

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25188

Appellee

v.

MICHAEL W. MOTON

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 07 11 3915

Appellant

DECISION AND JOURNAL ENTRY

Dated: January 12, 2011

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Someone robbed two restaurants using a sawed-off shotgun. In both cases, anonymous tips led the police to Michael Moton. The police put together a photo array and showed it to the robbery victims. Witnesses from both robberies identified Mr. Moton as the robber. A warrant was issued for his arrest, and, after a stand-off with police, he surrendered. A jury convicted him of two counts of aggravated robbery with firearm specifications and repeat violent offender specifications and two counts of having a weapon under disability. He also pleaded guilty to a charge of escape. The trial court sentenced him to seventeen years in prison. This Court affirms his convictions because they are supported by sufficient evidence, are not against the manifest weight of the evidence, and the absence of a listed mens rea element for aggravated robbery in the indictment does not constitute a structural error.

BACKGROUND

{¶2} One evening, in early September, a man walked into a Kentucky Fried Chicken restaurant. Ashley Williams had just begun her shift. She testified that Francisco McDay, her co-worker, came to the front counter to take the man's order. She said the man pulled out a gun and told Mr. McDay to give him the money in the cash register. Mr. McDay complied with the man's demand and opened the register. The man took the money and left.

{¶3} Mr. McDay testified that his shift had just ended and he was preparing to leave when he saw a man come into the restaurant. He said that the man appeared to be just another customer. While his back was turned, Mr. McDay heard a "click-clacking" sound like a gun being cocked. He turned around to find the man holding a gun, which he recognized as a sawed-off shotgun. Mr. McDay described the gun as "worn . . . [and] old, like it was used." The man asked for the money in the register, and Mr. McDay gave it to him. Ms. Williams testified that the man wore jeans, a T-shirt, hat, and sunglasses. She recognized the robber as someone she had seen in the neighborhood, and who had come in the restaurant, but she did not know his name.

{¶4} Sergeant Ray Youngkin, an Akron Police Department detective, investigated the robbery. He testified that, two weeks after the robbery, he received information that an anonymous person had contacted police and named Michael Moton as the robber. He searched the Summit County Jail records and found a picture of Mr. Moton, which he took to the Crime Scene Unit to have it put into a photo array. He showed Ms. Williams and Mr. McDay the array and asked if they recognized anyone as the robber. Ms. Williams and Sergeant Youngkin both testified that Ms. Williams picked out Mr. Moton's picture. At trial, Ms. Williams again identified Mr. Moton as the robber.

{¶5} Nicholas Glaude worked as the general manager at Fat Billy's Pizza. He testified that, in late September, two men came into the store. The taller man appeared to be in his late teens while the shorter man appeared to be in his mid-twenties. The men asked for change to use the pay phone, which Mr. Glaude gave them, and they then went outside.

{¶6} Mr. Glaude testified that he did not see them use the pay phone, but that the men came back into the store a few minutes later. They looked at the menu for awhile, and Mr. Glaude asked if he could help them. He testified, "It didn't really seem like they wanted to order, just seemed like they were doing it anyway." The shorter man ordered cheesy bread, which Mr. Glaude started to make.

{¶7} After pulling the ingredients from the freezer, Mr. Glaude turned around and saw the shorter man standing on the counter, pointing a shotgun at his face. Mr. Glaude fled, escaping through the store's side door. He ran around the street corner and flagged down a passing van. The driver let Mr. Glaude in the van. While Mr. Glaude called 911, the driver drove around the corner. Mr. Glaude observed the two men, whom he recognized from their clothing and build as the men from his store, running away. He described their run as "almost like a gallop . . . like the one was trying to conceal the shotgun" and like "they're waddling and carrying stuff."

{¶8} He told the driver not to follow them because he did not want to endanger her or her passengers. He watched the men until they ran onto a cross-street, describing their path to the dispatcher. The driver took Mr. Glaude back to the store, where he discovered that the cash register was missing.

{¶9} Mr. Glaude testified that, a few days after the robbery, he received an anonymous call from a person who told him that one of the people who robbed his store was named Mike,

but that the caller was unsure of Mike's last name. Mr. Glaude testified that the caller said the name sounded like "Moen or Moran or Moton." Mr. Glaude called the Akron Police Department and shared the phone caller's information with them.

{¶10} A few days later, Detective Darryl Parnell, who was investigating the robbery, asked Mr. Glaude to look at some photographs to see if he recognized anyone as one of the men who robbed him. After looking through the photographs, Mr. Glaude identified Mr. Moton from his picture as being one of the robbers. At trial, Mr. Glaude identified Mr. Moton as the robber with the shotgun.

