**[Cite as *State v. Bohanna*, 2010-Ohio-5568.]**

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DANIEL M. BOHANNA

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 09CAA120103

O P I N I O N

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| CHARACTER OF PROCEEDING: | Criminal Appeal from the Court of Common Pleas, Case No. 09CRI070378 |
| JUDGMENT: | Reversed |
| DATE OF JUDGMENT ENTRY: | November 16, 2010 |

APPEARANCES:

For Plaintiff-Appellee

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*Wise, J.*

**{¶1}** Appellant Daniel N. Bohanna appeals from his conviction, in the Delaware County Court of Common Pleas, on one count of aggravated robbery with a firearm specification. The appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

**{¶2}** On the late morning of July 24, 2009, Joseph Gerrick, manager of the Polaris Parkway Taco Bell restaurant, was making a deposit at the U.S. Bank branch located within the Meijer store in Lewis Center, Ohio. He testified that it was his practice to take the previous night's deposits, pick them up via the drive-thru window in a Taco Bell to-go bag, and take them to the bank. The Meijer store with the U.S. Bank branch is located on the west side of U.S. 23. Immediately south of the Meijer is a KinderCare daycare center; immediately south of the KinderCare is a Goodwill store. All of their parking lots are joined via Owenfield Drive.

**{¶3}** As Gerrick approached the Meijer front doors, a man wearing a black hoodie and ski-mask quickly walked toward him from across the parking lot, northbound from the direction of the KinderCare. The man told Gerrick to “give [him] the money.” Gerrick did not give the individual the cash receipts, but began to back up and hurry into the Meijer store. As Gerrick fled, the individual began to run back toward the KinderCare facility. The man kept his right hand in the hoodie's pocket throughout the brief exchange.

**{¶4}** The man did not get any of the Taco Bell deposit money. His flight took him past two individuals, Michelle Kendall and Melinda Snider. Both testified that they observed a man with dark pants running southbound, from the direction of Meijer past

the KinderCare and towards the Goodwill store. Snider testified that as the suspect ran in front of her, it appeared as if he "was carrying something. I did not see an item or object, but his arm was under his right side when he was running ... His arm was not moving. It was tucked up under. His other arm was free." (Tr. at 105-106).

**{¶5}** Both Kendall and Snider described observing the suspect get into a red jeep that was parked in the Goodwill driveway. The jeep immediately pulled onto Owenfield Drive and turned eastbound onto Powell Road, in the direction of I-71. As the vehicle drove off, Kendall called 911 and gave the dispatcher the license plate number "R, as in Robert, 901455." Tr. at 83.

**{¶6}** The license plate was traced to Shawna Hopson. Detective Barbeau testified that Hopson's address is on Crossgate Road in Columbus, Ohio. It took Det. Barbeau approximately 30-40 minutes to travel from the crime scene to that address. Arriving at approximately 11:40 a.m., the detectives waited about forty-five minutes before approaching the Hopson residence.

**{¶7}** Detective Barbeau testified that appellant answered the door. Appellant initially wore only boxer shorts and denied that he was "Daniel Bohanna," despite Detective Barbeau's observation that appellant had a tattoo on his upper left arm that said "Daniel." Appellant also initially denied that Hopson was present in the house. In fact, she was found in the home. Hopson consented to the detectives searching the residence.

**{¶8}** During the search, detectives found a red jeep with registration R901455. Detectives searched the jeep and found inside it two handguns. The first was a semiautomatic gun found in the rear of the jeep. The second was a revolver found in

the front passenger-side door. Additionally, the search of the jeep revealed a hoodie, two pairs of shoes and another pair of pants.

**{¶9}** On July 31, 2009, the Delaware County Grand indicted appellant for aggravated robbery (R.C**.** 2901.11(A)(1)) with a firearm specification (R.C. 2941.145), and having a weapon under disability (R.C. 2923.13(A)(1)). The disability alleged was that appellant was a fugitive from justice from Colorado.

**{¶10}** A jury trial began on October 20, 2009. During the trial, the State moved to dismiss the count of having a weapon while under a disability. The defense did not object. Furthermore, at the close of the State's case, defense counsel moved to acquit, which the court denied.

**{¶11}** Appellant ultimately was found guilty of aggravated robbery with a firearm specification.

**{¶12}** On December 7, 2009, the trial court sentenced appellant to four years in prison on the aggravated robbery count, plus three years on the firearm specification, to run consecutively for a total sentence of seven years.

