

[Cite as *State v. Lowe*, 2004-Ohio-4622.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82997

STATE OF OHIO

Plaintiff-appellee

vs.

ERIC LOWE

Defendant-appellant

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT  
OF DECISION:

SEPTEMBER 2, 2004

CHARACTER OF PROCEEDING:

Criminal appeal from Common  
Pleas Court, Case No. CR-433793

JUDGMENT:

Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

For plaintiff-appellee:

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CUYAHOGA COUNTY PROSECUTOR  
BRIAN P. MOONEY, ESQ.  
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For defendant-appellant:

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KARPINSKI, J.:

{¶1} Defendant appeals his convictions for aggravated robbery, (R.C. 2911.01), grand theft motor vehicle, (R.C. 2913.02), Kidnapping, (R.C. 2905.01), and having a weapon under disability,<sup>1</sup> (R.C. 2923.13). His convictions for robbery and kidnapping each include a three-year firearm specification. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} The facts leading to defendant's convictions are as follows.

{¶3} On January 6, 2003, Xavier Morris returned home at approximately 11:30 p.m. As Morris approached the front door to his apartment building, he was robbed at gunpoint. The man, later identified as defendant, took Morris' jacket and car. While driving Morris' car,

{¶4} defendant was later stopped by police. After attempting to flee the scene, defendant was arrested and identified by Morris as the man who robbed him at gunpoint and stole his car.

{¶5} Following a jury trial, defendant was convicted and sentenced. He now appeals and presents the following assignments of error.

- I. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE "COLD STAND" IDENTIFICATION OF THE APPELLANT BY THE ACCUSER.

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<sup>1</sup>The disability is for defendant's two prior convictions: drug abuse and attempted robbery.

{¶6} Defendant argues the trial court erred in failing to suppress Morris' identification of him as his assailant. Defendant says the police identification procedure, known as a "cold stand," was unreliable and impermissibly suggestive. In a "cold stand" the victim, in a relatively short time after the incident, is shown only one person and asked whether the victim can identify the perpetrator of the crime. *State v. Scott*, (May 11, 2000), Cuyahoga App. No. 76171, 2000 Ohio App. LEXIS 2023, at \*6. This court has previously explained the conditions necessary for a proper "cold stand."

{¶7} A cold stand or one-on-one show-up identification is permissible as long as the trial court considers the following factors:

1. The opportunity of the witness to view the criminal at the time of the crime;
2. The witness' degree of attention;
3. The accuracy of the witness' prior description of the criminal;
4. The level of certainty demonstrated by the witness;
5. The length of time between the crime and the confrontation. (Citations omitted.)

*State v. Thompson*, Cuyahoga App. No. 79938, 2002 Ohio App. LEXIS 2351, at \*6.

{¶8} In the case at bar, Cleveland police officer Douglas responded to Morris' call that he had been robbed. Douglas

recorded Morris' description of the man who robbed him at gunpoint.

Douglas testified Morris described his assailant as a black male, approximately 6'1" and 170 pounds, wearing a black hooded jacket, black pants, and black tennis shoes. Morris estimated the man's age to be 20 years or older.

{¶9} Morris testified that when he was robbed, he was able to see his assailant's face because the area was well lit. He also testified the robbery took about five minutes, during which he saw defendant's face and the black short nosed .38 revolver defendant was pointing at him.

{¶10} After defendant was arrested driving Morris' car, Morris was taken to the location where defendant was being detained and positively identified defendant. Douglas testified that Morris' earlier description of the man who robbed him was consistent with defendant at the scene.

{¶11} Morris stated that when he was taken to the location of defendant's arrest, about an hour had passed since the robbery. Morris acknowledged that when he called 911 he had said the man was wearing black boots, but at the arrest scene defendant was actually wearing black tennis shoes. Morris further stated, however, that when he saw defendant at the cold stand identification, his shoes were what he remembered seeing on the man who robbed him.

{¶12} The basis of Morris' cold stand identification of defendant was reliable: he had sufficient opportunity to view his attacker at the time of the crime; his attention was not diverted;

his description to Douglas of the man who robbed him was, except for the type of shoe, consistent with the appearance of defendant at the cold stand; and, he was certain defendant and his assailant were one and the same person.

{¶13} We conclude from the record before this court that Morris' cold stand identification of defendant satisfies the conditions established in *Thompson* and is, therefore, reliable. Accordingly, the trial court did not err in denying defendant's motion to suppress.

{¶14} Defendant's first assignment of error is overruled.

{¶15} II. THE TRIAL COURT ERRED IN ALLOWING THE JURY TO HEAR EVIDENCE OF AN ALLEGED CRACK STEM TO [SIC] WAS REMOVED FROM THE DEFENDANT'S PERSON BUT WAS NOT THE SUBJECT OF CRIMINAL PROSECUTION.

{¶16} Defendant argues that the crack pipe seized from him the night of his arrest was inadmissible as a prejudicial prior bad act.