{¶11} Sergeant Youngkin and Detective Parnell independently secured warrants for Mr. Moton's arrest based upon the identifications made by Ms. Williams and Mr. Glaude. Mr. Moton's picture was shown to officers who worked in an apartment complex he was known to frequent. One day, Officer Mychal Brown and his partner saw Mr. Moton in the lobby of the apartment building and attempted to detain him while they confirmed the warrants for his arrest were still active. Officer Brown testified that Mr. Moton tried to flee, prompting the officers to attempt to subdue him. Officer Brown's partner attempted to "tase" Mr. Moton, but the taser malfunctioned, allowing Mr. Moton to escape. According to Officer Brown, the police received an anonymous tip a couple days later regarding Mr. Moton's whereabouts. The police surrounded the house where he was hiding and, after a stand-off that lasted over an hour, Mr. Moton surrendered.

MENS REA

{¶12} Mr. Moton's first assignment of error is that the absence of an expressed mens rea element in the indictment for the aggravated robbery counts constitutes a structural error that denied him his right to due process. He has argued that it was structural error because it

permeated his entire trial. As evidence of permeation, he has pointed to the lack of expressed mens rea in the indictment, has argued the State failed to argue a mens rea element regarding the aggravated robbery charges, and has argued that the trial court failed to instruct the jury regarding mens rea in relationship to those counts.

{¶13} This assignment of error is founded on *State v. Colon*, 118 Ohio St. 3d 26, 2008-Ohio-1624. The Ohio Supreme Court, however, recently overruled *Colon* and held that, “when an indictment fails to charge a mens rea element of the crime, but tracks the language of the criminal statute describing the offense, the indictment provides the defendant with adequate notice of the charges against him and is, therefore, not defective.” *State v. Horner*, 126 Ohio St. 3d 466, 2010-Ohio-3830, at ¶45 (citing *State v. Buehner*, 110 Ohio St. 3d 403, 2006-Ohio-4707).

{¶14} Mr. Moton was convicted of violating Section 2911.01(A)(1) of the Ohio Revised Code by committing aggravated robbery. Section 2911.01(A)(1) provides that “[n]o person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall . . . [h]ave a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.” Both of the aggravated robbery counts in his indictment tracked the statutory language. Under *Horner*, the indictment was not defective. The absence of a specified mens rea in Mr. Moton’s indictment for aggravated robbery does not constitute a structural error. Mr. Moton’s first assignment of error is overruled.

INSUFFICIENT EVIDENCE

{¶15} Mr. Moton’s third assignment of error is that his conviction for aggravated robbery under count one of his indictment is not supported by sufficient evidence and is against the manifest weight of the evidence. Sufficiency of the evidence claims are reviewed de novo.

State v. Rucker, 9th Dist. No. 25081, 2010-Ohio-3005, at ¶9 (citing *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997)). Viewing the evidence in the light most favorable to the prosecution, this Court must determine whether the evidence could have convinced the average finder of fact beyond a reasonable doubt of Mr. Moton’s guilt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶16} Mr. Moton was convicted of armed robbery under Section 2911.01(A)(1) of the Ohio Revised Code. Section 2911.01(A)(1) provides that “[n]o person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code . . . shall . . . [h]ave a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.”

{¶17} Mr. Glaude testified that Mr. Moton came into his store and brandished a sawed-off shotgun at him. After escaping, he said he saw Mr. Moton and his accomplice fleeing the scene, apparently carrying something. Upon returning to his store, he found the cash register missing, along with approximately three hundred dollars that had been inside it. Viewing the evidence in the light most favorable to the State, there was sufficient evidence to demonstrate beyond a reasonable doubt that Mr. Moton committed aggravated robbery.

MANIFEST WEIGHT WITH RESPECT TO COUNT ONE

{¶18} The second part of Mr. Moton’s third assignment of error is that his conviction for aggravated robbery is against the manifest weight of the evidence. When a defendant argues that his conviction is against the manifest weight of the evidence, this Court “must 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*, 33 Ohio App. 3d 339, 340 (1986).

{¶19} Mr. Moton has argued that, since Mr. Glaude expressed doubt as to Mr. Moton’s purpose, having testified that he was unsure if it was just a robbery or if someone was there to kill him, “the jury had to speculate to reach the inference that [Mr.] Moton was specifically engaged in theft, rather than any number of other activities.” Mr. Moton also has argued that, because Mr. Glaude could not identify the two men spotted on the street “gallop[ing]” away from Fat Billy’s as the same men who had been in the store, the jury had to make an inference that they were the same two men. Finally, Mr. Moton has argued that the jury had to infer from Mr. Glaude’s testimony that Mr. Moton and his partner took the cash register and that this is an impermissible inference based solely upon another inference.

{¶20} The jury did not have to stack an inference on an inference. Mr. Glaude testified that he fled from two men, one of whom had pointed a shotgun at him. He testified further that he later saw the same two men, whom he recognized from their clothing, running away from the restaurant. It appeared to him that they were carrying something. When he returned to his restaurant, the cash register and the money inside were gone. Nothing in the record brings Mr. Glaude’s credibility into question, and the jury was entitled to believe his testimony. The conclusion that Mr. Moton engaged in theft is reasonable and supported by facts relayed by Mr. Glaude. It is not an inference on an inference, and we cannot say that the jury lost its way in coming to that conclusion. Mr. Moton’s conviction for aggravated robbery is not against the manifest weight of the evidence. Mr. Moton’s third assignment of error is overruled.

MANIFEST WEIGHT WITH RESPECT TO COUNT TWO

{¶21} Mr. Moton's second assignment of error is that his conviction for aggravated robbery stemming from count two of his indictment is against the manifest weight of the evidence. He has argued that Ms. Williams's testimony should be discounted because her credibility is questionable. He has cited her lack of testimony about the robber's hair style and glasses during the robbery as evidence of her lack of credibility. Further, he has argued that her apparent failure to report having seen Mr. Moton on the street following the robbery "seriously places into question the veracity of her account of events." At trial, however, Mr. Moton's counsel highlighted these possible discrepancies during questioning. The jury was aware of them and was able to assess Ms. Williams's credibility accordingly.

{¶22} Ms. Williams and Mr. McDay both testified that an armed man robbed the Kentucky Fried Chicken. Mr. McDay described the gun as being a shotgun and admitted that he was so focused on it that he could not identify the robber. Ms. Williams, who was not the direct target of the robbery, testified that she recognized the robber after the fact as a man she had seen around the neighborhood. While she did not know his name, she knew his face. When Sergeant Youngkin presented the photo array to Ms. Williams, she identified Mr. Moton as the man who had robbed the restaurant. The jury was entitled to believe her testimony, and this Court cannot say that the jury lost its way in finding that Mr. Moton was the robber. His conviction for aggravated robbery is not against the manifest weight of the evidence. Mr. Moton's second assignment of error is overruled.

OPERABILITY OF THE FIREARM

{¶23} In his fourth assignment of error, Mr. Moton has argued that the State failed to demonstrate the operability of the firearm used in the robberies and, as a result, his convictions

for the gun specifications and having a weapon under disability are not supported by sufficient evidence or are against the manifest weight of the evidence.

{¶24} The jury found Mr. Moton guilty of being in violation of Section 2923.13(A)(2)-(3) of the Ohio Revised Code. Under Section 2923.13(A)(2)-(3), “[u]nless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if . . . [t]he person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence, [or] [t]he person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.” Additionally, the jury found that Mr. Moton used a firearm in the commission of two aggravated robberies, fulfilling the requirements of the gun specifications for each offense.

{¶25} Under Section 2923.11(B)(1) of the Ohio Revised Code, a firearm is defined as “any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. ‘Firearm’ includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.” A Court “evaluate[s] the evidence of a firearm’s operability by examining the totality of the circumstances.” *State v. Ware*, 9th Dist. No. 22919, 2006-Ohio-2693, at ¶13 (quoting *State v. McElrath*, 114 Ohio App. 3d 516, 519 (1996)).

{¶26} While the shotgun was not recovered, Mr. Glaude, Ms. Williams, and Mr. McDay all testified that Mr. Moton brandished it during the robberies. This Court has “a long precedent of finding operability sufficiently established, even though a weapon is not recovered, when one brandishes a gun in a threatening manner and the victim testifies to the threat and describes the gun.” *State v. Ware*, 9th Dist. No. 22919, 2006-Ohio-2693, at ¶13 (citing *State v. Williams*, 9th Dist. No. 19559, 2000 WL 1875397 at *3 (Dec. 27, 2000)). Viewing the evidence in the light most favorable to the prosecution, the evidence is sufficient to convince an average fact finder beyond a reasonable doubt that Mr. Moton possessed a weapon while under disability and that he used an operable gun in the commission of the two aggravated robberies.

{¶27} Mr. Moton has argued that Mr. McDay’s testimony that the shotgun appeared “old,” “worn,” and “used,” creates a question of whether the weapon was operable. Mr. McDay, however, testified that Mr. Moton “click-clack[ed]” the shotgun like he was cocking it. Ms. Williams testified that he pointed the gun at Mr. McDay and asked for the money from the register. Mr. Glaude also testified that Mr. Moton pointed the gun at him. While the gun was not recovered, the actions of Mr. Moton related through testimony support the conclusion that the gun was operational. The jury was entitled to find that Mr. Moton’s brandishing of the shotgun was evidence of its operability, regardless of whether it appeared old, worn, or used. This Court cannot say that the jury lost its way in finding that Mr. Moton possessed an operable firearm and that he used it in the commission of the aggravated robberies. His convictions for having a weapon under disability and the gun specifications are not against the manifest weight of the evidence. Mr. Moton’s fourth assignment of error is overruled.

CONCLUSION

{¶28} Mr. Moton's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. Because the language of the indictment tracked the Ohio Revised Code, the absence of a mens rea in the indictment for each count of aggravated robbery does not constitute a structural error. The judgment of the Summit County Common Pleas Court 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.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶29} As I agree there was no defect in the indictment, I would overrule appellant's first assignment of error as well. I would clarify though that the jury was properly instructed on the applicable mens rea of theft. I concur with the remainder of the opinion.

APPEARANCES:

NICHOLAS J. MARINO, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.