[Cite as *State v. McCollins*, 2015-Ohio-2815.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-P-0038**
- vs -	:	
MICHAEL MCCOLLINS, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2013 CR 0741.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Michael J. Cheselka, Jr., Michael J. Cheselka, Jr., LLC, 75 Public Square, Suite 920, Cleveland, OH 44113 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the Portage County Court of Common Pleas. Appellant Michael McCollins, Jr. was indicted on four counts of aggravated robbery, a felony in the first degree, in violation of R.C. 2911.01(A)(1). Each count also carried a firearm specification. A jury found McCollins guilty of two counts of aggravated robbery, but only one with the attending firearm specification. McCollins was acquitted on the two remaining charges. On appeal, McCollins asserts that the trial court erred in overruling his motion to suppress his statements to the police and further argues that

his convictions lacked sufficient evidence and were against the manifest weight of the evidence. For the following reasons, we affirm.

{¶2} Early in the afternoon on October 26, 2013, Tre Nichols was at his house playing video games when his friends Gary Bacchus, Chris Mason, and McCollins arrived. According to Nichols, he is 5'5", Mason is 5'3", Bacchus is 5'8"-5'9" and McCollins is 6'-6'2". One of the guys, according to Nichols said they were going to Kent to "hit a lick," which meant that they were going to rob people. The four of them drove to Kent in Mason's car, and eventually went to a party on College Street. At approximately 2:00-3:00 a.m., after the party ended, McCollins and Bacchus were talking with Dustin Friel and Joseph Bevacqua on the back porch while Mason and Nichols hung out on the lower steps.

{¶3} Eventually either Mason or McCollins asked Friel and Bevacqua if they had any marijuana. After Bevacqua pulled out his marijuana, he was robbed. Specifically he testified that there was a "short black guy" 5'1"-5'2" and a "big black guy" 6'1"-6'2" weighing 240-260 pounds. He further testified that the short black guy hit him in the face twice with a gun, and went into his pockets and grabbed his phone. However, Bevacqua was unable to identify McCollins as the big black guy. Friel maintained that the bigger black guy was the person who robbed Bevacqua and the shorter black guy was the person who robbed him.

{¶4} Bacchus testified for the prosecution pursuant to a proffered plea agreement, and explained that he and McCollins robbed two "white guys" at the College Street party after asking for marijuana. However, Bacchus consistently denied that McCollins was carrying a gun, and claimed McCollins punched one of the white guys and took his phone and marijuana.

{¶5} According to Bacchus, he, Mason, Nichols, and McCollins ran away from the College Street party. At some point, Bacchus and McCollins made it to Main Street where McCollins met a guy named Terry for 10 minutes. In one of McCollins' statements to the police, McCollins claims that he purchased a gun from a man named Terry that night. The police were unable to confirm this information.

{¶6} Eventually, the four men met up again, and drove around Kent until Bacchus and McCollins spotted three people, who later turned out to be Jennifer Starner, Tyler Beal and Scott Kennedy. According to Bacchus, he asked to be let out of the car so that he and McCollins could rob these people.

{¶7} According to Beal, he was walking down Franklin Avenue early in the morning with Kennedy and Starner when he saw an African-American male with short hair and a hoodie drawn over his face start to follow them. After they reached the post office, Beal claimed that the man in the hoodie pulled out a dark revolver with a wooden handle and said "give me everything you have." Beal then took everything out of his pockets and dropped it on the ground while Starner dropped her purse. Kennedy, who was wearing a gorilla suit as a Halloween costume, said that he did not have any pockets. At this point, another man appeared out of the alleyway and hit Kennedy in the face near his jaw causing Kennedy to hit the ground. The man then ripped open Kennedy's pants and took out his wallet and phone. Starner's and Kennedy's accounts corroborate Beal's testimony.

{¶8} Bacchus' testimony also corroborates Beal's testimony. According to Bacchus, he went around the back of a house to urinate when McCollins stopped two men and one female by pointing a gun at them. Bacchus walked up to McCollins and asked him if he checked the man in the gorilla suit. McCollins said "no" and the man in

the gorilla suit said he had nothing. Bacchus testified that he then pistol-whipped the man in the gorilla suit in the jaw, and he and McCollins took the rest of the belongings back to Mason's car.

{¶9} After McCollins was booked, he made several statements to detectives and one statement to a detention officer. Robert Treharn, a lieutenant with the Kent Police Department, testified that McCollins told him that he hit a dude "or something" with respect to a robbery behind a house involving a phone and marijuana. McCollins also told Treharn that Nichols and Mason did not have anything to do with the robberies. McCollins further admitted to punching a person in the College Street robbery in the chest, but denied having a gun with him. He later said that he was too intoxicated to know if he had a gun and that it was possible that he possessed one that night.

{¶10} David Marino, a detective with the Kent Police Department, conducted follow-up interviews during which McCollins stated that Gary Bacchus said "he pistol-whipped the guy in the gorilla suit." McCollins also admitted to buying a gun with a wooden handle from a man named Terry.

{¶11} Julie Loomis, the detention officer with the Kent Police Department, testified that McCollins asked to speak with her, and after informing McCollins that she was not a police officer and his statements would not be confidential, agreed to listen to him. Loomis testified that McCollins admitted that he did something bad "but not like that." McCollins furthered that "I don't want people to think I did it. He pistol-whipped three people; I've been pistol-whipped before." Loomis explained that McCollins was referring to someone named Gary. McCollins told her that he did not want to punch someone in the head, so he punched them in the chest.

{¶12} McCollins did not testify in his defense. Rather, his defense was based on the victims' inconsistent descriptions of the height and weight of their assailants, which was inconsistent with his physical description. Specifically, Beal's statement to the police indicated that his assailant weighed 180-200 pounds, but he later acknowledged that McCollins weighs "a boatload" more than that. Beal also said that the person who robbed Kennedy was taller than the person who robbed him, and the person who robbed him was shorter than Bacchus. Beal did pick McCollins out of a show-up as the person who robbed him because his build was similar to the robber. However, after a press release named McCollins as one of the individuals arrested, Beal viewed pictures on Facebook, which solidified his identification. Beal, however, denied that the press release influenced his Facebook identification.

{¶13} At trial Starner described the initial robber as a larger guy with a round face and facial hair. She said the second robber was shorter than Kennedy. At the show-up, Starner indicated that an individual with dreadlocks was definitely one of the individuals who robbed them; however, neither Bacchus nor McCollins had dreadlocks at the time. Mason, however had dreadlocks. Finally, Starner testified that she viewed images of McCollins on Facebook to confirm her identification after the press release was issued. She denied that it influenced her Facebook identification.

{¶14} Finally, Kennedy admitted that he did not become confident about his identification of McCollins until he saw McCollins in court. Kennedy denied identifying McCollins solely because he was sitting at the table with defense counsel. Instead, he identified McCollins because he generally fit the same build as the robber he saw. Kennedy also acknowledged that many people fit that same general build.

{¶15} As for Nichols' and Bacchus' testimony, McCollins alleged that Nichols and Bacchus had close ties to Mason and that they were trying to protect their closer friend.

{¶16} We consider McCollins' first and second assignments of error together because they are interrelated. In these assignments, McCollins alleges:

{¶17} "The guilty verdicts were based upon insufficient evidence."

{¶18} "The guilty verdicts were against the manifest weight of the evidence."

{¶19} Within these assignments, McCollins alleges that there is insufficient evidence that he was correctly identified as the robber and that there was insufficient evidence that he knowingly exerted control over the stolen items. As to the College Street robbery, McCollins alleges that Nichols' testimony is incredible because of his self-interest in not being incarcerated. He also claims that both Bevacqua and Friel alleged that the smaller individual, who could not be McCollins, robbed them. Finally, McCollins claims that his use of alcohol and marijuana prior to the robberies made him too intoxicated to form the requisite mental state to commit robbery.

{¶20} As for the Franklin Avenue robbery, McCollins claims that the evidence shows he was not the person who robbed Starner, Kennedy or Beal because of the conflicting testimony as to the initial robber's description. He also alleges that his gunshot residue test, which tested positive, could have been a false positive. .

{¶21} In determining whether evidence is sufficient to sustain a conviction, the reviewing court asks whether reasonable minds could differ as to whether each material element of a crime has been proven beyond a reasonable doubt. *State v. Bridgeman*, 55 Ohio St.2d 261, 381 N.E.2d 184 (1978). If reasonable minds could differ as to whether each material element has been proven, a Crim.R. 29 motion for

acquittal must be overruled. *Id.* at 263-64. The evidence adduced at trial and all reasonable inferences must be viewed in a light most favorable to the state. *State v. Maokhamphiou*, 11th Dist. Portage No. 2006-P-0046, 2007-Ohio-1542, ¶20.

{¶22} In contrast, a manifest weight challenge requires the reviewing court to play the role of a "thirteenth juror." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541 (1997). A reviewing court should be cognizant of the fact that the jury is in the best position to assess the credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus (1967). For an appellate court to overturn a conviction as against the manifest weight of the evidence, it must find that "'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.'" *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983).

{¶23} R.C. 2911.01(A)(1) states "no person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶24} "(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it * * *."

