[Cite as *State v. D'Souza*, 2014-Ohio-5650.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 13CA3586
vs.	:	
CHRISTOPHER D'SOUZA	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Bryan Scott Hicks, P.O. Box 359, Lebanon, Ohio 45036

COUNSEL FOR APPELLEE: Mark E. Kuhn, Scioto County Prosecuting Attorney, 612 6th Street, Room E, Courthouse Annex, Portsmouth, Ohio 45662

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-15-14

ABELE, P.J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. A jury found Christopher D'Souza, defendant below and appellant herein, guilty of (1) aggravated robbery in violation of R.C. 2911.01(A)(1), and (2) robbery in violation of R.C. 2911.02(A)(2). The trial court merged the two counts and sentenced appellant to ten years for aggravated robbery.

{¶ 2} Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE AS WELL AS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE COURT ERRED IN REFUSING TO CHARGE THE JURY WITH LESSER INCLUDED OFFENSES."

{¶ 3} On July 6, 2013, around 9:44 a.m., a man wearing a gray hooded sweatshirt with the hood pulled up, shorts, dark sunglasses, and distinctive black high-top shoes walked into the WesBanco Bank branch with a plastic bag. The man approached teller Robin Jones' window with his left hand inside his sweatshirt sleeve. Jones immediately suspected that the man intended to rob the bank. The man leaned over the counter, shoved the plastic bag at Jones and stated, "give me your money." During the entire exchange, the man kept his left hand pointed at Jones. Jones complied with the man's request and placed money from her drawer inside the bag.

{¶ 4} During the time that the man was at Jones' window, the other bank employees were on alert and concerned that the man was robbing the bank. WesBanco Vice-President Pam Shaw

watched the entire incident from her office and noticed the frightened look on Jones' face. Shaw watched the man exit the bank, then turn right into the alley next to the bank. Shaw exited the back door and saw the man in an alley beside the "Party Time" bar. She lost sight of him, but shortly thereafter saw a man walking "very slow." This man wore a white shirt and black shorts. Shaw said the man did not wear socks, shoes, or sunglasses. Shaw yelled at the man, but at that same time the man heard police sirens and began to run. Police subsequently apprehended this man (appellant) and brought him to the bank. Jones, Shaw, and two other tellers identified the man as the individual who robbed the bank.

{¶ 5} Just before the bank robbery, Daniel Schmidt observed a man wearing a gray hooded sweatshirt looking in the dumpster behind Party Time. The man approached Schmidt and asked him for a cigarette, then walked toward the bank. Five to ten minutes later, Schmidt saw this same man running from the direction of the bank. The man, carrying a plastic bag, ran to the Party Time dumpster and placed something inside the dumpster. The man then dropped to the ground, pulled off his sweatshirt, shoes, and socks, and placed them in the dumpster. The man started walking, while constantly looking behind him. Schmidt later identified appellant as the man he saw both before and after the bank robbery.

{¶ 6} On July 15, 2013, a Scioto County Grand Jury returned an indictment that charged appellant with (1) aggravated robbery in violation of R.C. 2911.01(A)(1), and (2) robbery in violation of R.C. 2911.02(A)(2). On September 30 and October 1, 2013, the court held a jury trial.

{¶ 7} At trial, all of the bank employees positively identified appellant as the man who robbed the bank. Schmidt also positively identified appellant as the man who he saw near the

Party Time dumpster before and after the robbery. Schmidt explained that appellant had very distinctive eyes. All of the witnesses expressed their identification with certainty.

{¶ 8} Jones also testified that the man who robbed the bank possessed a gun during the robbery. She stated that when the man approached her, he "had his arms up with a gun in his arm in his hoodie sleeve and a bag." Jones demonstrated for the jury how the individual held his hand and stated that she "assumed that there was a gun pointing at me." The prosecutor asked her to explain a picture taken from the surveillance video at the bank. Jones stated: "That's when he approached and had his hand up. You can see where he has the gun in his hoodie." She further described to the jury what they were viewing and stated: "Right there. It's off a little bit. You can see him pointing right there and that's when I start putting money in the bag that he handed me. I guess he did have the gun in his left hand. I was backwards." The prosecutor asked her: "Now the still picture that I put up there in front of you, you mentioned a gun in his hoodie, does that show in that still photo from the surveillance video?" Jones responded affirmatively.

{¶ 9} The prosecutor asked Jones why she believed the suspect had a gun in his hand rather than a finger posed to look like a gun and Jones responded: "I mean I couldn't see, to me it was a gun. When something like that is pointed under a shirt, it's a gun to me." The prosecutor asked whether the man held "it like his finger" or held it "like a gun." Jones stated, "He was holding it like a gun, like you do." The prosecutor then said "Like this?" Jones stated, "Yeah."

{¶ 10} Jones testified that although she was scared during the robbery, she tried to remain calm because she thought that she "may not get to go home today." Jones explained that she was frightened because "[h]e had a gun pointing at me, I couldn't go no where [sic]. I mean I couldn't run. I just had to hope I wasn't going to get shot. I had to comply with what he wanted to get

him out of the building to make sure nobody was hurt."

{¶ 11} Jones testified that when the police returned to the bank with a suspect, she identified him as the robber. She stated that he had the same shorts, but his hoodie was missing, as were his sunglasses, socks, and shoes. Jones explained that when she saw the suspect exit the cruiser, she was "100%" certain he was the individual who had robbed the bank.

{¶ 12} After the state rested, appellant moved for a Crim.R. 29 judgment of acquittal on count one. He asserted that the state failed to present sufficient evidence to show that he possessed a weapon. The trial court overruled appellant's motion. Later, appellant requested the trial court to give the jury an R.C. 2911.02(A)(3) robbery by force instruction. The trial court denied this request.

{¶ 13} At the conclusion of the trial, the jury found appellant guilty of both offenses as charged in the indictment. The court thereupon merged the convictions and sentenced appellant to serve ten years in prison for the aggravated robbery conviction. This appeal followed.

I

{¶ 14} In his first assignment of error, appellant asserts that the evidence is not sufficient to support his aggravated robbery conviction and that his conviction is against the manifest weight of the evidence. Specifically, appellant asserts that the state failed to present sufficient evidence that he possessed a deadly weapon and that the jury's finding that he possessed a deadly weapon is against the manifest weight of the evidence. Appellant also contends that the state failed to present sufficient evidence that he was the culprit and that the jury's finding is against the manifest weight of the evidence.

A

STANDARD OF REVIEW

{¶ 15} Initially, we observe that although appellant combines the sufficiency and manifest weight of the evidence arguments, "sufficiency" and "manifest weight" present two distinct legal concepts. Eastley v. Volkman, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶23 (stating that "sufficiency of the evidence is quantitatively and qualitatively different from the weight of the evidence"); State v. Thompkins, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), syllabus. When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. Thompkins, 78 Ohio St.3d at 386 (stating that "sufficiency is a test of adequacy"); State v. Jenks, 61 Ohio St.3d 259, 274, 574 N.E.2d 492 (1991). The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Jenks, 61 Ohio St.3d at 273. Furthermore, a reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." Thompkins, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶ 16} Thus, when reviewing a sufficiency-of-the-evidence claim, an appellate court must construe the evidence in a light most favorable to the prosecution. State v. Hill, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); State v. Grant, 67 Ohio St.3d 465, 477, 620 N.E.2d 50 (1993). A reviewing court will not overturn a conviction on a sufficiency-of-the-evidence claim unless reasonable minds could not reach the conclusion that the trier of fact did. State v. Tibbetts, 92

Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); State v. Treesh, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶ 17} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." Thompkins, 78 Ohio St.3d at 387. When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses. The reviewing court must bear in mind; however, that credibility generally is an issue for the trier of fact to resolve. State v. Issa, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); State v. Murphy, 4th Dist. No. 07CA2953, 2008–Ohio–1744, ¶31. Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" Thompkins, 78 Ohio St.3d at 387, quoting State v. Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 18} If the prosecution presented substantial evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. State v. Eley, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus. A reviewing court should find a conviction against the manifest weight of the evidence only in the "'exceptional case in which the evidence weighs heavily against the conviction.'" Thompkins, 78 Ohio St.3d at 387,

quoting Martin, 20 Ohio App.3d at 175; State v. Lindsey, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

B

AGGRAVATED ROBBERY

{¶ 19} R.C. 2911.01(A)(1) sets forth the essential elements of aggravated robbery and states:

> No person, in attempting or committing a theft 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[.]

