[Cite as *State v. Brown*, 2018-Ohio-5431.]

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

STATE OF OHIO,	:	Case No. 18CA3643
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
MATTHEW BROWN,	:	
		RELEASED: 12/28/2018
Defendant-Appellant.	:	

APPEARANCES:

Justin C. Haskamp, Mason, Ohio, for appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

Harsha, J.

{¶1} After a jury convicted Matthew A. Brown of aggravated robbery, the trial court sentenced him to six years in prison and other sanctions. Brown asserts that his conviction was against the manifest weight of the evidence because there was no credible evidence identifying him as one of the robbers, and he presented alibi testimony that he was at home at the time of the robbery.

{¶2} However, the crime victim, Trevor Rayburn, identified the man who pointed a gun at him and robbed him as having orange-brown or reddish facial hair, which matches the color of Brown's beard and mustache. A convicted co-defendant testified that he had planned the robbery with Brown, who stole Rayburn's money and split it with him the next day. Facebook messages between the co-defendant and Brown before and after the robbery were consistent with the co-defendant's testimony. One of Brown's friends testified that the next day after the robbery, Brown admitted to him that he had "robbed a guy" in Chillicothe; shortly thereafter, the friend observed

Brown with his family at Walmart spending a lot of money. The jury was free to credit the state's evidence, and it did not clearly lose its way in doing so. Brown's aggravated-robbery conviction is supported by the manifest weight of the evidence.

{¶3} Next Brown contends that the trial court's instruction on aggravated robbery, which he did not object to, constituted plain error. Brown argues that there was inadequate evidence that the robber used a deadly weapon during the crime. But Rayburn testified that the robber pointed a black gun, which Rayburn believed was real because of the robber's threats to shoot him. Because Rayburn's observation and belief and Brown's multiple threats to use the gun were evidence upon which a jury could reasonably find the use of a deadly weapon, the trial court was justified in giving the instruction. The trial court did not commit error, much less plain error, by instructing the jury on the charged offense of aggravated robbery.

{¶4} Finally, Brown claims that the trial court's six-year prison sentence was excessive in light of the circumstances and mitigating factors. He argues that the trial court did not consider and assign sufficient weight to certain mitigating factors. But the trial court stated that it considered the seriousness and recidivism factors in R.C. 2929.12. In doing so it did not need to balance the factors in the manner that Brown desires. Brown did not establish by the requisite clear and convincing evidence that his six-year prison sentence was either contrary to law or not supported by the record. We reject Brown's claims and affirm his conviction and sentence.

I. FACTS

{¶5} The Ross County Grand Jury returned an indictment charging Matthew Brown with one count of aggravated robbery. Brown entered a plea of not guilty and

filed a notice of alibi stating that he was at his home in Lucasville, Ohio, during the time of the aggravated robbery in Chillicothe.

{¶6} At the jury trial the victim Trevor Rayburn, a high school teacher from the Columbus, Ohio area, testified he has collected comic books for over 40 years. He indicated he met an individual named Jonathan Warren when he bought comic books from him at a flea market off of State Route 23 while traveling from Columbus to Portsmouth. Warren claimed that he had three graded copies of Amazing Fantasy No. 15, a 1962 comic book featuring the first appearance of Spider-Man. Stan Lee, who created Spider-Man and a myriad of other Marvel characters, purportedly signed one of the copies. Rayburn gave Warren $1,000 as part of a negotiated $12,000 purchase price, and Warren sent him photos purporting to be of two of the three comic books he was selling to him.

{¶7} Rayburn testified that he arranged to meet Warren near the Game Stop in Chillicothe after Warren got off work. Rayburn took out $11,000 in $100 bills from his bank and sent a photo of it to Warren. Sometime after 10:30 p.m. on November 12, 2016, Rayburn parked his car next to Warren's pickup truck in the Game Stop parking lot. Warren got out of the truck and into the back seat of Rayburn's car, where he counted the money Rayburn gave him. Warren then walked towards his truck, which he said had the comic books, but he stopped to light a cigarette before grabbing a box.

{¶8} According to Rayburn he noticed a man with a dark hoodie and blue jeans standing nearby. Rayburn told Warren to get back into his car because he didn't like the fact that the man was acting suspiciously. Warren grabbed the box and got in the back seat again, but the other man, who had his hoodie pulled tight around his face so

only his scruffy, orange-brown facial hair was visible, pulled out a gun and told them to give him everything they had or he would shoot them. Rayburn put the car in reverse, but the man hung onto the car and again threatened to shoot Rayburn if he didn't pull over. The man then took the money and the box from Warren and ran away. At that point Rayburn called the police and yelled at Warren, who he believed had set up the robbery. He never saw the books that Warren had offered to sell. Rayburn testified that the gun that the man had pointed at him was "probably black" with a "little red something in the middle," and that he believed the gun to be real.

