[Cite as *State v. Lewis*, 2010-Ohio-1338.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No: 09CA3123
	:	
v.	:	
	:	**DECISION AND**
JOSEPH M. LEWIS,	:	**JUDGMENT ENTRY**
	:	
Defendant-Appellant.	:	File-stamped date: 3-19-10

APPEARANCES:

Pamela C. Childers, Chillicothe, Ohio, for Appellant.

Michael M. Ater, Ross County Prosecutor, and Jeffrey C. Marks, Ross County Assistant Prosecutor, Chillicothe, Ohio, for Appellee.

Kline, J.:

{¶1} Joseph Lewis appeals his felony conviction for robbery. On appeal, he contends that his conviction is against the manifest weight of the evidence. We disagree and find that there is substantial evidence in the record to support Lewis's conviction. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} On the evening of April 11, 2009, Steven Blevins was walking down Second Street in Chillicothe, Ohio. Lewis stood on a porch along with an unidentified white male and an unidentified white female. As Blevins walked down the street, the unidentified male called out and said that Blevins looked like Willie Nelson. Blevins walked to the porch in order to engage the unidentified man in a conversation.

Apparently, Blevins either mentioned that he had recently been discharged from a hospital or that he had been frequently hospitalized in the past.

{¶3} Blevins had recently cashed a check for just over two hundred dollars. He had purchased some prepaid minutes for his cellular phone and had also purchased some cigarettes. Blevins estimated that he had close to two hundred dollars on his person in cash when he walked up to the porch.

{¶4} Blevins received a phone call from his nephew on his cellular phone. After Blevins talked with his nephew for a couple of minutes, Lewis told Blevins to hang up the phone. This made Blevins nervous, and Blevins retrieved a cigarette from his pocket. As Blevins removed his lighter, his money was briefly visible. Lewis walked over to stand next to Blevins and looked in Blevins's pocket at the money.

{¶5} Lewis and the unidentified male then asked Blevins to purchase cocaine from them. Blevins declined, and, as he left, Lewis and the unidentified male followed. The female had previously left, but the record does not establish when she left. Lewis and the unidentified male "corralled" Blevins, forcing him to walk into an alley. And at that point, Lewis struck Blevins in the mouth with his fist. Blevins testified that this blow knocked him down and that he immediately placed his hand in his pocket to protect his money. Then the unidentified male picked up a table leg and threatened to put Blevins back into the hospital if he did not let Lewis have the money. Blevins complied, and Lewis seized the cash as well as a gold cross that Blevins commonly carried. Lewis threw the cross on the ground, said that Blevins could keep it, and left with the unidentified male. As they were leaving, they told Blevins to go ahead and report the

robbery to the police because Lewis and his accomplice would just say that Blevins was there to buy drugs.

{¶6} While Blevins was on the ground after being punched, he had noticed that Lewis was wearing a pair of glossy black tennis shoes. Blevins left the area and went to a friend's house. He eventually returned to the scene of the assault, retrieved his gold cross, and then walked to the police station. Blevins testified that this took approximately forty minutes.

{¶7} After Blevins filled out his report for the police, the police presented Blevins with a photographic lineup. Blevins circled two individuals in the lineup, and he stated that one of the individuals resembled the man who attacked him more strongly than the other. The individual who most strongly resembled Blevins's attacker was Lewis. Blevins identified Lewis as his attacker during the trial, and he also identified the shoes the police took from Lewis as being those worn by his attacker.

{¶8} Blevins testified, under cross examination, that he had memory problems related to his illnesses, but he also stated that he could "remember the events and where I've been and stuff like that. It's the small [things,] * * * like people's names and stuff like that that I have a rough time with[.]" Trial Transcript at 60. And he testified that he was taking a large number of medications for various ailments ranging from anti-depressants to antibiotics. Finally, Blevins also testified that he kept his money in a different pocket than his wallet, and he would only carry cash in his wallet if he had bills of larger denominations or more money.

{¶9} Officer Peter Shaw of the Chillicothe Police Department testified that he was on patrol on April 11, 2009 and testified as to the following events. Based on Blevins's

report, the police dispatcher notified officers that a man had been robbed by a black male who had been in the company of a white female and a white male. The dispatcher also indicated that the black male had been wearing glossy black shoes. Officer Shaw saw Lewis as well as a white male and female shortly after receiving the report. Officer Shaw called out to Lewis and asked him to stop walking. Lewis yelled an obscenity and continued to walk away from the officer.

{¶10} A second officer escorted Lewis back to Officer Shaw, who advised Lewis of his rights under *Miranda*. Lewis had an odor of alcohol on his person, watery eyes, and slurred speech. Officer Shaw tried to question Lewis, but Lewis was recalcitrant and continued to cuss the officer out. At this point, Officer Shaw arrested Lewis and brought him to the Ross County Jail on suspicion of robbery.

{¶11} The trial court held a jury trial on June 30, 2009. The jury convicted Lewis of robbery, a second degree felony, in violation of R.C. 2911.02. The trial court sentenced Lewis to six years in prison.

{¶12} Lewis appeals his robbery conviction and raises the following assignment of error: "THE TRIAL COURT'S VERDICT IS AGAINST THE MANIFEST WEIGHT OF EVIDENCE AND THEREFORE VIOLATES APPELLANT'S RIGHTS AS PROTECTED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION."

II.

{¶13} In his sole assignment of error, Lewis contends that his robbery conviction is against the manifest weight of the evidence.

{¶14} When determining whether a criminal conviction is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph two of the syllabus. See, also, *State v. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶41. We "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the 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 granted." *Smith* at ¶41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-71; *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "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." *Martin* at 175 (citations omitted).

{¶15} "Even in our role as thirteenth juror we are constrained by the rule that the weight to be given evidence and the credibility to be afforded testimony are normally issues to be determined by the trier of fact. * * * The fact finder 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' * * * Thus, we will only interfere if the fact finder clearly lost its way and created a manifest miscarriage of justice." *State v. Davis*, Washington App. No. 09CA28, 2010-Ohio-555, at ¶13 (citations within quote omitted).

{¶16} The jury convicted Lewis of robbery in violation of R.C. 2911.02(A)(2), which provides that "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: * * * (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another." The robbery statute references the definition of theft offense at R.C. 2913.01(K). This provision in turn cross references, among other provisions, R.C. 2913.02. This is the theft statute, and it provides that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) Without the consent of the owner[;] (4) By threat; [or] (5) By intimidation." R.C. 2913.02(A)(1), (4) & (5).

{¶17} Lewis contends that Blevins's account of the robbery is so unbelievable that, by crediting Blevins's testimony, the jury lost its way and thereby created a manifest miscarriage of justice.

{¶18} First, Lewis claims that Blevins actually identified two photographs as possibly being the man who robbed him. However, both Blevins and Officer Christopher McGowan (who administered the photographic line-up) testified that Blevins had identified the fourth picture as the one that most resembled the man who had committed the robbery. This was the picture of Lewis. In addition, Blevins testified at trial that Lewis was his attacker.

{¶19} Second, Lewis asserts that the State introduced no evidence in regard to the unidentified male or female and that Blevins could not even remember what they looked like. Nor was any evidence presented on why Blevins was or was not given the opportunity to identify them from a line-up. These facts may be true, but the fact that

the police may or may not have identified other potential defendants does not directly challenge Blevins's credibility. There is nothing in the record to indicate that Blevins had an opportunity to identify a suspect as the unidentified white male and failed to do so.

{¶20} Third, Lewis maintains that Blevins had persistent and numerous memory problems. Lewis identifies the following as evidence of this: Blevins could not remember which photograph of Lewis's shoes the police showed to him; Blevins could not remember where he had cashed his check the day before the incident allegedly occurred; and Blevins could not remember why he had recently been in the hospital. However, as the State argues, regardless of which photograph the police showed Blevins, Blevins testified at trial that the shoes were the same as the ones worn by his attacker. Furthermore, Blevins's failure to recall precisely where he cashed the check is not a matter of significance in and of itself. The jury may simply have concluded that Blevins's failure to recall where he cashed a check on a particular day eighty days prior to the trial was not surprising and did not significantly call Blevins's memory into question. Finally, Blevins's failure to remember the details of his hospital visit is not directly related to his account of the robbery. And Blevins provided two justifications for his failure to remember specifics. First, he testified that his memory problems were in regard to details rather than events. Second, he testified that he had been to the hospital so frequently that he needed to check his notes in order to know why he had been there at that particular time. These justifications are not so unreasonable as to make his account unbelievable as a matter of law.

{¶21} Lewis also contends that there are reasons to doubt that any robbery took place. He argues that Blevins's testimony that his attacker stole his money but left him his cell phone and gold cross is unbelievable. Lewis notes that the police only found $125.00 on his person rather than the $200.00 that Blevins contends was stolen. And Lewis contends that this discrepancy casts doubt on whether Lewis committed the robbery. Finally, Lewis asserts that Blevins failed to contact the police immediately after the alleged robbery, and this failure casts doubt on Blevins's testimony.

{¶22} However, Blevins's account of the robbery describes an attacker motivated by a chance view of the money. The crime was arguably motivated by impulse, and it is wholly consistent with this theory that the attacker should concentrate on cash rather than possessions. Cash is far more readily exchanged and is far harder to identify as belonging to a particular individual. In addition, as the State argues, the jury may have reasonably concluded that Lewis had spent some of the $200.00 before he was arrested. As to Blevins's failure to immediately contact the police, Blevins testified that he was extremely shaken after the assault, and because of that he was scared and needed time to build up his courage to go to the police. The jury may have reasonably concluded that after being assaulted and robbed Blevins was not thinking as rationally as he might otherwise have been.

{¶23} Therefore, we find substantial evidence in the record supporting Lewis's robbery conviction. This is not one of those exceptional cases where the jury so lost its way that the defendant's conviction is a manifest miscarriage of justice. We find that a reasonable trier of fact could have credited Blevins's testimony, and that testimony, if

believed, establishes the elements of the offense of robbery. Accordingly, we overrule Lewis's sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and Appellant pay the 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 Ross County Court of Common Pleas 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. Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.