{¶ 20} In the case at bar, appellant disputes whether he was the "person" who attempted or committed a theft offense, and whether, if he was the "person," he had a deadly weapon on or about his person or under his control when he attempted or committed a theft offense.

B

IDENTITY

{¶ 21} Appellant contends that the evidence fails to show that he is the person who committed the crime. He asserts that none of the witnesses saw the culprit's face, and that even though the witnesses identified appellant as the culprit when law enforcement officials brought appellant to the bank, "that would have failed any line-up test in the country. It is fundamental that you do not ask for an identification with only one person in the possibilities." Appellant appears to suggest that the identification procedure was unreliable and, thus, the jury should have

disregarded it.[1]

{¶ 22} "Every criminal prosecution requires proof that the person accused of the crime is the person who committed the crime." State v. Tate, — Ohio St.3d —, 2014-Ohio-3667, — N.E.2d —, ¶15. A one-person "showup" can be used to prove a suspect's identity as long as it does not result in a "'very substantial likelihood of misidentification.'" State v. Madison, 64 Ohio St.2d 322, 331, 415 N.E.2d 272 (1980), quoting Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.E.2d 401. As the court explained in Madison, 64 Ohio St.2d at 332:

> "'There is no prohibition against a viewing of a suspect alone in what is called a "one-man showup" when this occurs near the time of the alleged criminal act; such a course does not tend to bring about misidentification but rather tends under some circumstances to insure accuracy. * * *
>
> * * * [P]olice action in returning the suspect to the vicinity of the crime for immediate identification in circumstances such as these fosters the desirable objectives of fresh, accurate identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trial is fresh. * * * .'"

Id., quoting Bates v. United States, 405 F.2d 1104 (D.C. Cir. 1968); accord State v. Thompson, 4th Dist. Vinton No. 12CA688, 2013-Ohio-2235, ¶15.

{¶ 23} To determine whether a one-person showup resulted in a "very substantial likelihood of misidentification," courts should examine the totality of the circumstances, including: (1) the witness's opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the witness's certainty; and (5) the length of time between the criminal act and the identification. Madison, 64 Ohio St.2d at 331-332, citing Biggers; accord State v. Garvin, 197 Ohio App.3d 453,

[1] We observe that appellant did not file a motion to suppress the identification as violative of his due process rights. See State v. Davis, 76 Ohio St.3d 107, 112, 666 N.E.2d 1099 (1996).

2011-Ohio-6617, 967 N.E.2d 1277, ¶25 (4th Dist.); State v. Dickess, 174 Ohio App.3d 658, 2008-Ohio-39, 884 N.E.2d 92, ¶24.

{¶ 24} After our review in the case at bar, we do not believe that the identification procedure carried a substantial likelihood of misidentification. Here, the bank teller interacted directly with the suspect. When law enforcement officials brought appellant to the bank shortly after the robbery, four bank employees unequivocally identified appellant as the culprit. Additionally, Schmidt, who saw the individual both before and after the robbery and who interacted with him, positively identified appellant as the culprit.

{¶ 25} Furthermore, the state presented DNA evidence obtained from the sweatshirt that the culprit wore. The state's DNA expert testified that the DNA from the sweatshirt is consistent with appellant's DNA.

{¶ 26} Consequently, we disagree with appellant that the identification testimony was unreliable and insufficient to prove his identity as the suspect. The foregoing evidence constitutes substantial competent and credible evidence that appellant was the culprit and, thus, the jury's finding is not against the manifest weight of the evidence.

D

WEAPON

{¶ 27} Within his first assignment of error, appellant also argues that the evidence fails to show that he possessed a deadly weapon when attempting or committing a theft offense. When determining whether a defendant possessed a deadly weapon, the factfinder "is entitled to draw all reasonable inferences from the evidence presented." State v. Vonderberg, 61 Ohio St.2d 285, 401 N.E.2d 437 (1980), syllabus. The state need not prove that the defendant "had actually displayed

the weapon in order to establish that he had possessed one." State v. Knight, 2nd Dist. Greene No. 2003CA14, 2004-Ohio-1941, ¶17. Additionally, the state need not produce the weapon in order to secure an aggravated robbery conviction. Vondenberg, 61 Ohio St.2d at 288-89. Instead, "the factfinder may infer that the defendant possessed a deadly weapon based on his words and conduct." Knight at ¶18. This does not mean, however, that the state must prove that the defendant made a verbal threat indicating the presence of a deadly weapon. Id. at ¶19. Additionally, we observe that a victim need not "be '100 percent' certain that [an] unseen object is a gun." State v. Watkins, 8th Dist. Cuyahoga No. 84288, 2004-Ohio-6908, ¶23.

