[Cite as *State v. Brooks*, 2009-Ohio-5559.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92389

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WAHID BROOKS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508454

BEFORE: Stewart, J., Cooney, A.J., and Gallagher, J.

RELEASED: October 22, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

John T. Castele
1310 Rockefeller Building
614 West Superior Avenue
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Katherine Mullin
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, OH 44113

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

MELODY J. STEWART, J.:

{¶ 1} A jury found defendant-appellant, Wahid Brooks, guilty of three counts of aggravated burglary and three counts of kidnapping, all of which contained one and three-year firearm specifications. The charges arose after Brooks and codefendant Eric Rogers, with the assistance of codefendant Robin Edwards, entered an occupied apartment for the purpose of committing a robbery. Although Brooks raises challenges to the sufficiency and weight of the evidence in this appeal, he focuses primarily on the impact of an identification of him made by a state witness shortly before trial. Although the court instructed the jury that it could not consider that identification, Brooks maintains that the witness's identification could not be cured by a cautionary instruction. He also argues that the state violated Crim.R. 16 by failing to disclose this identification prior to trial.

I

{¶ 2} The evidence showed that the victims of the aggravated burglary were three men who had gathered to play cards in an apartment. Jan Moss, the tenant of the apartment in which the burglary occurred, wanted some friends to come over to play cards, but one of those friends, Robert Vickers, had difficulty arranging for transportation. As Moss waited to hear whether Vickers could attend the game, he received a telephone call from Edwards.

In the course of offering Moss birthday greetings, Edwards asked him to loan her $20. Moss told Edwards that he would loan her the money if she gave Vickers a ride to his apartment. She agreed and picked up both Brooks and Rogers to accompany her.

{¶ 3} Edwards transported Vickers as promised. She and Vickers entered the apartment and left Brooks and Rogers in the car. When Edwards asked for the money she had been promised for transporting Vickers, she and Moss began arguing. Edwards eventually received her money, and in the process saw that Moss carried both his social security and rent money.

{¶ 4} Edwards left the apartment and rejoined Brooks and Rogers. They went to a nearby bar. At some point, Rogers "said something about hittin' a lick," a phrase that Edwards understood to mean either committing a robbery or selling drugs. Edwards called Moss and apologized for her earlier conduct. Eager to have another person join the card game, Moss invited her back to his apartment. Edwards agreed. Although not really expecting her to show, a few minutes later Edwards called Moss and said, "[b]uzz me in. Open the door. I'm coming up."

{¶ 5} In reality, she was not at Moss's apartment — she remained at the bar and watched Brooks and Rogers leave. Moss heard his doorbell and, assuming the visitor was Edwards, "buzzed" to let the visitor in the building

and opened the door to his apartment. Brooks and Rogers walked in — one carried a sawed-off shotgun, the other carried a handgun. When the occupants of the apartment saw the guns, they began to panic. They were told by one of the gunmen that they would not be shot if they cooperated. The three card players were ordered to the floor. The gunmen went through the victims' pockets and some of Moss's drawers. One of the card players, Kenneth Curry, identified Brooks as the person who went through his pockets. When the two gunmen left the apartment, Moss discovered that the gunmen had taken more than $300 in cash, some jewelry and medicine from him, as well as the cell phones belonging to all three men.

{¶ 6} Brooks and Rogers returned to the waiting Edwards. She saw them holding $180. The three drove away with Edwards leaving Brooks at an undisclosed location while she and Rogers went to her house. The police arrived at Edwards's house shortly thereafter and ordered the occupants to exit the house. Edwards woke her mother and the two of them left, but Rogers stayed behind and would not leave. The police called for backup and, after a standoff, Rogers surrendered. Edwards's mother, the homeowner, allowed the police to search the premises. During that search, the police found a cell phone stuffed between the mattress and box spring of Edwards's bed — the cell phone belonged to Vickers.

II

{¶ 7} In his first assignment of error, Brooks makes two complaints about eyewitness testimony: first, the court's cautionary instruction that ordered the jury to disregard an eyewitness identification of Brooks by Brandy Stewart, a neighbor in Moss's apartment building, lacked efficacy; second, that the court should have stricken evidence that Vickers identified both Brooks and Rogers from a photo array shortly after the burglary because Vickers was unable to identify either defendant during trial.

A

{¶ 8} Mistrials are necessary "only when the ends of justice so require and a fair trial is no longer possible." *State v. Garner* (1995), 74 Ohio St.3d 49, 59; see, also, *State v. Franklin* (1991), 62 Ohio St.3d 118, 127. Because the trial judge is in the superior position to determine whether a mistrial is required, *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, at ¶92, the court has broad discretion when ruling on a motion for mistrial. *State v. Lacona*, 93 Ohio St.3d 83, 100, 2001-Ohio-1292.

1

{¶ 9} Stewart testified that her doorbell rang at about the same time as the events occurring within Moss's apartment. She "buzzed" to open the door to the building, but when she opened her apartment door, she did not see anyone. Stewart went back into her apartment, but her child wandered out the door and into the hallway. She followed the child and saw two men

standing at Moss's door. She retrieved the child and went back into her apartment, but looked through her peephole and saw the two men enter Moss's apartment. A few minutes later, Moss knocked on her door to tell her that he had been robbed.

{¶ 10} During her direct examination, Stewart identified Brooks and Rogers as the men she saw enter Moss's apartment. When asked if she had been shown any pictures of the two men, Stewart replied that an assistant prosecuting attorney had shown her photographs of the two men at some undetermined time between the night of the burglary and the day of her testimony. Complaining that the state had not disclosed to him that it had shown Stewart his photograph while preparing her for trial, Brooks asked the court to declare a mistrial or give a cautionary instruction to the jury. The court denied the request for a mistrial, but instructed the jury to "disregard the in-court identification" made by Stewart.

{¶ 11} We conclude that the court did not abuse its discretion by choosing to instruct the jury to disregard Stewart's in-court identification rather than grant the motion for a mistrial. A jury is presumed to follow the court's cautionary instructions. *State v. Jones* (2001), 91 Ohio St.3d 335, 344; *State v. Raglin* (1998), 83 Ohio St.3d 253, 264. The court's instruction very clearly told the jury to disregard Stewart's in-court identification

because it had come not "from her mind," but "possibly from her having seen a photograph within a couple days of that testimony."

{¶ 12} Brooks argues that Stewart's identification was so unreliable that it could not be cured by an instruction, but there is nothing in the record that suggests that the jury did not heed the court's instruction. In the end, Brooks is left to argue that whatever remained of Stewart's testimony relating to what she witnessed at the time of the burglary was too tainted and unreliable to be admissible. But what remained of that testimony was a description of relative height and weight of the two men she saw at Moss's door, and a description of their clothing. It seems unlikely that the state's photographs could have depicted these things in a manner that affected her initial description of the two men she saw standing outside Moss's door. Given this unlikelihood, Stewart's description of the two men properly became a matter of credibility for the jury.

B

{¶ 13} Brooks next argues that the court should have stricken a pretrial photo array identification made by Vickers because he could not make an in-court identification of Brooks and Rogers.

{¶ 14} Vickers testified that the men who entered Moss's apartment wore masks, but that he "looked at them real good." However, when asked if he saw those men in the courtroom, Vickers replied, "[n]o. Huh-uh." The

state then showed him a photo array and asked him to identify a mark on that sheet. Vickers said that the mark was his name and that he put it there to show "that's the guy I picked that robbed me." Brooks objected to the state's use of the photo array, arguing that it was prejudicial for the state to use the array after Vickers could not make an in-court identification of the defendants. On cross-examination, Vickers said that he merely identified pictures in the photo array based on the question whether he "recognized anyone." The defense then asked, "[s]o you may recognize these individuals — but not recognize them as the perpetrators of the robbery; correct?" Vickers replied, "[r]ight."

{¶ 15} On redirect examination, the state referenced the photo array and asked Vickers, "do you know who — where you said that you left your mark at [sic], do you know this individual?" Vickers replied, "I pointed him out. I don't know. I had never seen him before, but I pointed him out." When asked why he pointed out that person, Vickers replied, "[l]ook [sic] like I know him, somewhere." When asked to clarify what he meant by "somewhere," Vickers simply said, "[s]omewhere." Brooks asked the court to strike this testimony on grounds that it would be highly prejudicial to him if it was admitted.

{¶ 16} The court has broad discretion to admit evidence, *State v. Long* (1978), 53 Ohio St.2d 91, 98, and we find that the court did not abuse its

discretion by allowing Vickers's testimony. At no point prior to trial did Brooks file a motion to suppress Vickers's identification, so he waived any right to argue that the identification process itself was unreliable. Crim.R. 12(H); *State v. Ruby*, 149 Ohio App.3d 541, 2002-Ohio-5381.

