[Cite as *State v. Kapsouris*, 2004-Ohio-5119.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 02 CA 230
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
MICHAEL KAPSOURIS,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 02CR359A.
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Paul Gains Prosecuting Attorney Attorney Jason Katz Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney John Juhasz 7330 Market Street Youngstown, Ohio 44512

JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Gene Donofrio

Dated: September 23, 2004

VUKOVICH, J.

{¶1} Defendant-appellant Michael Kapsouris appeals from his conviction in the Mahoning County Common Pleas Court of aggravated robbery, a violation of R.C. 2911.01, and felonious assault, a violation of R.C. 2903.11. These crimes were committed with co-defendant Jacob DiCarlo. DiCarlo and Kapsouris were tried together despite having both moved for relief from joinder. Kapsouris raises four issues to be decided by this court. The first issue is whether the trial court erred in overruling the motion for relief from prejudicial joinder. Next, this court must determine whether admission of "other acts" evidence against DiCarlo violated Kapsouris' right to due process. The third issue is whether the convictions are against the manifest weight of the evidence. Lastly, this court must determine whether the trial court erred when it imposed more than the minimum sentence. For the reasons stated below, the judgment of the trial court is affirmed.

STATEMENT OF FACTS

{¶2} On July 30, 2001, around 3:00 p.m., Debra Mitchell arrived at Key Bank in Austintown, Ohio to deposit approximately $6,000. (Tr. 330). After she pulled into the parking lot, she noticed a Pontiac Grand Am pulling into the parking space to her left. (Tr. 331). There were two men in this car, a driver and a passenger. When she exited her van, the passenger in the Grand Am exited the vehicle and grabbed the bag she had in her hand that contained the $6,000. (Tr. 338, 399). Mitchell and the passenger struggled for a minute. (Tr. 340). During the struggle, Mitchell saw a little knife in his hand. (Tr. 339, 340). The passenger overpowered her and threw the money in the back seat of the car and got into the car. (Tr. 342, 343). Mitchell reached through the open passenger window in pursuit of the passenger and the money. (Tr. 343). The driver then placed the car in reverse; Mitchell was still halfway in the passenger's window at this time, but was able to exit the car before it moved too far. (Tr. 344). The assailants then fled the scene. (Tr. 344).

{¶3} Mitchell retreated to her van to follow the assailants. While in pursuit, she called 911 on her cell phone. Mitchell felt something wet at her side and noticed it was blood. She reported to the 911 operator that she thought she had been stabbed

in the altercation. Mitchell was later taken to the hospital, where she gave a statement and physical description of the assailants to the police. She described the passenger as being a Caucasian male approximately six foot tall with a pierced eyebrow, light blue eyes and a shaved head. (Tr. 361). She described the driver as a little heavier with a shaved head. (Tr. 361).

{¶4} Based upon the area where Mitchell stated the assailants fled to and based upon the physical description, the Austintown police believed that DiCarlo and Kapsouris were involved in the crime. Eventually, both DiCarlo and Kapsouris were arrested and indicted. Prior to trial, both moved for relief from prejudicial joinder; the trial court denied the motion. At trial, Mitchell positively identified Kapsouris as the passenger of the Grand Am and DiCarlo as the driver of the Grand Am. Also at trial, testimony from two informants implicated both DiCarlo and Kapsouris in the crime. The jury found them both guilty of the felonious assault and aggravated robbery. Kapsouris was sentenced to a total of 13 years. He timely appeals from his conviction raising four assignments of error.

ASSIGNMENT OF ERROR NUMBER ONE

{¶5} "THE TRIAL COURT DENIED APPELLANT CONFRONTATION AND CROSS EXAMINATION LIBERTIES SECURED BY U.S. CONST., AMEND. VI AND XIV AND BY OHIO CONST., ART. I §16 WHEN IT FAILED TO GRANT RELIEF FROM PREJUDICIAL JOINDER."

{¶6} Prior to trial, both DiCarlo and Kapsouris moved to sever the trials. The trial court denied their motions. Kapsouris renewed the motion at the close of the state's case; the trial court once again denied this motion. (Tr. 616). Thus, Kapsouris preserved the issue for review. *State v. Owens* (1975), 51 Ohio App.2d 132, 146 (stating motion for relief from prejudicial joinder must be timely raised and renewed).

{¶7} The decision of whether to grant a motion for separate trials is a matter resting within the trial court's sound discretion, and a reviewing court will not disturb that decision on appeal absent a showing that the trial court abused its discretion. *State v. Torres* (1981), 66 Ohio St.2d 340. An abuse of discretion connotes more than just an error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶8} Crim.R. 14 mandates when severing trials is necessary; it states in pertinent part:

{¶9} "If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment * * * or by such joinder for trial together of indictments * * * the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires."

{¶10} Kapsouris claims the trial court erred when it failed to grant him relief from the joinder. His argument is based upon the United States Supreme Court case of *Bruton v. United States* (1968), 391 U.S. 123.

{¶11} "In *Bruton*, the Supreme Court held that in a joint trial of two defendants, a confession of one co-defendant who did not testify could not be admitted into evidence even with a limiting instruction that the confession could only be used against the confessing defendant. The rationale of *Bruton* was that the instruction of a potentially unreliable confession of one defendant which implicates another defendant without being subject to cross-examination deprives the latter defendant of his right to confrontation guaranteed by the Sixth Amendment." *State v. Moritz* (1980), 63 Ohio St.2d 150, 153, quoting *United States v. Fleming* (C.A.7, 1979), 594 F.2d 598, 602.

{¶12} Kapsouris argues that statements made by DiCarlo, who did not testify at trial, to Daniel Farah and Jason Yuschak implicating both Kapsouris and DiCarlo in the robbery and assault could not be introduced at trial without violating *Bruton*. Yuschak, who was convicted of federal charges, acted as an informant in this case. He agreed to cooperate to get a lighter sentence. (Tr. 584). In the presence of an agent from the Bureau of Alcohol, Tobacco and Firearms (ATF), Yuschak telephoned DiCarlo. The conversation was taped and played at trial. (Tr. 585, 587). During this conversation, DiCarlo implicated himself in the robbery and acknowledged that he received proceeds from the robbery. DiCarlo mentions Kapsouris' name twice in this taped conversation. The first time occurs when Yuschak asked how DiCarlo knew to rob the women at the bank. DiCarlo stated that "Mike" knew about it. The second time DiCarlo mentions Kapsouris occurs when DiCarlo is talking about how he spent the money from the robbery on a crack binge. He stated, "Mike Kapsouris he doesn't even smoke crack." (Yuschak-DiCarlo taped telephone conversation.)

{¶13} As aforementioned, the *Bruton* rationale was based on the introduction of a potentially unreliable confession of one defendant which *implicates the other defendant*. The state contends that neither of DiCarlo's statements to Yuschak that referenced Kapsouris implicated Kapsouris in the crimes. Thus, according to the state, no *Bruton* violation occurred.

{¶14} The state's argument is unpersuasive. In *Moritz,* the Ohio Supreme Court stated:

{¶15} "'[T]he *Bruton* rule applies with equal force to all statements that tend significantly to incriminate a co-defendant, whether or not he is actually named in the statement. The fact that the incrimination amounts to a link in a chain of circumstances rather than a direct accusation cannot dispose of the applicability of the *Bruton* rule. Just as one can be convicted on circumstantial evidence, one can be circumstantially accused.' *Fox v. State* (Ind. App. 1979), 384 N.E.2d 1159, 1170." *Moritz*, 63 Ohio St.2d at 155.

{¶16} We acknowledge that the first statement does not specifically identify "Mike Kapsouris" and that the second statement does not expressly implicate Kapsouris in the crime. However, despite this, when listening to the conversation as a whole, it becomes obvious that DiCarlo is talking about robbing the victim with another person. He is talking about how "they" did not get caught. During this conversation he mentions Mike Kapsouris; he does not mention any other name. This implicitly leads to the conclusion that Kapsouris was involved in the robbery. Thus, given the *Moritz* reasoning, the DiCarlo-Yuschak statement does create a *Bruton* problem.