{¶9} Warren, who had been convicted of complicity to the same robbery, testified that he never had the comic books he represented he was selling, and that he sent Rayburn pictures of comic books he found online. Warren admitted that he and Brown planned to rob Rayburn when he came to Chillicothe to finalize the deal. Warren indicated he knew Brown through Gary White, a mutual friend. Warren testified that on the night of the robbery, he messaged Brown and the robbery proceeded as planned, with Brown stealing the money and running away. They referred to work on a plumbing job in their messages to hide their planned robbery. The next day, Gary White drove Warren to Brown's house in Lucasville, where they split the stolen cash. Although Warren did not initially admit to the police that he and Brown had robbed Rayburn, he eventually did so while being detained on an unrelated arrest warrant.

{¶10} Gary White corroborated certain aspects of Warren's testimony, including that he drove Warren to Brown's house to get money the day after the robbery. White also testified over objection that Warren admitted to arranging the robbery of a prospective comic book purchaser, that Brown put a gun to the man's head, demanded

everything they had, and stole the $11,000 purchase money for the non-existent comic books.

{¶11} James Michael Keaton, Brown's longtime friend, testified that he and another friend had gone to Brown's house on the night of the robbery at around midnight, but Brown's girlfriend told them he wasn't home. When they returned to Gary White's house, Brown came over around 12:45 a.m. Later that morning Brown confided in Keaton that he had been in Chillicothe the evening before and that he had "robbed a guy." Brown told Keaton that a game shop employee had set up a comic-books-for-cash deal and that he had robbed them and took the money. Keaton, who worked at Walmart, later saw Brown and his family spending money on two shopping carts full of items.

{¶12} Brown also made a $450 cash payment on his home loan a few days after the robbery.

{¶13} Detective Twila Goble obtained a search warrant for Warren's Facebook records, which confirmed messages between Warren and Brown leading up to the robbery and thereafter. Before the robbery Warren asked Brown whether they were still working, and Brown replied affirmatively. Then at 11:03 p.m. just prior to the robbery, Warren sent a thumbs-up image to Brown. The next morning after the robbery, Warren kept trying to contact Brown, until they agreed to meet later that evening to talk about the "plumbing issue." Although Brown initially told Det. Goble that he was at Gary White's house around the time of the robbery at midnight, Goble later determined that Brown wasn't at that house until around 1:00 a.m., which would have given him enough time to commit the robbery in Chillicothe and then drive home to Lucasville. Det. Goble

also testified that Rayburn had described the robber as having reddish facial hair, which matched Brown's red beard and mustache.

{¶14} Brown and his wife testified that he was at home during the time of the robbery. His wife (then girlfriend) stated she told Keaton that Brown wasn't there that night because she did not see his van; they claimed Brown had parked it behind the barn to look for plumbing parts he needed for the job for Warren. Brown denied committing the robbery, claimed his Facebook messages with Warren were for a plumbing job he was going to do for him, and contended that he usually paid his bills with cash.

{¶15} The jury returned a verdict finding Brown guilty as charged of aggravated robbery. The trial court sentenced him to a six-year prison sentence and a mandatory period of post-release control, and ordered him to pay restitution to Rayburn.

II. ASSIGNMENTS OF ERROR

{¶16} Brown assigns the following errors for our review:

1. APPELLANT'S CONVICTION FOR AGGRAVATED ROBBERY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF ARTICLE IV, SECTION 3 OF THE OHIO CONSTITUTION.

2. THE TRIAL COURT'S INSTRUCTION FOR AGGRAVATED ROBBERY WAS PLAIN ERROR.

3. THE TRIAL COURT'S SENTENCING WAS EXCESSIVE IN LIGHT OF THE CIRCUMSTANCES AND MITIGATING FACTORS.

III. LAW AND ANALYSIS

A. Manifest Weight of the Evidence

1. Standard of Review

{¶17} In his first assignment of error Brown asserts that his aggravated-robbery conviction was against the manifest weight of the evidence. To determine whether a criminal conviction is against the manifest weight of the evidence, we 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 a manifest miscarriage of justice. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 119. If the state presented substantial credible evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the state established the essential elements of the offense, the judgment of conviction is supported by the manifest weight of the evidence. *State v. Adams*, 2016-Ohio-7772, 84 N.E.3d 155, ¶ 22 (4th Dist.) citing *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus (superseded by state constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997)).

