[Cite as *State v. Farmer*, 2010-Ohio-3406.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93246

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KIRKLAND FARMER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514481

BEFORE: Jones, J., Rocco, P.J., and Cooney, J.

RELEASED: July 22, 2010

JOURNALIZED:

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Kirkland Farmer ("Farmer"), appeals the trial court's denial of his motion to suppress and his conviction. Finding no merit to the appeal, we affirm.

{¶ 2} In 2008, Farmer was charged with burglary and theft. Farmer filed a motion to suppress, which the trial court denied. Farmer waived his right to a trial by jury, and the case proceeded to trial before the bench.

{¶ 3} The following evidence was adduced at the hearing on the motion to suppress and at trial.

{¶ 4} On August 8, 2008, Lamar Taylor ("Taylor") was standing outside his house when he saw a man, later identified as Farmer, in the backyard of his neighbor's house. Farmer was holding a television and a small bicycle. Taylor called out to Farmer and asked him if he knew who lived at that house. Farmer stated that his family lived there. Farmer then proceeded to walk down the street with the bicycle. Taylor testified that he saw Farmer try to ride the bike, but one of the tires was flat and the handlebars appeared to be broken.

{¶ 5} Taylor asked a friend to contact the police and tell them that someone had broken into the house of his neighbor, Kathy Smith ("Smith"). When the police arrived, Taylor gave them a description of Farmer, stating that he was a black male wearing a white t-shirt, blue jeans, and a cap. Taylor told the police that Farmer was carrying a red bicycle and had dropped the TV in the field next to Smith's house. He also told the police that Farmer had taken the bicycle and was headed in the direction of the corner store. The police left, but returned within ten minutes with a man in the back of the cruiser and the bicycle in the trunk. Taylor identified Farmer as the man he had seen with the television and bicycle. Taylor overheard the police say they caught Farmer trying to throw the bicycle in a dumpster.

{¶ 6} Cleveland police officer Robin Grady ("Grady") testified that he responded to a call about a break-in. When he arrived on the scene, he and his partner checked Smith's house and spoke with Taylor. Taylor gave the

officers a description of Farmer and the bicycle and told them the direction in which Farmer headed. The officers left the scene to look for Farmer and saw him about three blocks away from Smith's house. When the police pulled up, Farmer got off the bike and tried to put it into a dumpster. While police were detaining Farmer, Jerry Landers ("Landers") approached them and told the officers that Farmer had tried to sell him the bicycle. Landers testified that people told him that Farmer had stolen a bike, and that Farmer came up to him and asked him if he wanted to buy it. Landers was able to identify Farmer in court.

{¶ 7} The police proceeded back to Smith's house. Officer Grady testified that, when Taylor looked into the patrol car where Farmer was seated, Taylor was able to identify Farmer without hesitation.

{¶ 8} The court convicted Farmer of burglary and misdemeanor theft, a lesser included offense of felony theft, and sentenced him to a total of two years in prison.

{¶ 9} Farmer now appeals, raising the following two assignments of error for review:

> "I. The trial court erred by denying the defendant's motion to suppress eyewitness identification.
>
> "II. Mr. Farmer's conviction for burglary was against the manifest weight of the evidence."

Motion to Suppress

{¶ 10} In the first assignment of error, Farmer argues that the trial court erred when it denied his motion to suppress Taylor's eyewitness identification.

{¶ 11} This court set forth the scope of our review regarding a motion to suppress in *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172, as follows:

> "In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Clay* (1973), 34 Ohio St.2d 250, 298 N.E.2d 137. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. See *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54. However, without deference to the trial court's conclusion, it must be determined independently whether, as a matter of law, the facts meet the appropriate legal standard." *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906.

{¶ 12} Although the practice of showing suspects alone to persons for the purpose of identification, and not as part of a lineup, has been condemned, an identification of this nature violates due process only if the circumstances surrounding the identification are unnecessarily suggestive and unreliable after evaluating the totality of the circumstances. *Manson v. Brathwaite* (1977), 432 U.S. 98, 112-113, 97 S.Ct. 2243, 53 L.Ed.2d 140. "Although the presentation of a single suspect for identification is ordinarily discouraged, an exception is recognized when the suspect is apprehended at or near the scene of the crime and is presented to the victim or witness shortly thereafter." *State v. Madison* (1980), 64 Ohio St.2d 322, 332, 415 N.E.2d 272; *State v. Williams* (Oct. 4, 2001), Cuyahoga App. No. 78961.

{¶ 13} Our focus is upon the reliability of the identification, not the identification procedures. *State v. Jells* (1990), 53 Ohio St.3d 22, 26, 559 N.E.2d 464. In examining reliability, the court must consider (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Neil v. Biggers* (1972), 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401; *State v. Williams*, 172 Ohio App.3d 646, 2007-Ohio-3266, 876 N.E.2d 991, ¶9. The court must review these factors under the totality of the circumstances. Id.