{¶17} The other statement at issue is the Daniel Farah statement. Farah testified that he was in a holding cell with DiCarlo and he asked DiCarlo what happened. (Tr. 448). Farah testified that DiCarlo stated that he did not do anything and that Kapsouris got him into trouble. (Tr. 448). Farah explained that DiCarlo is a drug user and he owed some money for a $2,500 coke bill. (Tr. 448). DiCarlo told Farah that Kapsouris gave him the money to pay the coke bill and that is how DiCarlo got involved in the "whole mess." (Tr. 448).

{¶18} This statement, as the above statements to Yuschak, does not explicitly implicate Kapsouris in the crime. Rather, it states that Kapsouris got DiCarlo into trouble. The state once again claims this statement is broad and vague and, as such,

it cannot be concluded that DiCarlo was implicating Kapsouris in the criminal activity in question. While it is a broad statement, when the conversation as a whole is considered, it circumstantially implicates Kapsouris in the robbery and assault at the Key Bank in Austintown. Thus, we disagree with the state's conclusion and find that this statement also creates a *Bruton* problem when considering the totality of the evidence. See *Moritz*, 63 Ohio St.2d at 155.

{¶19} This determination, however, does not necessarily mean that reversal is required. In *Moritz,* the Ohio Supreme Court stated, "A violation of an accused's right to confrontation and cross-examination is not prejudicial where there is sufficient independent evidence of an accused's guilt to render improperly admitted statements harmless beyond a reasonable doubt." 63 Ohio St.2d 150, paragraph two of the syllabus. See, also, *Chapman v. California* (1867), 386 U.S. 18; *Schneble v. Florida* (1972), 405 U.S. 427. Furthermore, when a contested statement is not incriminating to a defendant on its face, but is only so when linked with other evidence at trial, a trial court's limiting instruction is enough to restrain the jury from considering the statement for a purpose that would violate the defendant's right to confrontation. *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, at ¶43, citing *State v. Laird* (1989), 65 Ohio App.3d 113, 115-117, citing *Richardson v. Marsh* (1987), 481 U.S. 200. Thus, if sufficient independent evidence was admitted at trial to prove Kapsouris' guilt and a proper limiting instruction was given, then it would render the improperly admitted statements harmless beyond a reasonable doubt.

{¶20} The state contends that independent evidence of guilt came from two separate sources. The first was Kapsouris' admission to Farah. The second was Mitchell's identification of Kapsouris as the passenger of the Grand Am.

{¶21} Farah testified that Kapsouris told him that he and DiCarlo robbed a fat or pregnant women at the bank and received approximately $6,000. (Tr. 444). Farah also stated that Kapsouris told him that he stabbed the victim. (Tr. 446).

{¶22} During trial it was disclosed that Farah is an incarcerated individual with a very lengthy criminal record. (Tr. 451). He entered into an agreement to testify at this trial in exchange for the Mahoning County Prosecutor to appear at his judicial release hearing in Trumbull County. (Tr. 452). According to Farah, the judicial release was already going to be granted regardless of whether the Mahoning County

Prosecutor attended the hearing. (Tr. 452). Additionally, Farah's testimony as to what Kapsouris told him about the Key Bank robbery was not in the written statement he gave to the police. (Tr. 460-464, 488-493). Rather, the written statement addresses statements DiCarlo made to Farah about the incident at Key Bank. (Tr. 460-464). The written statement only references one statement Kapsouris made to Farah, which was that Kapsouris committed a robbery on Bexley the same day the robbery occurred at Key Bank. (Tr. 489). However, Farah testified that the reason he did not include information about Kapsouris in his written statement was because he ran out of time and the detectives were unable to return to talk to him before he was transported to Lorain Correctional Institution. (Tr. 497).

{¶23} These facts may call into the question the reliability of Farah's testimony. Based upon the above facts, repeated attempts were made to show inconsistencies in Farah's testimony. However, Farah's testimony remained unchanged during 75 pages of testimony. Thus, if believed, Farah's testimony established independent evidence of guilt.

{¶24} Regardless, even if Farah's testimony cannot be considered reliable, Mitchell's identification provides sufficient independent evidence of guilt. Shortly after the robbery, Mitchell gave a physical description of the passenger of the car as being over six feet tall, bald, blue eyes, a pierced eyebrow and having no chest hair. (Tr. 375, 381). She also stated that he may have had a tattoo or marking, but she was not sure. (Tr. 381). At trial, she positively identified Kapsouris as the driver of the car. (Tr. 353).

{¶25} Kapsouris claims her identification is weak. At trial he used her previous description to try to show that he was not the passenger in the car. (Tr. 375, 381-386). Kapsouris showed that at the time of the trial he was not bald, he had a mustache, he had a tattoo on his back that was six inches in length, and his eyes were brown. (Tr. 385-386). However, Mitchell pointed out that those characteristics are alterable, i.e. he could have shaved and wore colored contacts. (Tr. 387).

{¶26} Despite the discrepancies, Mitchell's identification was not weak. After the incident, Mitchell was shown a photographic lineup, which allegedly contained Kapsouris' picture. (Tr. 354, 525). Mitchell was unable to positively identify any person from this lineup. (Tr. 354, 525). Later it was discovered that Kapsouris was

not pictured in the photographic lineup. (Tr. 525). A mistake had occurred and a Nicholas Michael Kapsouris was pictured in the lineup instead of Michael Nicholas Kapsouris (appellant). (Tr. 525). Therefore, when Mitchell had the opportunity to falsely identify the assailant, she did not.

{¶27} Furthermore, Mitchell did not waiver on the fact that DiCarlo was the driver and Kapsouris was the passenger of the Grand AM. A news story was broadcasted after the arrest of DiCarlo. In that broadcast it was represented that DiCarlo was suspected of being the passenger and the assailant that stabbed Mitchell. Mitchell stated that this information was incorrect and called the detective the next day and informed the detective that DiCarlo was the driver of the Grand Am, not the passenger and he was not the individual who stabbed her. (Tr. 347).

{¶28} Thus, Mitchell's identifications were strong and consistent even when given the opportunity to wrongly identify the assailants. Her testimony was sufficient independent evidence of guilt to render the *Bruton* problem harmless beyond a reasonable doubt, if a proper limiting instruction were given.

{¶29} Kapsouris incorrectly states that the trial court gave no limiting instruction. During jury instructions the trial court stated the following:

{¶30} "Multiple defendants. You must decide separately the question of guilt or innocence of each of the two defendants. If you cannot agree upon a verdict as to both of the defendants but you do agree as to one, you must render a verdict as to the one upon whose guilt or innocence you do agree.

{¶31} "You must separately consider the evidence applicable to each defendant as though he were being separately tried and you must state your findings as to each defendant uninfluenced by your verdict as to the other defendant." (Tr. 719).

{¶32} Though the instruction is nonspecific, it is a limiting instruction. Kapsouris had the opportunity to object to the instruction if he did not think it was adequate, however, no objection was made. Thus, all but plain error is waived. While an instruction specifically detailing that DiCarlo's statement to Yuschak and Farah could not be considered when determining Kapsouris' guilt would have been more informative, the instruction as it was read does not amount to plain error.

{¶33} For all the above stated reasons, this assignment of error lacks merit. However, we take this opportunity to caution trial courts that in this type of situation it may be advisable to grant separate trials to avoid these confrontation problems. *Moritz*, 63 Ohio St.2d 156-157.

ASSIGNMENT OF ERROR NUMBER TWO

{¶34} "ADMISSION OF 'OTHER ACTS' EVIDENCE CONCERNING A CO-DEFENDANT IMPERMISSIBLY UNDERMINES THE PRESUMPTION OF INNOCENCE AND DENIES DUE PROCESS, U.S. CONST., AMEND. XIV, AND LIBERTIES SECURED BY OHIO CONST., ART I, §§1, 2, AND 16."

{¶35} Kapsouris argues that "other acts" evidence about DiCarlo that was introduced at trial denied him (Kapsouris) a fair trial. This "other acts" evidence suggested that DiCarlo was involved with drugs, that he had firearms, and that he assaulted state's witness Daniel Farah.

{¶36} The state counters by claiming Kapsouris does not have standing to raise this issue. Alternatively, the state argues that even if Kapsouris has the right to raise the issue, he waived them by failing to object at trial.

{¶37} Evid.R. 404 prohibits the circumstantial use of "other acts" evidence if its purpose is to show that an accused has the propensity to commit the crime with which he stands charged. See *State v. Thompson* (1981), 66 Ohio St.2d 496, 497; *State v. Curry* (1975), 43 Ohio St.2d 66, 68. The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id.

{¶38} The "other acts" evidence admitted in this matter were DiCarlo's statements to Yuschak and Farah about his drug problem, Yuschak's statement that originally the ATF agent had him call DiCarlo about buying guns, and Farah's testimony that prior to trial, while in jail, DiCarlo assaulted him. (Tr. 456, 589).

{¶39} Concerning the drugs, DiCarlo told Farah that he had a drug problem and that was how he got involved in the "whole mess." In the DiCarlo-Yuschak taped

conversation, DiCarlo stated he was on a crack binge all summer. During this conversation, however, DiCarlo stated, "Mike Kapsouris doesn't even smoke crack." This evidence shows no bad acts of Kapsouris; it just shows that Kapsouris knows DiCarlo.

{¶40} Yuschak's testimony as to calling DiCarlo to buy guns reveals even less about Kapsouris than the drug testimony. There is nothing in the testimony to insinuate that Kapsouris carries a gun, buys illegal guns, or sells guns illegally. Therefore, this evidence shows no bad acts of Kapsouris.

{¶41} Lastly, the Farah testimony as to DiCarlo's assault on him, does not implicate Kapsouris in the altercation. Farah testified that DiCarlo assaulted him; he never stated that Kapsouris had anything to do with the altercation. (Tr. 457-458). Thus, this testimony also does not show evidence of bad acts of Kapsouris.

{¶42} Given all of the above, we agree with the state; Kapsouris does not have standing to raise any issue he has with the "other acts" evidence. The rule prevents "other acts" evidence from being admitted against the accused when the "other acts" evidence is being admitted to prove that the accused acted in conformity therewith. However, implicit in this rule is that the "other acts" evidence must be the "other acts" of the accused, not the accused's co-defendant. Since, the "other acts" evidence directly relates to DiCarlo and not to Kapsouris, Kapsouris has no standing to find fault with their admission.

{¶43} In looking closely at Kapsouris' argument, it appears he is really arguing "guilt by association"/prejudicial joinder (which is addressed under assignment of error number one). Kapsouris is suggesting that this "other acts" evidence exemplifies the prejudicial joinder; DiCarlo's bad acts reflect upon Kapsouris since Kapsouris is friends with DiCarlo, and thus it makes him (Kapsouris) guilty by association. As explained under the first assignment of error, we find no merit with Kapsouris' claim that he was prejudiced by the joinder. The arguments made under this assignment of error do not change the analysis under the first assignment of error. As such, these arguments are without merit and this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

{¶44} "CONVICTIONS AND A PRISON SENTENCE VIOLATE U.S. CONST. AMEND VIII AND XIV AND OHIO CONST. ART. I, §§1, 2, 9, AND 16 WHEN THE CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶45} Kapsouris argues that his convictions for aggravated robbery and felonious assault were against the manifest weight of the evidence. The basis of this argument is that the evidence against him came from "Mitchell's weak identification" and a "fortuitous" snitch (Farah).

{¶46} Analysis under the manifest weight of the evidence standard requires an appellate court to review the entire record, reweigh the evidence and all reasonable inferences, consider the credibility of witnesses, and resolve conflicts in the evidence. Such an undertaking essentially places the Court of Appeals in the position of the thirteenth juror. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42.

{¶47} An appellate court will only reverse and remand a conviction as contrary to the manifest weight of the evidence in order to prevent a miscarriage of justice. The authority to do so is reserved for the rare and exceptional case where the evidence weighs heavily against the conviction and convinces us that the jury clearly lost its way. *Thompkins*, 78 Ohio St.3d at 387. An appellate court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the essential elements of the offense have been proven beyond a reasonable doubt. *State v. Baker* (1993), 92 Ohio App.3d 516, 538; citing *State v. Jenks* (1991), 61 Ohio St.3d 259.

{¶48} In order to be convicted of aggravated robbery, a violation of R.C. 2911.02(A)(3), the evidence must prove the following elements: (1) that Kapsouris committed a theft offense, as defined by R.C. 2913.01 (depriving an owner of their property without consent, by deception, or by threat), and (2) used a deadly weapon during the commission of the theft offense.

{¶49} At trial, Mitchell identified Kapsouris as the passenger of the Grand Am who stole $6,000 from her and stabbed her. This testimony establishes the elements of R.C. 2911.02(A)(3).

{¶50} Kapsouris argues that there are clear discrepancies in the physical description she gave to the police shortly after the robbery and his physical attributes

at the time of trial. Mitchell described the passenger as bald and having no hair on his chest. At the time of trial, Kapsouris had hair on his head and chest. She said the passenger had a pierced eyebrow. At the time of trial, Kapsouris had no pierced eyebrow. She also stated that the passenger or driver may have had a tattoo or marking on them. At the time of trial, Kapsouris had a compact disc sized tattoo on his back.

{¶51} While Mitchell's physical description does not precisely match up with the physical attributes of Kapsouris, these physical attributes are changeable. A person can shave their head and chest. An eyebrow piercing can be removed. A tattoo can be applied, covered-up or altered. A person's eye color can be changed with colored contacts.

{¶52} Thus, despite Kapsouris' contention, Mitchell's identification was not "seriously impeached." As stated above, some of her physical descriptions are changeable attributes. Furthermore, as explained under the first assignment of error, when Mitchell had the opportunity to falsely identify the passenger of the car in the photographic lineup that allegedly contained Kapsouris, she did not. (Tr. 354, 525). Thus, her identification of Kapsouris was not weak.

{¶53} In addition to Mitchell's testimony, Farah testified that Kapsouris admitted to him that he (Kapsouris) robbed and stabbed a fat or pregnant woman.[1] This testimony also established the elements of aggravated robbery.

{¶54} Kapsouris argues that Farah is a "fortuitous snitch" and is not a credible witness. Kapsouris claims, "Without the snitch 'admissions,' the government lacked enough evidence for an indictment, let alone a conviction." He then states that Farah was impeached.

{¶55} As explained in the first assignment of error, Farah is an informant and a convicted felon. Furthermore, his written statement did not state that Kapsouris was in any way involved in the robbery and assault at Key Bank, rather it just implicated DiCarlo in these crimes. These facts may call into question the credibility of his testimony.

{¶56} Yet, when on the stand, Farah was not impeached even though repeated attempts were made by both DiCarlo's and Kapsouris' attorneys to do so. Farah's

testimony remained consistent through approximately 75 pages of testimony. (Tr. 438-514). He explained why his written statement did not implicate Kapsouris in the crimes. (Tr. 497). He stated he was not able to complete the statement during the three hour time period that the detectives were at the jail. (Tr. 497). It was his understanding that the detectives were going to come back so he could finish the statement, but he was transported to Lorain Correctional Institution before they could get back to him. (Tr. 497-498). Furthermore, Farah testified on direct-examine that Kapsouris told him that he (Kapsouris) stabbed the victim. On cross-examination the following colloquy occurred between Farah and Kapsouris' counsel:

{¶57} "Q. And did Michael Kapsouris tell you there was a knife involved?

{¶58} "A. No.

{¶59} "Q. Why did you tell the prosecutor - -

{¶60} "A. Not a knife. He said - - he didn't tell me what kind of tool he used. He could have used a fork for all I know. But he just said they had to do her, there was a stabbing, a wrestle, and then he went on. I didn't get the details, Mr. Lavelle, okay." (Tr. 481).

{¶61} This is one example of his testimony remaining consistent through cross-examination despite having the opportunity to change.

{¶62} Determinations of witness credibility is primarily for the jury. *State v. DeHass* (1967), 10 Ohio St.2d 230, at paragraph one of the syllabus. A reviewing court does not have the advantage of viewing the witnesses' demeanor and hearing witnesses' voice inflections during the testimony. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77. A cold record cannot divulge subtle body language that may indicate to a jury whether the witness is or is not credible.

{¶63} Thus, when considering the role of the jury, we do not find that the evidence weighs heavily against the conviction or that the jury clearly lost its way. The conviction for aggravated robbery is not against the manifest weight of the evidence. This argument lacks merit.

