[Cite as *State v. Hollabaugh*, 2010-Ohio-6600.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009 CA 00313
ROBERT HOLLABAUGH	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas Case No. 2009CR1527 (B)
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	December 30, 2010

APPEARANCES:

For Plaintiff-Appellee:

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Delaney, J.

{¶1} Defendant-Appellant, Robert Hollabaugh, appeals the judgment of the Stark County Court of Common Pleas, convicting him of one count of aggravated robbery with gun specification. The State of Ohio is Plaintiff-Appellee.

{¶2} On September 17, 2009, Appellant and Richard Cook, approached Durward Gower in the parking lot of the Eagles' building on Atlantic Avenue, in Canton, Ohio. Appellant and Cook were riding bicycles, and approached Gower as he was hanging his handicapped placard on his mirror in his car.

{¶3} Appellant, who was wearing a gray hoodie pulled over his head, a pair, of cut-off jean shorts, and was riding a red and white bicycle, asked Gower if he knew what time it was. Gower responded that it was 2:05 p.m., and at that time, Appellant pulled a handgun, pointed it at Gower and demanded that Gower give Appellant his money or he would blow Gower away.

{¶4} Cook pulled out a handgun as well and demanded that Gower give him his car stereo. Gower took all of the money out of his wallet and gave it to Appellant, but was unable to remove the stereo from the dashboard. Appellant and Cook then rode away from Gower. Gower immediately went inside the Eagles' building and called 9-1-1, telling the dispatcher that he had just been robbed. He gave a description that two white men robbed him. He described the first man as wearing a gray hoodie with the hood up, cut-off jean shorts, and riding a red and white bicycle. He described Cook as wearing a dark short sleeved shirt and riding a blue and white bicycle. He stated that Appellant's gun appeared to be a .32 caliber revolver that he believed looked like "dirty

stainless steel." He described Cook's gun as a black "Saturday night special" like he had seen on television.

{¶5} Approximately twenty minutes later, Canton Police Officers Michael McKay and Kevin Sedares both heard the dispatcher announce the robbery call with a description of both suspects. Officer McKay observed two men matching the description, riding their bicycles in the Save-a-Lot parking lot, close to the Eagles' building. He specifically noted that one of the men was wearing a gray hoodie with the hood up, which drew his attention based on the description and the fact that it was a warm day. McKay immediately radioed that he believed he had found the suspects and due to the fact that they were possibly armed, he requested back-up before approaching the suspects. Officer Sedares quickly approached from the opposite direction.

{¶6} Officer McKay briefly lost sight of the suspects, but found them again when Officer Sedares had stated that he saw them and stopped them close by. The officers searched both Appellant and Cook, but found no weapons on either of them.

{¶7} Gower was brought to the scene to see if he recognized either man. He immediately stated that the bicycles were the ones that the suspects who approached him were riding. He also immediately identified Cook as being the one riding the blue and white bicycle who demanded the car stereo. He had a harder time identifying Appellant because Appellant had pulled his hoodie down and unzipped it. He still made a positive identification of Appellant, but stated that it would be better if he could see him with his hoodie up.

{¶8} At trial, Gower positively identified the bicycles and identified Appellant as the first person who approached him, pulled a gun on him, and demanded money.

{¶9} Police officers located a .32 caliber gun next to a set of bicycle tracks close to where the suspects were apprehended. No fingerprints were found on the gun, but it was determined that Appellant could not be excluded as a DNA contributor on the gun.

{¶10} Appellant was recorded making a phone call from the jail after he was arrested and telling someone that the police had found his "burn," which is street slang for a handgun.

{¶11} Justin Cunningham also testified at trial that he saw Appellant with a gun the day before the robbery.

{¶12} Appellant was indicted on one count of aggravated robbery with a firearm specification. R.C. 2911.01(A)(1); R.C. 2941.145. Appellant proceeded to trial. At the conclusion of the trial, the jury found Appellant guilty as charged. The trial court sentenced Appellant to an aggregate prison term of ten years.