**{¶13}** On December 11, 2009, appellant filed a notice of appeal. He herein raises the following six Assignments of Error:

**{¶14}** "I. APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED AS INSUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO FIND THAT HE HAD A DEADLY WEAPON UNDER HIS CONTROL, AND THAT HE RECKLESSLY DISPLAYED THE WEAPON, BRANDISHED IT, INDICATED THAT HE POSSESSED IT, OR USED IT.

**{¶15}** "II. APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED AS INSUFFICIENT [EVIDENCE] WAS PRESENTED AT TRIAL TO PROVE THAT HE HAD A FIREARM ON OR ABOUT HIS PERSON OR UNDER HIS CONTROL, AND RECKLESSLY EITHER DISPLAYED THE FIREARM, BRANDISHED THE FIREARM, INDICATED THAT HE POSSESSED THE FIREARM OR USED IT TO FACILITATE THE OFFENSE.

**{¶16}** "III. THE TRIAL COURT DID NOT SUFFICIENTLY INQUIRE AS TO APPELLANT'S COMPLAINTS ABOUT HIS APPOINTED COUNSEL TO DETERMINE WHETHER APPELLANT'S COMPLAINTS WERE SUBSTANTIATED.

**{¶17}** "IV. THE TRIAL COURT ABUSED ITS DISCRETION IN CALLING MS. SHAWNA HOPSON AS ITS WITNESS UNDER CRIMINAL RULE 614 FOR THE SOLE PURPOSE OF ALLOWING THE STATE OF OHIO TO IMPEACH HER WITH PRIOR TESTIMONY, AS THIS DENIED THE APPELLANT THE RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT.

**{¶18}** "V. THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL PURSUANT TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY PERMITTING THE STATE OF OHIO TO CALL MS. LORRIE SANDERSON AND INTRODUCE IMPROPER IMPEACHMENT EVIDENCE.

**{¶19}** "VI. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

**{¶20}** In his First Assignment of Error, appellant contends his conviction for aggravated robbery was not supported by sufficient evidence. We agree.

**{¶21}** In reviewing a claim of insufficient evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. "For purposes of establishing the crime of aggravated robbery, a jury is entitled to draw all reasonable inferences from the evidence presented that the robbery was committed with the use of a gun * * *." *State v. Vondenberg* (1980), 61 Ohio St.2d 285, syllabus.

**{¶22}** R.C. 2911.01(A)(1) states as follows: "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 *** [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]"

**{¶23}** In the case sub judice, evidence pertaining to appellant's use of a gun during the attempted hold-up is found in three places in the record: (1) The testimony of the victim, Gerrick; (2) The testimony of witness Melinda Snider; and (3) The subsequent discovery by Detective Barbeau of two loaded handguns in the Jeep used in the getaway.

**{¶24}** At trial, Gerrick testified on direct examination that in the Meijer lot, a man wearing a mask and a hoodie quickly approached him "somewhere between a slow

walk and a quick walk." Tr. at 50. The man simply said "give me the money." Tr. at 52. Gerrick noticed the man had his right hand in his hoodie pocket. Id. Gerrick recalled being "caught off guard," so he "decided to run." Tr. at 53. Gerrick never stated during direct that he saw or sensed the presence of a gun.