{¶ 14} It is the defendant's burden to show that the identification procedure was unduly suggestive. *State v. Freeman*, Cuyahoga App. No. 85137, 2005-Ohio-3480, reversed on other grounds by *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174. If the defendant is able to meet this burden, then the court must consider whether the procedure was so unduly suggestive as to give rise to irreparable mistaken identification. Id. The ultimate focus in determining whether reversible error exists is not just on whether the practice was used, but on whether it was so suggestive as to create "a very substantial likelihood of irreparable misidentification." *State v. Broom* (1998), 40 Ohio St.3d 277, 284, 533 N.E.2d 682, quoting *Neil v. Biggers* at 198.

{¶ 15} Moreover, even if an identification procedure contains notable flaws, this factor does not, per se, preclude the admissibility of the identification. *State v. Page*, Cuyahoga App. No. 84341, 2005-Ohio-1493, citing *State v. Merrill* (1984), 22 Ohio App.3d 119, 121, 489 N.E.2d 1057; *State v. Moody* (1978), 55 Ohio St.2d 64, 67, 377 N.E.2d 1008.

{¶ 16} In the case at bar, Farmer argues that the eyewitness identification was suggestive and unreliable because the police conducted a cold stand while Farmer was in police custody. We disagree.

{¶ 17} Taylor had the opportunity to observe and talk with Farmer from a short distance during daylight hours. Taylor testified that he observed Farmer for 10-15 minutes. The police arrived on the scene within minutes, received a quick description of the suspect, left to patrol the area, and returned to the scene with Farmer within ten minutes. Taylor immediately identified Farmer as the person he saw with the television and bike. Taylor testified that he identified Farmer by "his face and his clothing." Taylor also identified the bike in the police cruiser as the one he saw Farmer carrying.

{¶ 18} In his brief, Farmer claims that "the police told [Taylor] that the Defendant was the person who committed the crime." This argument lacks merit. Although Taylor testified that he overhead the officers state that they found Farmer trying to put the bicycle in a dumpster, Taylor also testified that this knowledge did not influence his identification of Farmer because he

remembered what Farmer looked like. There is no evidence in the record that the police identified Farmer as the person who committed the burglary.

{¶ 19} In looking at the totality of the circumstances, the trial court found that Taylor "viewed Farmer in daylight at close range. Mr. Taylor was attentive to the suspect's identity, believing that the suspect was fleeing after committing a crime against Mr. Taylor's neighbor. There was little delay between the break-in and Mr. Taylor's identification of the suspect. There is no indication that the police prompted Mr. Taylor [to] make a certain identification." We agree and find that Farmer failed to satisfy his burden of demonstrating that the identification procedure was suggestive. Accordingly, we find that the trial court's denial of the motion to suppress is supported by competent credible evidence.

{¶ 20} The first assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 21} In the second assignment of error, Farmer argues that his conviction for burglary was against the manifest weight of the evidence.

{¶ 22} In evaluating a challenge to the verdict based on the manifest weight of the evidence, a court sits as the thirteenth juror, and intrudes its judgment into proceedings that it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a jury that has "lost its way." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. As the Ohio Supreme Court declared:

{¶ 23} "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence* offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.' * * *

{¶ 24} "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 25} In *State v. Bruno*, Cuyahoga App. No. 84883, 2005-Ohio-1862, we stated that the court must be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact. A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the prosecution proved the offense beyond a reasonable doubt. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus; *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132. Moreover, in reviewing a claim that a

conviction is against the manifest weight of the evidence, the conviction cannot be reversed unless it is obvious that 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. Garrow* (1995), 103 Ohio App.3d 368, 659 N.E.2d 814.

{¶ 26} Farmer argues that the state failed to prove beyond a reasonable doubt that he broke into Smith's house because Taylor only saw Farmer in the backyard and, although Taylor testified that he saw a damaged back door at the Smith's house, Taylor could not state how long it had been damaged. We find Farmer's argument without merit.

{¶ 27} Although Taylor did not see Farmer exit Smith's house, he saw Farmer in Smith's yard. Taylor checked her back door and saw that it had been kicked open. Smith testified that her back door was not damaged when she left that day, but when she returned home, her door had been kicked in. Smith's son testified that he had left his bicycle inside the house by the back door and one of the tires was flat. When the police returned his bicycle to him, the handlebars were loose, and the flat tire was inflated. Smith also identified her television that police recovered in the field next to her house.

{¶ 28} We find that the trial court did not lose its way or create such a manifest miscarriage of justice as to require reversal of the conviction for burglary. Thus, Farmer's convictions are not against the manifest weight of the evidence.

{¶ 29} The second assignment of error is overruled.

{¶ 30} Judgment is affirmed.

It is ordered that appellee recover of appellant 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 common pleas court 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.

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR