the best position to weigh the credibility of the witnesses for both the prosecution and the defense. See, e.g., *State v. McMullen*, 12th Dist. Nos. CA2005-09-414, CA2005-10-427 & CA2005-10-429, 2006-Ohio-4557, at ¶29-31 (affirming defendant's convictions in a manifest weight challenge where the State's witnesses provided inconsistent testimony and defendant presented several alibi witnesses in his defense); *State v. Pearson*, 2d Dist. No. 21203, 2006-Ohio-5585, at ¶35-41 (affirming defendant's convictions in a manifest weight challenge where a police dog had tracked defendant from the scene to his apartment complex and the victim had identified him as her assailant,

despite the fact that he presented three alibi witnesses who testified he was with them at the time of the offense). As this Court has recently reiterated, "[a] verdict is not against the manifest weight of the evidence because the jury chose to believe the State's witnesses rather than the defense witnesses." *State v. Sykes*, 9th Dist. No. 25263, 2011-Ohio-293, at ¶24, quoting *State v. Andrews*, 9th Dist. No. 25114, 2010-Ohio-6126, at ¶28.

{¶17} To the extent Brown argues that there was "[e]vidence *** presented that there was a series of robberies of cab drivers *** after [he] was incarcerated" he appears to be relying on a statement made to him by his cousin during a phone call he made from jail. The record reveals that the phone call was played for the jury, but a copy of the recording was not introduced into evidence, nor was this topic developed through questioning in the record, so it is unclear to this Court what "evidence" was produced on this topic at trial. Moreover, as the trier of fact, the jury was free to credit or discredit any statements made by the parties throughout the phone call as to this issue.

{¶18} For the foregoing reasons, Brown's arguments that his convictions are against the manifest weight of the evidence lack merit. His sole assignment of error is overruled.

III

{¶19} Brown's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

NICHOLAS SWYRYDENKO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.