**{¶25}** During cross-examination by defense counsel, Gerrick testified in pertinent part as follows:

**{¶26}** "Q. And at that ten feet, I think you indicated [the suspect] got to within three or four feet of you; right?

**{¶27}** "A. Uh-huh.

**{¶28}** "Q. You have to say yes or no.

**{¶29}** "A. Yes.

**{¶30}** "Q. Did that person ever touch you?

**{¶31}** "A. No.

**{¶32}** "Q. Did he ever grab you?

**{¶33}** "A. No.

**{¶34}** "Q. Kick at you or swing at you in any way?

**{¶35}** "A. No.

**{¶36}** "Q. And I believe the quote - - you said the only thing he said was, 'give me the money'?

**{¶37}** "A. That's correct.

**{¶38}** "Q. That person didn't say that he had a weapon?

**{¶39}** "A. No.

**{¶40}** "Q. And you certainly didn't see a weapon; right?

**{¶41}** "A. No, I did not.

**{¶42}** "* * *

**{¶43}** "Q. You knew that somebody was trying to get money out of you?

**{¶44}** "A. Correct.

**{¶45}** "Q. But you didn't know what to do about it?

**{¶46}** "A. No.

**{¶47}** "Q. And it's safe to say at that point, you weren't even sure there was a weapon there?

**{¶48}** "A. That's correct.

**{¶49}** "Q. And based on your observation, that could have been a balled-up fist?

**{¶50}** "A. That's correct.

**{¶51}** "Q. It could have just be a hand in the pocket?

**{¶52}** "A. That's correct." Tr. at 58, 60.

**{¶53}** At least one Ohio appellate case suggests that a conviction under R.C.2911.01(A)(1) requires proof of more than a defendant approaching a victim and demanding money while simply holding his or her hand in their pocket. See *State v. Knight*, Greene App.No. 2003CA14, 2004-Ohio-1941. In that case, the defendant was convicted of aggravated robbery based upon his entrance into a store with both hands in his jacket pockets, telling the clerk to open the cash register. Id. at ¶20. The cashier in *Knight* testified that although she never saw the defendant display a gun, even when he took his hands out to grab the money, she believed the defendant possessed a gun, and she gave him access to the register based on that belief. Id. at ¶20-¶28. Although

the Second District Court of Appeals found the State's evidence to be legally sufficient, the Court nonetheless reasoned: "If [the cashier] had merely testified that Knight had approached her with his hands in his pockets, we would agree that the state's evidence was insufficient." Id. at ¶20.

**{¶54}** Similarly, in a case from this Court, *State v. Patterson* (March 14, 1994), Stark App.No. 9435, 1994 WL 115952, we reversed an aggravated robbery conviction, in part finding "[t]here was no evidence that the 'produce' knife was brandished or its presence ever suggested by [the defendant] either through verbal statement or by furtive gesture at any time during the entire course of events."[1]

**{¶55}** Appellant in the case sub judice has challenged his aggravated robbery conviction where the victim, Gerrick, never testified that he saw a gun or even thought appellant was carrying one. The State essentially responds that any weaknesses in Gerrick's testimony are compensated by the additional evidence supplied by Snider and Detective Barbeau. As set forth in our recitation of facts, supra, the record in the case sub judice reveals that prosecution witness Melinda Snider, an employee of the day care center near the parking lot, testified that as the suspect ran in front of her, it appeared as if he was carrying something tucked under his right arm, although she did not see such item. Furthermore, about an hour after the incident, Detective Barbeau located two loaded handguns in Hopson's Jeep, which had been identified by license plate number as the vehicle into which the fleeing suspect had entered.

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[1] It is worth noting that the statute in effect at the time simply required the prosecution to prove the accused had " *** a deadly weapon or dangerous ordnance *** on or about his person or under his control."

**{¶56}** We reiterate that due process requires the State to prove every element of the crime charged beyond a reasonable doubt. See, e.g., *State v. Nucklos,* 171 Ohio App.3d 38, 44, 869 N.E.2d 674, 2007-Ohio-1025, (additional citations omitted). Upon full review in this instance, including Snider's and Barbeau's above testimony, while indeed there was a limited measure of circumstantial evidence of appellant's possession of a firearm during the attempted holdup of Gerrick, in assessing the evidence before us in a light most favorable to the prosecution, we cannot conclude that reasonable triers of fact could have found, beyond a reasonable doubt, that appellant displayed, brandished or used a weapon, or, at least, "indicated" that he possessed a weapon, as required under R.C. 2911.01(A)(1) for the crime of aggravated robbery.

**{¶57}** Appellant's First Assignment of Error is therefore sustained.

II., III., IV., V., VI.

**{¶58}** Based on our analysis of appellant's first Assigned Error, we need not analyze the arguments in Assignments of Error II, III, IV, V, and VI, which are hereby found to be moot.

**{¶59}** For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Delaware County, Ohio, is hereby reversed, and appellant's conviction, firearm specification, and sentence are vacated.

By: Wise, J.
Gwin, P. J., and
Hoffman, J., concur.

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JUDGES

JWW/d 1027

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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|---|---|---|
| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | |
| -vs- | : | JUDGMENT ENTRY |
| DANIEL M. BOHANNA | : | |
| Defendant-Appellant | : | Case No. 09CAA120103 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is reversed.

Costs assessed to appellee.

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JUDGES