{¶ 17} In any event, Vickers's testimony was not so prejudicial that the court had the duty to strike it from the record. Vickers initially identified Brooks when shown the photo array. However, Vickers's trial testimony showed that he selected Brooks's photograph not because Brooks was one of the men in the apartment, but because he had seen Brooks "somewhere." As the court noted, this simply created an issue of Vickers's credibility — an issue that the court correctly found should be resolved by the jury.

III

{¶ 18} Brooks next argues that the state's failure to provide him with advance notice that it had shown witness Stewart his photograph was a violation of Crim.R. 16 that warranted a dismissal of the charges or a mistrial.

{¶ 19} Crim.R. 16(B)(1)(f) states that, "[u]pon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment." If the state violates Crim.R. 16(B)(1)(f), Crim.R.

16(E)(3) permits the court to "make such order as it deems just under the circumstances." The court has discretion under Crim.R. 16(E)(3) to determine the appropriate response for failure of the state to disclose material subject to a valid discovery request. *State v. Wiles* (1991), 59 Ohio St.3d 71, 78-79. This discretion should be exercised to impose a sanction "that is reasonably related to the offensive or noncompliant conduct and the impact of that conduct upon the ability of the defendant to present a defense." *State v. Crespo*, Mahoning App. No. 03 MA 11, 2004-Ohio-1576, ¶13. See, also, *State v. Jones*, Cuyahoga App. No. 91846, 2009-Ohio-2381.

{¶ 20} The court did not abuse its discretion by ordering the sanction that it did — striking Stewart's identification from the evidence. When Brooks objected to Stewart's testimony, he did so on the grounds that had he been made aware that the state had shown his photograph to her, he would have filed a motion to suppress on grounds that the procedure was too suggestive. By striking Stewart's testimony, the court gave Brooks the relief he would have been entitled to receive if he had filed a motion to suppress.

{¶ 21} Admittedly, there is a difference between having trial testimony stricken and not having any testimony in the first place. However, the court's cautionary instruction very clearly told the jury that it could not consider Stewart's in-court identification as evidence. As previously stated,

there is nothing in the record to suggest that the jury disregarded this instruction.

IV

{¶ 22} For his third assignment of error, Brooks argues that the state failed to produce sufficient evidence to show that he was one of the two men who entered Moss's apartment and robbed the victims. He also argues that the state failed to produce evidence sufficient to prove the operability of the firearms used in the commission of the burglary.

A

{¶ 23} When reviewing a claim that there is insufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1981), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 24} To prove the commission of aggravated burglary as charged under R.C. 2911.11(A)(2), the state had to show that Brooks, by force, stealth, or deception, trespassed in an occupied structure when another person was present, with purpose to commit in the structure a criminal offense, and that Brooks had a deadly weapon.

{¶ 25} Brooks does not argue that the state failed to establish these elements, but maintains that there was no evidence to show his identity as one of the perpetrators.

{¶ 26} Edwards testified that she had been in the company of Brooks and Rogers shortly before the burglary. Rogers said that he wanted to "hit a lick," a phrase she understood to mean commit a robbery or sell drugs. After Edwards made her call to Moss, Brooks and Rogers left her at the bar and walked the short distance to Moss's apartment building. One of the victims, Curry, identified Brooks as the man who went through his pockets. When Brooks and Rogers returned to the bar, Edwards said they had approximately $180 on them. Viewing this evidence in a light most favorable to the state, we find sufficient evidence from which a trier of fact could find that Brooks was one of the perpetrators.

B

{¶ 27} To prove a firearm specification, the state must show beyond a reasonable doubt that a firearm was operable at the time of the offense. *State v. Murphy* (1990), 49 Ohio St.3d 206, at syllabus. "[S]uch proof can be established beyond a reasonable doubt by the testimony of lay witnesses who were in a position to observe the instrument and the circumstances surrounding the crime." Id. The state may use circumstantial evidence to establish that the defendant possessed an operable firearm. See *State v.*

Thompkins, 78 Ohio St.3d 380, 1997-Ohio-52, paragraph one of the syllabus. "A victim's belief that the weapon is a gun, together with the defendant's intent to create and use the victim's belief for the defendant's own criminal purposes, is sufficient to prove a firearm specification." *State v. Dickess*, 174 Ohio App.3d 658, 2008-Ohio-39, at ¶53, citing *State v. Jeffers* (2001), 143 Ohio App.3d 91. In *State v. Johnson*, Cuyahoga App. No. 90449, 2008-Ohio-4451, we stated at ¶22:

{¶ 28} "'[A] firearm penalty-enhancement specification can be proven beyond a reasonable doubt by circumstantial evidence. * * * [T]he trier of fact may consider * * * any implicit threat made by the individual in control of the firearm.' *State v. Thompkins*, 78 Ohio St.3d 380, 385, 678 N.E.2d 541, 1997-Ohio-52. Thus where an individual brandishes a gun and implicitly but not expressly threatens to discharge the firearm at the time of the offense, the threat can be sufficient to satisfy the state's burden of proving that the firearm was operable or capable of being readily rendered operable. Id. at 384, 678 N.E.2d 541. '*Thompkins* clarifies that actions alone, without verbal threats, may be sufficient circumstances to establish operability of a firearm.' *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131, 1997-Ohio-304 (noting that circumstantial evidence of two masked men waving guns and stating that they are committing a robbery was sufficient to sustain a firearm specification). See, also, *State v. Knight*, Greene App. No. 2003 CA 14,

2004-Ohio-1941, at ¶19 ('both a weapon's existence and its operability may be inferred from the facts and circumstances')."

{¶ 29} The victims collectively testified to having seen Brooks and Rogers enter the apartment. Curry testified that Brooks held a handgun on him while the other man held a shotgun. Moss testified that one of the robbers told Vickers that "he wasn't going to shoot him if we cooperate * * *." This evidence that Brooks and Rogers brandished guns and made an implicit threat to shoot in the absence of cooperation constituted sufficient proof of operability.

V

{¶ 30} Finally, Brooks maintains that the jury's verdict is against the manifest weight of the evidence because there were too many inconsistencies and omissions in the evidence to support the conclusion that he participated in the crimes.

{¶ 31} The manifest weight of the evidence standard of review requires us to 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 such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten* (1986), 33 Ohio App.3d 339, 340. The use of the word "manifest" means that the trier of fact's decision

must be plainly or obviously contrary to all of the evidence. This is a difficult burden for an appellant to overcome because the resolution of factual issues resides with the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶ 32} There were inconsistencies in the identification testimony by the victims. For example, Moss testified that one of the robbers "had a thing over his mouth, like right here (indicating)." He could not identify either perpetrator immediately after the robbery, admitting to being too upset to focus and suffering from asthma.

{¶ 33} Vickers testified that the robbers wore ski masks that had separate openings for their eyes and mouth. Although he identified Brooks from a photo array the same day as the crime, when asked at trial if he saw those persons who committed the robbery, he replied, "[n]o. Huh-uh."

{¶ 34} Curry, the victim who identified Brooks as the person who went through his pockets, could not say whether the robbers covered their faces.

{¶ 35} The jury could have looked past those inconsistencies to find the state's version of the facts pointed to Brooks's guilt. Both Moss and Edwards agreed that after she left his apartment with the money for transporting Vickers, she made arrangements to go back to his apartment. As Edwards

did so, she was in the company of Brooks and Rogers at a bar about one block from Moss's apartment. Rogers suggested they "hit a lick" and left with Brooks. The timing of their departure was consistent with Moss's testimony that someone appeared at his door shortly after he finished his telephone call with Edwards.

{¶ 36} Despite differing testimony on whether the assailants wore masks, Curry was able to identify Brooks. Collectively, the victims and Stewart consistently described the robbers as being of unequal height — one robber was several inches taller than the other. Moreover, they gave fairly consistent descriptions of the clothing worn by the robbers — a description that matched Stewart's recollection of their clothing.

{¶ 37} Edwards testified that Brooks and Rogers returned to the bar within 10 to 15 minutes, carrying $180 in cash. The three drove off, eventually stopping to drop off Brooks. Edwards and Rogers returned to her house where, after a stand-off with Rogers, the police discovered a cell phone belonging to Vickers.

{¶ 38} The consistency of these facts is enough to overcome any inconsistencies with certain aspects of the victims' identification testimony. The jury could rationally have viewed Edwards's testimony in conjunction with Curry's firm identification and the discovery of Vickers's cell phone in Rogers's possession to conclude that the state's evidence supported a guilty

verdict on the charged offenses. When the facts are viewed in this light, we cannot say that the jury lost its way by finding Brooks guilty.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MELODY J. STEWART, JUDGE

COLLEEN CONWAY COONEY, A.J., and
SEAN C. GALLAGHER, J., CONCUR