{¶18} Generally, it is the role of the jury to determine the weight and credibility of evidence. *See State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, at ¶ 132. " 'A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it.' " *State v. Reyes-Rosales*, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 17, quoting *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. We defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses'

demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Id.*; *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 18.

2. Analysis

{¶19} The jury convicted Brown of aggravated robbery in violation of R.C. 2911.01(A)(1), which 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[.]"

{¶20} Brown claims that the evidence identifying him as the robber is against the manifest weight of the evidence. He argues that Rayburn could not accurately identify the robber who pointed a gun at him and stole his money; Warren was a liar, who along with White had a motive to implicate Brown in the robbery to facilitate Warren's purchase of a pickup truck from White; and he and his wife both testified that he was at home during the robbery.

{¶21} However, the state presented the victim, Trevor Rayburn, who identified the robber as having orange brown or reddish facial hair, which matches the color of Brown's beard and mustache. Jonathan Warren, a co-defendant convicted of the same aggravated robbery, testified that he had planned the robbery with Brown, who stole Rayburn's money, and they split the money the next day. Facebook messages between Warren and Brown before and after the robbery were consistent with Warren's testimony. Warren later told Gary White and the police that he and Brown had robbed a

person and that Brown had put a gun to the person's head.[1] And James Michael Keaton, Brown's friend, testified that early the next day after the robbery, Brown admitted to him that he had "robbed a guy in Chillicothe"; shortly thereafter, Keaton observed Brown with his family at Walmart spending a lot of money. Brown also made a large cash payment on his loan a few days after the robbery. Detective Twila Goble testified that Brown had initially told her that he was at White's house at midnight on the night of the robbery, but she later determined that this was not true.

{¶22} As the trier of fact, the jury was free to credit the state's evidence; it did not clearly lose its way in concluding Brown was the robber. Brown's aggravated-robbery conviction is supported by the manifest weight of the evidence. We overrule his first assignment of error.

B. Jury Instruction

1. Standard of Review

{¶23} In his second assignment of error Brown contends that the trial court committed plain error by instructing the jury on the charged offense of aggravated robbery. Our review of whether a jury instruction is warranted is de novo. *State v. Depew*, 4th Dist. Ross No. 00CA2562, 2002-Ohio-6158, ¶ 24 ("While a trial court has some discretion in the actual wording of an instruction, the issue of whether an instruction is required presents a question of law for de novo review").

[1] Brown's trial counsel objected on the basis of hearsay when White testified about Warren's statements to him, but the trial court permitted them as non-hearsay statements of a co-conspirator under Evid.R. 801(D)(2)(e). We question the applicability of this provision because the robbery had already ended at the time the statements were made and the statements were not made in furtherance of the crime. Thus, we do not consider White's testimony in our weight of the evidence analysis. Nevertheless, Brown does not claim error on appeal and its admission would appear to be harmless beyond a reasonable doubt because of the overwhelming evidence against him.

{¶24} "A criminal defendant has the right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *State v. Howard*, 4th Dist. Ross No. 07CA2948, 2007-Ohio-6331, ¶ 26. "[A] trial court should give a proposed jury instruction if it is a correct statement of the law and is applicable to the facts of the particular case." *Id.* citing *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (1991). In determining whether to give a requested jury instruction, a trial court considers the adequacy of the evidence to support the requested instruction. *State v. Schwendeman*, 2018-Ohio-240, 104 N.E.3d 44, ¶ 18 (4th Dist.). When the instruction is requested by the state concerning an offense-as opposed to an instruction on an affirmative defense or a lesser included offense requested by the defendant-the evidence required is that which could reasonably be found by the trier of fact to prove the defendant guilty. *See, e.g. State v. Ruble*, 2017-Ohio-7259, 96 N.E.3d 792, ¶ 72, citing *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 244 (jury instruction on complicity is proper as long as the evidence adduced at trial could reasonably be found to have proven the defendant guilty as an aider and abettor.) A trial court need not give an instruction if the evidence does not warrant it. *State v. Hamilton*, 4th Dist. Scioto No. 09CA3330, 2011-Ohio-2783, ¶ 70.