{¶ 28} In Knight, for example, the court determined that the defendant's words and conduct sufficiently demonstrated that he possessed a deadly weapon. In Knight, a store clerk testified that the defendant "c[a]me up to the counter and he had his hand in his pocket." Id. at ¶21. The clerk stated that "it just seemed like he had a gun in his pocket." Id. at ¶23. The prosecutor asked the clerk to demonstrate for the jury what she observed, and the clerk explained: "[H]e just came up to the counter and he had both hands in his pocket, and the right hand just * * * was out and looked like he had a small gun in his pocket." Id. at ¶25. The prosecutor asked the clerk what made her believe that the defendant had a gun in his pocket, and she stated "[j]ust the shape that it was taking like in his pocket." Id. at ¶27. The clerk additionally testified that the defendant "did not display a gun when he took both hands out of [his] pockets to grab money from the case register, thus causing her to question whether he, in fact, had a gun. However, she further testified that she had opened the cash register drawer for him, because she had believed that he possessed a gun." Id. at ¶28. The defendant asserted that the clerk's testimony did not sufficiently establish that he possessed a deadly weapon. The appellate court disagreed and explained:

> "If [the store clerk] * * * had merely testified that [the defendant] had approached her with his hands in his pockets, we would agree that the state's evidence was insufficient. However, [the store clerk] testified that she believed that [the defendant] possessed a gun and that she gave him access to the cash register on the belief that he was armed with a gun[.]"

Id. at ¶20. The court further noted that the clerk testified that the defendant's "right hand was 'out' compared to his other hand, thus suggesting a concealed gun." The court also observed that the clerk demonstrated to the jury how the defendant held his hands and thus "presume[d] that [the clerk's] demonstration was sufficient to support a reasonable inference that [the defendant] possessed a deadly weapon." Id. at ¶29. Additionally, the clerk stated that she opened the register based on her belief that the defendant possessed a gun. Id. at ¶29.

{¶ 29} In State v. Haskins, 6th Dist. Erie No. E-01-016, 2003-Ohio-70, the court determined that the state presented sufficient evidence to show that the defendant possessed a deadly weapon, even though the witness did not actually see a gun and even though no weapon was recovered. In Haskins, the defendant approached a gas station attendant and stated, "Are you going to give me the money or do I have to pull this pistol out of my pocket?" Id. at ¶3. Even though the attendant did not actually see a gun, she immediately put up her hands. Id. The appellate court determined that these facts constituted sufficient circumstantial evidence that the defendant possessed a gun. Id. at ¶42. The court additionally determined that the defendant's aggravated robbery conviction was not against the manifest weight of the evidence. Id. at ¶42.

{¶ 30} In State v. Colley, 4th Dist. Scioto No. 09CA3323, 2010-Ohio-4834, we determined that the defendant's words and conduct sufficiently demonstrated that he possessed a deadly weapon. In Colley, the defendant walked into a gas station and approached the cashier with his hand stuck in his pocket. He then pulled that same hand out of his pocket, tucked it underneath

his shirt, and stated, "Give me all your money or I'll shoot you." Id. at ¶2. The cashier did not actually see a gun, but still backed away from the cash register, hit the panic button, and ran into the parking lot.

{¶ 31} On appeal, the defendant argued that the state failed to present sufficient evidence that he possessed a deadly weapon. The defendant asserted that the state did not present any evidence that the cashier actually saw a weapon on or about the defendant's person, and it did not present any evidence that a weapon was recovered. We concluded that the jury reasonably could have inferred that the defendant had a gun based on the store cashier's description of the incident. The cashier stated that the defendant "acted like he pulled something out of his pocket and had his hand under his shirt and told me if I didn't give him all the money he was going to shoot me." Id. We also observed that the surveillance video supported the cashier's account of the incident. The surveillance footage showed the defendant at the counter "with his hand tucked into his shirt." When asked to further explain her belief that the defendant had a gun, the cashier stated: "He put his hand in his pocket and pulled it out and stuck it under his shirt and he kind of lunged forward and said 'Give me all your money or I'm going to shoot you.' I just assumed he had a gun." Id. at ¶40.