{¶17} Generally, "an accused can not be convicted of one crime by proving he committed other crimes or is a bad person." *State v. Thornton*, Cuyahoga App. No. 73232, 1999 Ohio App. LEXIS 1449, at \*14, citing *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180. Consequently, "evidence of other crimes, wrongs or bad acts independent of, and unrelated to, the offenses for which a defendant is on trial is generally inadmissible to show criminal propensity." *Id.* at \*15.

{¶18} There is, however, an exception to the general rule against admissibility of prior bad acts:

{¶19} "While 'other acts' evidence may not be used to prove criminal propensity, such evidence may be admissible "if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove notice, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Lowe* (1994), 69 Ohio St. 3d 527, 530, 634 N.E.2d 616." Id.

{¶20} The admission or exclusion of evidence, including the admission of other acts evidence, lies within the trial court's sound discretion. *State v. Bey* (1999), 85 Ohio St.3d 487, 709 N.E.2d 484.

{¶21} Upon arrest, police seized a crack pipe from defendant's person. Defendant told police that he did not steal Morris' car but was only using it as a "crack rental," meaning he gave Morris crack in exchange for using his car. At trial, a defense witness confirmed defendant's stated reason for using Morris' car. The witness stated that, wanting to buy some crack, he had approached defendant on the evening of January 6, 2003. Defendant told him he did not have any crack because he had traded what he had for the use of Morris' car.

{¶22} On this record, the admission of the crack pipe was error because it does not fit within any of the listed exceptions in Evid.R. 404(B). However, we cannot conclude that admission of the pipe was unfairly prejudicial to defendant. Thus we conclude

that the admission of this evidence did not contribute to defendant's conviction and merely amounted to harmless error. *State v. Charley*, Cuyahoga App. No. 82944, 2004-Ohio-3463. Defendant's second assignment of error is overruled.

{¶23} III. THE DICTATES OF R.C. 2945.05 WERE NOT STRICTLY FOLLOWED; THEREFORE, THE COURT WAS WITHOUT JURISDICTION TO PROCEED TO TRIAL ON COUNT SEVEN WITHOUT A JURY.

{¶24} Defendant claims the trial court did not have jurisdiction to try him without a jury on the weapons under disability charge. According to defendant, because the jury waiver in this case was not filed prior to trial it does not comply with R.C. 2945.05.<sup>2</sup> He also claims the trial court erred because it did not engage him in the colloquy mandated by the statute.

{¶25} R.C. 2945.05 states:

{¶26} "In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I . . . . ., defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by

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<sup>2</sup>See also, Crim.R. 23(A), which provides that "a criminal defendant may knowingly, intelligently and voluntarily waive in writing his or her right to trial by jury."

jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury." Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial."

{¶27} The leading case interpreting this statute is *State v. Pless* (1996), 74 Ohio St.3d 333, 658 N.E.2d 766. In *Pless*, the Ohio Supreme Court stated as follows:

{¶28} "In a criminal case where the defendant elects to waive the right to trial by jury, R.C. 2945.05 mandates that the waiver must be in writing, signed by the defendant, filed in the criminal action and made part of the record thereof. Absent strict compliance with the requirements of R.C. 2945.05, a trial court lacks jurisdiction to try the defendant without a jury." *Id.*, at syllabus, paragraph one.

{¶29} "R.C. 2945.05 requires that the waiver occur before trial and that the waiver is filed, time-stamped and contained in the record; there is no specification that the waiver must be filed and incorporated into the record before trial is held." *State v. Shelton*, Cuyahoga App. No. 83242, 2004-Ohio-1131, at ¶12.

{¶30} In the case sub judice, the record shows and defendant acknowledges that his jury waiver was filed mid-way through the trial, just before the state rested its case and well



before any verdict. The record also shows a substantial discussion between defendant and the court about his jury waiver. In open court, the trial judge engaged defendant in the following conversation:

"THE COURT: Okay. Do you understand, Mr. Lowe, what you're doing here?

THE DEFENDANT: I understand.

THE COURT: I thought you understood this before. If you don't, you just tell me. You don't have to waive any jury, you can have a jury trial on that issue, too. Bring the jury right back in here and we'll let them have a - finish the case, having a weapon under disability.

THE DEFENDANT: No, sir. No, sir.

THE COURT: Okay. So you are waiving the jury and you're having the judge try that, whether you are guilty or not guilty. You face up to a year in jail.

THE DEFENDANT: Yes.

THE COURT: That count.

THE DEFENDANT: Yes.

THE COURT: You understand the jury could find you not guilty of anything and the judge could find you guilty of that and send you to prison and \$2500 fine?

THE DEFENDANT: Yes, sir.

THE COURT: Or the jury could find you guilty on everything and the judge could give you off on everything else and take a hundred dollar fine.

THE DEFENDANT: Yes, sir.

THE COURT: That's what you want to do, is waive the jury?

THE DEFENDANT: Yes, sir. Bench trial."

Tr. 315-317.

{¶31} The record demonstrates not only that defendant's jury waiver was timely filed but also that his responses to the court's questions confirm that his waiver was knowing, voluntary, and intelligent. The trial court fulfilled all the requirements of R.C. 2945.05 and, therefore, had jurisdiction to try defendant without a jury. Defendant's assignment of error is overruled.