2. Analysis

{¶25} Brown concedes on appeal that he did not object to the trial court's instruction on the offense of aggravated robbery, so he forfeited all but plain error on appeal. *See State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 152; *State v. Fouts*, 4th Dist. Washington No. 15CA25, 2016-Ohio-1104, ¶ 58 ("Failure

to object constitutes forfeiture of any challenges on appeal except for plain error"). A party claiming plain error has the burden of demonstrating that (1) an error occurred, (2) the error was obvious, and (3) the error affected the outcome of the trial. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 378.

{¶26} Brown claims plain error exists because there was inadequate evidence to prove the robber had a deadly weapon when he committed the robbery. But Rayburn testified the robber pointed a black gun at him during the theft of the money, and that he believed that the gun was real. The robber twice threatened to shoot Rayburn, which supports a finding that the gun was real and operable. *See State v. D'Souza*, 4th Dist. Scioto No. 13CA3586, 2014-Ohio-5650, ¶ 27-36 (state need not produce the weapon or prove that the defendant actually displayed it to prove that he possessed a deadly weapon; factfinder may infer defendant possessed a deadly weapon by the defendant's words and conduct, e.g., threats to shoot or kill). This provided adequate evidence of Brown's use of deadly weapon, i.e., a gun, during the robbery for an instruction on the charged offense of aggravated robbery. We overrule Brown's second assignment of error, as there is no error, plain or otherwise.

C. Excessive Sentence

1. Standard of Review

{¶27} In his third assignment of error Brown claims that the trial court's six-year sentence for his aggravated-robbery conviction was excessive. When reviewing felony sentences appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, 22-23. Under R.C. 2953.08(G)(2), "[t]he appellate court's standard for review

is not whether the sentencing court abused its discretion." Instead, R.C. 2953.08(G)(2) provides that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either:

> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶28} Although R.C. 2953.08(G)(2)(a) does not mention R.C. 2929.11 and 2929.12, the Supreme Court of Ohio has determined that the same standard of review applies to those statutes. *Marcum* at ¶ 23 (although "some sentences do not require the findings that R.C. 2953.08(G)[2][a] specifically addresses[,] * * * it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court"); *State v. Butcher*, 4th Dist. Athens No. 15CA33, 2017-Ohio-1544, ¶ 84. Consequently, an appellate court may only vacate or modify a sentence if it is clearly and convincingly contrary to law, or if the appellate court finds by clear and convincing evidence that the record does not support the sentence. *See Marcum* at ¶ 23; *Butcher* at ¶ 84.

{¶29} The defendant bears the burden of establishing by clear and convincing evidence that the sentence is either contrary to law or not supported by the record. *See, e.g., State v. Fisher*, 4th Dist. Jackson No. 17CA5, 2018-Ohio-2718, ¶ 20, citing *State v. O'Neill*, 3d Dist. Allen No. 1-09-27, 2009-Ohio-6156, fn. 1. Clear and convincing evidence is more than a mere "preponderance of the evidence," but allows less certainty than is required "beyond a reasonable doubt. It requires only "a firm belief

or conviction as to the facts sought to be established. ” *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 18.

2. Analysis

{¶30} Brown claims that his six-year prison term is excessive. This six-year term is not contrary to law because his sentence was within the statutory range, the trial court stated that it considered the factors in R.C. 2929.11 and 2929.12, and it was not obligated to make specific findings concerning these factors. *See State v. Douglas*, 4th Dist. Athens Nos. 17C6 and 17CA8, 2018-Ohio-732, ¶ 42, citing *State v. Mullins*, 4th Dist. Scioto No. 15CA3716, 2016-Ohio-5486, ¶ 26-27; R.C. 2929.14(A)(1) (“For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years”).

{¶31} Nor has Brown established by the requisite clear and convincing evidence that his six-year prison sentence was not supported by the record. At the sentencing hearing Rayburn stated that Brown robbed him a gunpoint, told him twice he was going to kill him, took $11,000 in cash from him, and left him in a parking lot, terrified and questioning whether he could continue to tell his high school students that there are still good people in the world. The state requested a seven-year prison term because although Brown had no prior felony convictions, he had used a gun during the crime.

{¶32} Brown’s counsel requested a minimum sentence, but noted that Brown still maintained his innocence. And Brown’s church pastor asked that he serve the least amount of prison time so that he could come back to his community and get on with his life. Finally, Brown’s wife stated that he was sorely missed at home by her and their four children. Brown chose not to make a statement.

{¶33} The trial court imposed a six-year prison sentence after making this review of its analysis:

> The Court has considered the recommendation of the State and defense counsel. I've heard the victim impact statement from Mr. Rayburn in this case, I've heard the statements made on behalf of the defendant, Mr. Brown, in mitigation. I've considered the purposes and principles of felony sentencing found in 2929.11, the seriousness and recidivism factors found in 2929.12, the guidance factors found in 2929.13. I have taken into consideration that Mr. Brown has no prior record. I've also taken into consideration, even though he's not made a statement today, and he doesn't have to. The pre-sentence investigation, which indicates Mr. Brown refuses to accept his responsibility and culpability for the offense.
>
> I heard the evidence. I feel that the State proved its case beyond a reasonable doubt, twelve people that sat here, with no grudge against Mr. Brown, found the same thing.
>
> I've also considered that a gun was used in this offense. Mr. Rayburn has testified at trial and very clearly today indicated in his victim impact statement that there was a gun and if my recollection is correct, it was like the Wild West out in that parking lot for a time. Mr. Rayburn tried to get away, the defendant was hanging onto the car with a gun pointed at him.
> * * *
>
> I've listened to Mr. Rayburn. It takes a special type of person to be a teacher. It takes a special type of person to deal with children, impressionable adolescents on a day to day basis and tell them that there are good people in the world. Now, Mr. Rayburn's going to have difficulty doing that because you chose to slam a gun in his face.
>
> I[] find that this defendant is not amenable to any combination of community control sanctions and that a prison sentence is appropriate. I'm going to impose a six year term of imprisonment in the, with the Ohio Department of Corrections.

{¶34} Brown essentially claims that the trial court failed to accord sufficient weight to or ignored the following mitigating circumstances: (1) in committing the offense, he acted under strong provocation, i.e., Warren took advantage of his dire financial situation to coerce him into committing the robbery, R.C. 2929.12(C)(2); (2) there were substantial grounds to mitigate his conduct, i.e., he was worried about his

family being able to keep their home and take care of their children without additional money, R.C. 2929.12(C)(4); and (3) he had not been convicted of or pleaded guilty to a criminal offense before the aggravated robbery in this case, R.C. 2929.14(E)(2).

{¶35} There is nothing in the record to support Brown's claim that the trial court ignored these factors. The court expressly stated that it considered the seriousness and recidivism factors in R.C. 2929.12 and explicitly noted that Brown did not have a prior criminal record. And at the sentencing hearing Brown did not claim that he acted under strong provocation or that there were substantial grounds to mitigate his conduct; instead, he claimed he was innocent of the crime.

{¶36} At best Brown challenges the weight the trial court accorded the pertinent factors and its conclusion to impose a six-year prison sentence instead of a three, four, or five-year sentence. We have consistently rejected similar contentions. Simply because the court did not balance the factors in the manner appellant desires does not mean that the court failed to consider them, or that clear and convincing evidence shows that the court's findings are not supported by the record. *State v. Yost*, 4th Dist. Meigs No. 17CA10, 2018-Ohio-2719, ¶ 20, *State v. Graham*, 4th Dist. Adams No. 17CA1046, 2018-Ohio-1277, ¶ 26, *State v. Butcher*, 4th Dist. Athens No. 15CA33, 2017-Ohio-1544, ¶ 87.

{¶37} Likewise, the trial court did not have to credit the "strong provocation" mitigating factor of R.C. 2929.12(C)(2) because Brown never claimed that either the victim, Rayburn, or his accomplice, Warren, caused or contributed to his dire financial straits and his inability to make ends meet. *State v. Nichter*, 2016-Ohio-7258, 63

N.E.3d 1219, ¶ 35-41 (10th Dist.). Manifestly, Brown had a choice whether to help Warren rob Rayburn. Financial problems do not justify criminal behavior.

{¶38} Consequently, the trial court properly exercised its discretion in deciding to impose a prison sentence closer to the minimum three-year prison term than the maximum eleven-year prison term. Because Brown did not meet his burden to prove by clear and convincing evidence that his six-year prison term was either contrary to law or not supported by the record, we overrule his third assignment of error.

IV. CONCLUSION

{¶39} Brown's aggravated-robbery conviction is supported by the manifest weight of the evidence, the trial court correctly instructed the jury on the charge, and his six-year prison term is not excessive. Having overruled Brown's assignments of error, we affirm his conviction and sentence.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

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.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, 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.