{¶ 32} We determined that, based upon the defendant's conduct and the cashier's belief that the defendant possessed a gun, the jury reasonably could have inferred that the defendant possessed a gun. For similar reasons, we also rejected the defendant's argument that his aggravated robbery conviction was against the manifest weight of the evidence.

{¶ 33} In State v. Roscoe, 8th Dist. Cuyahoga No. 99113, 2013-Ohio-3617, the court concluded that the state failed to present sufficient evidence to show that the defendant possessed a

deadly weapon. In Roscoe, the victim testified that the defendant "pressed something small, cold and hard against [the victim's] neck * * * [and s]he assumed it to be a gun." Id. at ¶3. The appellate court determined that the victim's statement did not sufficiently establish that the defendant possessed a deadly weapon. The court explained:

> "Although the victim testified that she believed the object was a gun, the state provided no other evidence, as required, that this object was, in fact, a gun. [The defendant] never threatened to shoot the victim and the victim never identified the object pressed against her neck as a gun. The victim's description of the object as small, cold and hard could be used to describe countless objects. It is this court's conclusion that this belief, without more, does not create sufficient circumstantial evidence to support [the defendant's] conviction."

Id. at ¶36.

{¶ 34} In the case at bar, we find the facts more resemble Knight, Haskins, and Colley than Roscoe. Here, the bank teller testified that she believed that appellant held a gun inside his shirt sleeve. She demonstrated to the jury how appellant held his hand and explained why appellant's body language suggested to her that he possessed a gun. When the jury viewed the videotape, the teller showed the jury "where he has the gun in his hoodie." The teller stated that she complied with the robber's demands to ensure no one was hurt and so that she would not "get shot." Thus, even if the teller did not actually see a weapon, appellant's actions led her to believe that he possessed a weapon and led her to fear for her life and the safety of those around her. Consequently, we disagree with appellant that the state failed to present sufficient evidence to show that he possessed a weapon. Moreover, we do not believe that the jury's finding that appellant possessed a weapon is against the manifest weight of the evidence. Given the totality of the circumstances, the jury reasonably could have determined that appellant possessed a gun.

{¶ 35} Additionally, we reject any argument that the state was required to produce the gun

at trial in order to secure an aggravated robbery conviction. "To do so would emasculate R.C. 2911.01, and reward those armed robbers who have the fortune to escape the scene of the crime, and the foresight to destroy or conceal the weapons before they are apprehended." Vondenberg, 61 Ohio St.2d at 289.

{¶ 36} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 37} In his second assignment of error, appellant asserts that the trial court erred by refusing to give the jury a lesser included offense instruction. Appellant asserts that robbery, under R.C. 2911.02(A)(3), is a lesser included offense of aggravated robbery under R.C. 2911.01(A)(1) and robbery under R.C. 2911.02(A)(2). Appellant contends that the evidence that he possessed a weapon "was weak," and, as such, the court should have instructed the jury that it could find him guilty of robbery by force under R.C. 2911.02(A)(3).

{¶ 38} Determining whether a lesser included offense instruction is warranted involves a two-part test. State v. Deanda, 136 Ohio St.3d 18, 2013–Ohio–1722, 989 N.E.2d 986, ¶6. First, a trial court must determine if the requested charge is a lesser included offense of the charged crime. Id.; State v. Kidder, 32 Ohio St.3d 279, 281, 513 N.E.2d 311 (1987).

> "In determining whether an offense is a lesser included offense of another, a court shall consider whether one offense carries a greater penalty than the other, whether some element of the greater offense is not required to prove commission of the lesser offense, and whether the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed."

State v. Evans, 122 Ohio St.3d 381, 381, 2009-Ohio-2974, 911 N.E.2d 889, paragraph two of the syllabus.

{¶ 39} Second, a trial court must consider the particular evidence and determine if "a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser included offense." Shaker Hts. v. Mosely, 113 Ohio St.3d 329, 2007–Ohio–2072, 865 N.E.2d 859, ¶11; accord Deanda at ¶6; State v. Evans, 122 Ohio St.3d 381, 2009–Ohio–2974, 911 N.E.2d 889, ¶13. However, a lesser included offense instruction requires more than "some evidence" that a defendant may have acted in such a way as to satisfy the elements of the lesser offense. State v. Shane, 63 Ohio St.3d 630, 633, 590 N.E.2d 272 (1992).

{¶ 40} In the case at bar, the jury found appellant guilty of aggravated robbery under R.C. 2911.01(A)(1) and robbery under R.C. 2911.02(A)(2). R.C. 2911.01(A)(1) states:

> "No person, in attempting or committing a theft offense * * * shall do any of the following:
> (1) Have 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[.]"

R.C. 2911.02(A)(2) states:

> No 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[.]

{¶ 41} Appellant asserts that R.C. 2911.02(A)(3)–robbery by force–is a lesser included offense of both aggravated robbery and robbery by physical harm. R.C. 2911.02(A)(3) states:

> (A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:
> * * * *
> (3) Use or threaten the immediate use of force against another.

R.C. 2911.01(A)(1) and R.C. 2911.02(A)(2) carry greater penalties than R.C. 2911.02(A)(3). A violation of R.C. 2911.01(A)(1) is a first-degree felony; a violation of R.C. 2911.02(A)(2) is a

second-degree felony; and a violation of R.C. 2911.02(A)(3) is a third-degree felony. Additionally, some element of the greater offenses is not required to prove R.C. 2911.02(A)(3) robbery by force. R.C. 2911.01(A)(1) requires the offender to possess a deadly weapon and either display the weapon, brandish it, indicate that the offender possesses it, or use it. R.C. 2911.02(A)(2) requires the offender to inflict, attempt to inflict, or threaten to inflict physical harm on another. R.C. 2911.02(A)(3) requires the offender to use or threaten the immediate use of force against another. R.C. 2911.01(A)(1) aggravated robbery cannot be committed without R.C. 2911.02(A)(3) also being committed. Both statutes begin with the same prohibition against committing a theft offense. R.C. 2911.01(A)(1) proscribes committing a theft offense with a deadly weapon that the offender displays, brandishes, indicates that the offender possesses it, or uses it. R.C. 2911.02(A)(3) proscribes committing a theft offense by using or threatening the immediate use of force against another. If an offender displays, brandishes, indicates that the offender possesses a deadly weapon, or uses a deadly weapon, then the offender also implicitly uses or threatens the immediate use of force. Thus, R.C. 2911.02(A)(3) robbery by force is a lesser included offense of R.C. 2911.01(A)(1) aggravated robbery. State v. Elsberry, 12th Dist. Butler No. CA2011-12-221, 2013-Ohio-1378, ¶24.

{¶ 42} For similar reasons, we conclude that robbery by force is a lesser included offense of R.C. 2911.02(A)(2) robbery by inflicting or threatening to inflict physical harm.

{¶ 43} However, simply because R.C. 2911.02(A)(3) robbery is a lesser included offense of R.C. 2911.01(A)(1) aggravated robbery and R.C. 2911.02(A)(2) does not require the trial court to give the jury the lesser included offense instruction. Instead, to be entitled to the lesser included offense instruction, the evidence must show that "a jury could reasonably find the defendant not

guilty of the charged offense, but could convict the defendant of the lesser included offense."

{¶ 44} In the case sub judice, we do not believe that a jury could reasonably find appellant not guilty of aggravated robbery or robbery by inflicting or threatening to inflict physical harm, but guilty of robbery by force. All of the bank employees testified that they were frightened. Jones, the teller whose window appellant approached, stated that she feared for her life. At the least, appellant's actions show that appellant threatened to inflict physical harm. Moreover, the evidence supports a finding that appellant possessed a deadly weapon and indicated that he had it when he robbed the bank. Jones stated that appellant's actions and body language caused her to believe that he possessed a gun and made her fear for her life and the safety of others. Because Jones feared for her life and the safety of others, the jury could not reasonably conclude that appellant used or threatened to use mere force when robbing the bank. Instead, the evidence demonstrates, at a minimum, that appellant implicitly threatened to inflict physical harm. See Elsberry at ¶¶28-29 (holding that defendant's admission that he intended to cause store clerk to believe that he possessed a weapon capable of inflicting death showed that he used more than simple force when robbing the store).

{¶ 45} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant 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 Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele
Presiding 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.