{¶64} In order to be convicted of felonious assault, a violation of R.C. 2903.11(A)(2), the evidence must prove the following elements: (1) Kapsouris

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[1]Mitchell, during the sentencing hearing, stated she is fat.

knowingly caused physical harm to another, and (2) used a deadly weapon to cause the physical harm.

{¶65} Mitchell's and Farah's testimony establishing the elements of aggravated robbery also establish the elements of felonious assault. Kapsouris' admission to Farah established that Kapsouris acted knowingly in causing physical harm to Mitchell by stabbing her with a knife. Likewise, Mitchell's testimony and identification that Kapsouris stabbed her also established the same elements. Consequently, based on the reasons stated above, the felonious assault conviction is also not against the manifest weight of the evidence. This argument lacks merit. For the above stated reasons, this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER FOUR

{¶66} "THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING MORE THAN THE MINIMUM SENTENCE WITHOUT MAKING FACTUAL FINDINGS TO SUPPORT THE SENTENCE. U.S. CONST., AMEND. VIII AND XIV; OHIO CONST., ART I, §§1, 2, 9, AND 16."

{¶67} Kapsouris was sentenced to three years for the felonious assault, a second-degree felony, and ten years for the aggravated robbery, a first-degree felony. The trial court ordered the sentences to be served consecutively. The ten-year sentence for the aggravated robbery is the maximum sentence allowable by law. R.C. 2929.14(A)(1). The three year sentence for the felonious assault is neither the maximum nor the minimum sentence for a second-degree felony. R.C. 2929.14(A)(2).

{¶68} Kapsouris argues that the trial court erred in sentencing him. His argument does not attack the maximum sentence, rather it attacks the imposition of more than the minimum sentence. Kapsouris acknowledges that the trial court made the requisite findings for imposition of more than the minimum sentence, however, he finds fault with the trial court's failure to provide reasons on the record to support the requisite findings. Thus, he contends that the sentence imposed constitutes cruel and unusual punishment.

{¶69} "As a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment. * * * [Further,] it is generally accepted that punishments which are prohibited by the Eighth Amendment [to the United States Constitution] are limited to torture or other barbarous punishments,

degrading punishments unknown at common law, and punishments which are so disproportionate to the offense as to shock the moral sense of the community. * * * Where the offense is slight, more may be prohibited than savage atrocities. However, the penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community." *State v. Thomas*, 1st Dist. No. C-010724, 2002-Ohio-7333, at ¶32, quoting *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69-70.

{¶70} Hence, if the sentence falls within the statutory framework and is not so greatly disproportionate to the offense as to shock the sense of justice, it does not amount to cruel and unusual punishment. In this case, Kapsouris was convicted of two separate crimes, i.e. aggravated robbery and felonious assault. In determining whether his sentence complied with the felony sentencing statute we must examine the sentence for each conviction separately.

{¶71} As stated above, the felonious assault sentence was for three years; this is neither the minimum nor the maximum sentence allowable by law. R.C. 2929.14 (A)(2). A defendant is entitled to the shortest prison term authorized for the offense unless one of the two factors applies: (1) the offender was serving a prison term at the time of the offense, or the offender previously had served a prison term; or (2) the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others. R.C. 2929.14(B)(1) and (2).

{¶72} It is debatable as to whether the first factor is applicable. At the sentencing hearing, the state indicated that Kapsouris has a record, which included a felony receiving stolen property in which he received seven months. (Tr. 13). Kapsouris indicated that this information was incorrect. (Tr. 13). Kapsouris waived a PSI, therefore, this information is not in the record. (Tr. 12).

{¶73} Regardless of the above, the second factor was met. The trial court, at the sentencing hearing, practically recited the statute verbatim; it found that the shortest prison term would demean the seriousness of the offender's conduct and would not adequately protect the public. (Tr. 14). Therefore, the finding was made to support a nonminimum sentence.

{¶74} Kapsouris does not find fault with the finding, rather he contends that the trial court must state reasons supporting this finding. This contention is not supported

by law. In *State v. Viers*, we stated, "only findings are required; reasons are not required according to the plain language of R.C. 2929.14(B)." 7th Dist. No. 01JE19, 2003-Ohio-3483, at ¶10. *Viers* was decided before *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165. However, the *Comer* analysis and reasoning does not change our analysis in *Viers*. In *Comer*, the Supreme Court held that findings and reasons supporting those findings for the imposition of the maximum sentence and consecutive sentences must be made on the record at the sentencing hearing. Id. The thrust of the *Comer* decision was to inform trial and appellate courts that the findings and reasons supporting those findings must be made at the sentencing hearing and not just in the sentencing journal entry. Id.

{¶75} In stating that the findings and reasons supporting those findings must be made at the sentencing hearing, the Supreme Court references R.C. 2929.19(B)(2). Id. This statutory section states:

{¶76} "(2) The court shall impose a sentence and shall make a finding that gives its *reasons* for selecting the sentence imposed in any of the following circumstances:

{¶77} "(a) Unless the offense is a sexually violent offense for which the court is required to impose sentence pursuant to division (G) of section 2929.14 of the Revised Code, if it imposes a prison term for a felony of the fourth or fifth degree or for a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing, its *reasons* for imposing the prison term, based upon the overriding purposes and principles of felony sentencing set forth in section 2929.11 of the Revised Code, and any factors listed in divisions (B)(1)(a) to (i) of section 2929.13 of the Revised Code that it found to apply relative to the offender.

{¶78} "(b) If it does not impose a prison term for a felony of the first or second degree or for a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and for which a presumption in favor of a prison term is specified as being applicable, its *reasons* for not imposing the prison term and for overriding the presumption, based upon the overriding purposes and principles of felony sentencing set forth in section 2929.11 of the Revised Code, and the basis of the findings it made under divisions (D)(1) and (2) of section 2929.13 of the Revised Code.

{¶79} "(c) If it imposes consecutive sentences under section 2929.14 of the Revised Code, its *reasons* for imposing the consecutive sentences;

{¶80} "(d) If the sentence is for one offense and it imposes a prison term for the offense that is the maximum prison term allowed for that offense by division (A) of section 2929.14 of the Revised Code, its *reasons* for imposing the maximum prison term;

{¶81} "(e) If the sentence is for two or more offenses arising out of a single incident and it imposes a prison term for those offenses that is the maximum prison term allowed for the offense of the highest degree by division (A) of section 2929.14 of the Revised Code, its *reasons* for imposing the maximum prison term." (Emphasis added).

{¶82} This statutory section clearly states when findings and reasons for those findings must be made at the sentencing hearing, i.e. the imposition of consecutive sentences and/or maximum sentences. However, clearly absent from this statutory section is the requirement that *reasons* supporting the finding for the issuance of a sentence that is beyond the miminum must be made on the record at the sentencing hearing. Furthermore, in *Comer*, when addressing the imposition of more than the minimum sentence, the Court stated the following:

{¶83} "Accordingly, we hold that pursuant to R.C. 2929.14(B), when imposing a nonminimum sentence on a first offender, a trial court is required to make its statutorily sanctioned findings on the record at the sentencing hearing." 99 Ohio St.3d 463, at ¶26.

{¶84} Absent from this holding is the word *reasons*. As such, the trial court is not required to state reasons supporting its finding that the shortest prison term would demean the seriousness of the offense or would not adequately protect the public on the record.

{¶85} As this sentence falls within the terms of the valid statute, it does not amount to cruel and unusual punishment unless it shocks the sense of justice. See *Thomas*, 2003-Ohio-7333, at ¶33 (discussing consecutive sentences under the felony sentencing statute and finding it did not constitute cruel and unusual punishment). A three year sentence for felonious assault is not so greatly disproportionate to the

offense as to shock the sense of justice. Accordingly, we find that the sentence for felonious assault does not amount to cruel and unusual punishment.

{¶86} As to the sentence for the aggravated robbery, the trial court was not required to make the statutory minimum sentence findings because the maximum sentence was imposed as to this violation. *State v. Evans*, 102 Ohio St.3d 240, 2004-Ohio-2659, at ¶15. Kapsouris raises no arguments against the trial court's maximum sentence findings or reasons for the aggravated robbery conviction. Consequently, those findings and reasons will not be addressed. This assignment of error lacks merit.

{¶87} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Waite, P.J., concurs.
Donofrio, J., concurs.