{¶25} Robbery is defined as follows: "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶26} "(1) Have a deadly weapon on or about the offender's person or under the offender's control;

{¶27} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;

{¶28} "(3) Use or threaten the immediate use of force against another." R.C. 2911.02

{¶29} Here, there is sufficient evidence to support McCollins' convictions, and the convictions are not against the manifest weight of the evidence. Bacchus' testimony combined with McCollins' statements to police confirm that McCollins used force to steal items on College Street; that he purchased a gun from Terry; and that he then robbed Starner, Kennedy, and Beal on Franklin Avenue. Furthermore, although Bacchus was potentially biased against McCollins, his testimony is largely corroborated by the victims. Moreover, the glovebox contained stolen items, and appellant was the front seat passenger. Accordingly, the jury was free to credit Bacchus' testimony and convict McCollins. Finally, voluntary intoxication is not a defense to aggravated robbery. R.C. 2901.21(C).

{¶30} The first and second assignments are without merit.

{¶31} As his third assignment of error, McCollins alleges:

{¶32} "The trial court erred when it denied appellant's motion to suppress."

{¶33} Within this assignment, McCollins argues that he was too intoxicated to waive his *Miranda* rights and that his statements after the first interrogation must be suppressed because he was not re-mirandized before questioning continued.

{¶34} "The trial court acts as trier of fact at a suppression hearing and must weigh the evidence and judge the credibility of the witnesses." (Citations omitted.) *State v. Ferry*, 11th Dist. Lake No. 2007-L-217, 2008-Ohio-2616, ¶11. "[T]he trial court

is best able to decide facts and evaluate the credibility of witnesses." (Citation omitted.) *State v. Wagner*, 11th Dist. Portage No. 2010-P-0014, 2011-Ohio-772, ¶12. "The court of appeals is bound to accept factual determinations of the trial court made during the suppression hearing so long as they are supported by competent and credible evidence." *State v. Hines*, 11th Dist. Lake No. 2004-L-066, 2005-Ohio-4208, ¶14. "Once the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts." (Citations omitted.) *Ferry*, 2008-Ohio-2616, ¶11.

{¶35} "It is well established that a defendant who is subjected to custodial interrogation must be advised of his or her *Miranda* rights and make a knowing and intelligent waiver of those rights before statements obtained during the interrogation will be admissible. It is also well established, however, that a suspect who receives adequate *Miranda* warnings prior to a custodial interrogation need not be warned again before each subsequent interrogation." *State v. Treesh*, 90 Ohio St.3d 460, 470, 2001-Ohio-4, 739 N.E.2d 749 (2001).

{¶36} "Whether the original *Miranda* warning * * * was still effective is determined by reference to the totality of the circumstances." *State v. Brewer*, 48 Ohio St.3d 50, 60, 549 N.E.2d 491 (1990); *Treesh*, at 470, citing *State v. Roberts*, 32 Ohio St.3d 225, 232, 513 N.E.2d 720, 725 (1987) (holding that "[c]ourts look to the totality of the circumstances when deciding whether initial warnings remain effective for subsequent interrogations.") The factors to consider under *Roberts* include: "'(1) [T]he length of time between the giving of the first warnings and subsequent interrogation, * * * (2) whether the warnings and the subsequent interrogation were given in the same or different places, * * * (3) whether the warnings were given and the subsequent

interrogation conducted by the same or different officers, * * * (4) the extent to which the subsequent statement differed from any previous statements; * * * [and] (5) the apparent intellectual and emotional state of the suspect.'" (Citations omitted.) *Roberts*, 32 Ohio St.3d at 232, quoting *State v. McZorn*, 288 N.C. 417, 219 S.E. 201, 212 (1975).

{¶37} Here, the trial court found that the defendant was not intoxicated at the time of the questioning, and Marino's suppression hearing testimony supports that conclusion. Therefore, competent, credible evidence exists to support the trial court's finding with respect to McCollins' sobriety. Furthermore, McCollins appears alert in the subsequent interrogations. Additionally, the second interrogation occurred within two hours of the first interrogation, and the third interrogation occurred a little more than 24 hours after the first interrogation. Finally, all of the interrogations were conducted at the Kent Police Department. Based on these facts, subsequent *Miranda* warnings were not required. *State v. Powell*, 132 Ohio St. 3d 233, 2012-Ohio-2577, ¶119-122.

{¶38} In his fourth assignment of error appellant asserts:

{¶39} "The trial court erred when it entered the guilty verdict despite the cumulative errors in the trial."

{¶40} Having found no error, appellant's cumulative error assignment necessarily fails.

{¶41} The judgment of the trial court is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.