{¶32} IV. THE APPELLANT'S CONVICTIONS FOR HAVING A WEAPON UNDER DISABILITY AND THE FIREARM SPECIFICATIONS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE WHERE THE STATE FAILED TO SHOW THAT THE WEAPON ALLEGEDLY USED WAS OPERABLE.

{¶33} Defendant argues that his convictions for having a weapon under disability and the two firearm specifications are not supported by sufficient evidence because the state never proved the gun used to rob Morris was operable.

{¶34} A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 72 L.Ed.2d 652, 102 S.Ct. 2211, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶35} With respect to sufficiency of the evidence, "sufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the

jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. Black's Law Dictionary (6 Ed.1990) 1433. See, also, Crim.R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction). In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387, 1997-Ohio-52, 678 N.E.2d 541.

{¶36} "An appellate court's function in reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. A verdict will not be disturbed on appeal unless reasonable minds could not reach the conclusion reached by the trier of fact." *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492.

{¶37} According to defendant in the case at bar, the state never established that the firearm he possessed was "operable" as that term is defined by statute.

{¶38} R.C. 2923.11 (B) (1) defines a "firearm" as:

{¶39} 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 be readily rendered operable.

{¶40} The statute further states:

{¶41} "(2) When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm."

{¶42} The Ohio Supreme Court has held that "proof of operability can be established beyond a reasonable doubt by testimony of lay witnesses who were in a position to observe the instrument and the circumstances surrounding the crime." *State v. Murphy* (1990), 49 Ohio St.3d 206, 551 N.E.2d 932, syllabus. Moreover, whether a firearm was operable or capable of being readily rendered operable at the time of the offense, is determined within the context of "all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 385, 1997-Ohio-52, 678 N.E.2d 541; *State v. Crawford*, Cuyahoga App. No. 82833, 2004-Ohio-500.

{¶43} Morris testified he was approached from behind by a man with a gun. He felt the gun at his back. The man demanded Morris' jacket and car keys. Morris turned and saw defendant standing a foot away pointing a black snub nosed .38 revolver at him. Defendant took Morris' jacket and car keys and then told him "don't move \*\*\* I'm not playing, don't go in the building until I pull off." Tr. 290.

{¶44} Under the facts and circumstances in this case, defendant's actions and verbal threats imply that his gun was operable when he robbed Morris. Viewing this evidence in a light most favorable to the prosecution, as we must under the test for sufficiency, we conclude that there was sufficient evidence to show the statutory definition of a firearm was met. We therefore overrule this assignment of error.

{¶45} V. APPELLANT'S CONVICTION WAS BASED UPON INSUFFICIENT EVIDENCE.

{¶46} In this assignment of error, defendant contends that Morris' identification of him is unreliable and, therefore, insufficient evidence that he is the perpetrator who robbed and threatened him.

{¶47} We disagree.

{¶48} In Assignment of Error I, we previously rejected defendant's claim that Morris' identification was unreliable. Under the test of "sufficiency," we further conclude that any rational trier of fact could have found that Morris' identification of defendant as his assailant, was proven beyond a reasonable doubt. Accordingly, defendant's fifth assignment of error is without merit.

{¶49} VI. THE APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶50} In this assignment of error defendant again raises the unreliability of Morris' identification of him as his attacker.

He also again challenges the court and jury's determination that the gun he used against Morris was operable.

{¶51} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the 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* (1997), 78 Ohio St.3d 380, 387, citing *Tibbs v. Florida* (1982) 457 U.S. 31, at 42.

{¶52} "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. 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." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; *State v. Issa*, 93 Ohio St.3d 49. Morris initially described his assailant to police as a black male, approximately 6'1", weighing about 170 pounds and wearing black boots. Morris estimated the man to be 20 years or older. Defendant was 37 at the time of his arrest. Police officer Carney testified that defendant is actually three inches shorter and weighs "200 some pounds, 210 maybe." Tr. 215.

{¶53} According to defendant, the height discrepancy of three inches, a weight difference of almost 40 pounds, and the age difference are factors opposing his conviction as Morris' assailant. Defendant also points out that when he was arrested he

was wearing black tennis shoes not black boots as Morris originally told police.

{¶54} We have already determined that Morris' cold stand identification of defendant was reliable. On the basis of that identification, coupled with the other evidence adduced in this case, including evidence of defendant's arrest while he was driving Morris' automobile and his attempt to flee when stopped by police, we conclude that the weight of the evidence is not manifestly against defendant's convictions. Moreover, on the record before this court, the discrepancies defendant describes do not amount to the type of conflicting evidence which requires this court to conclude the jury lost its way in deciding that defendant is the person who robbed Morris.

{¶55} Additionally, because we have already determined that there was sufficient evidence that defendant's gun was operable, we do not address that issue again here. Defendant's fifth assignment of error is overruled.

Judgment accordingly.

It is ordered that appellee recover of appellant its 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. 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.

JAMES J. SWEENEY, J., CONCURS;

ANN DYKE, P.J., CONCURS IN JUDGMENT ONLY.

DIANE KARPINSKI  
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).