{¶13} Appellant now appeals, raising two Assignments of Error:

{¶14} "I. THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶15} "II. THE TRIAL [SIC] ERRED BY ADMITTING IRRELEVANT PREJUDICIAL TESTIMONY INTO EVIDENCE."

I.

{¶1} In his first assignment of error, Appellant argues that there was insufficient evidence to convict him of robbery and that his conviction was against the manifest weight of the evidence.

{¶2} When reviewing a claim of sufficiency of the evidence, an appellate court's role is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The 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. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶3} Conversely, when analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in 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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶4} In order to convict Appellant of aggravated robbery, the State would have to prove that Appellant while attempting or committing a theft offense, or in fleeing

immediately after the attempt or offense, had a deadly weapon on or about his person or under his control and either display the weapon, brandish it, indicate that he possessed it, or used it. R.C. 2911.01(A)(1).

{¶5} The evidence, as presented at trial, and when viewed in the light most favorable to the prosecution, was sufficient to support Appellant's conviction. Gower positively identified Appellant and Cook as the robbers and Appellant as the one who put the gun in his face and demanded the money. He was also able to positively identify the bicycles that the two men were on when they approached him. He also identified the hoodie that Appellant was wearing when he robbed Gower and when Appellant was arrested shortly thereafter. Gower described the gun that Appellant used as a .32 caliber pistol. The gun recovered next to the bicycle tracks and that Appellant could not be excluded as a DNA contributor was a .32 caliber pistol, which was tested and found to be in operating condition. Additionally, Appellant showed Justin Cunningham the day before the robbery that he had a gun on his person. This evidence is legally sufficient to support Appellant's conviction.

{¶6} Moreover, we do not see that the jury lost its way in convicting Appellant of aggravated robbery. Appellant offers no proof that the jury was influenced by improper motivations, or that the jury was swayed by bias, passion, or prejudice, resulting in a manifest miscarriage of justice. The jury was in the best position to view the credibility of the witnesses.

{¶7} Appellant's first assignment of error is overruled.

II.

{¶8} In Appellant's second assignment of error, he argues that the trial court erred in permitting the State to introduce inadmissible evidence under Evid. R. 404.

{¶9} Extrinsic acts may not typically be used to suggest that the accused has the propensity to act in a certain manner. Evid.R. 404; *State v. Smith* (1990), 49 Ohio St.3d 137, 140, 551 N.E.2d 190. However, there are exceptions. Evid.R. 404(B) allows such evidence where it is offered to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Additionally, R.C. 2945.59 provides, "In any criminal case in which the defendant's motive or intent * * * is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶10} If a court finds that evidence was inadmissible under Evid. R. 404(B), the court can still determine that the error was harmless. The Supreme Court of Ohio has held that error is harmless if "there is no reasonable possibility that the evidence may have contributed to the accused's conviction." *State v. Drew*, 10th Dist. No. 07AP-467, 2008-Ohio-2797. at ¶31, quoting *State v. Bayless* (1976), 48 Ohio St.2d 73, 357 N.E.2d 1035, paragraph seven of the syllabus. Moreover, it is appropriate to find error harmless where there is "either overwhelming evidence of guilt or some other indicia that the error did not contribute to the conviction." *State v. Ferguson* (1983), 5 Ohio St.3d 160, 166, fn. 5, 450 N.E.2d 265. "When considering whether error is harmless, our judgment is

based on our own reading of the record and on what we determine is the probable impact the statement had on the jury." *State v. Drew*, supra, citing See *State v. Kidder* (1987), 32 Ohio St.3d 279, 284, 513 N.E.2d 311.

{¶11} Specifically, the evidence that Appellant complains of is the testimony of Justin Cunningham. During Cunningham's testimony, he stated that Appellant was riding Cunningham's bicycle the day before the robbery and that the bicycle had been stolen from Cunningham recently. Cunningham testified that he spoke with Appellant the day before the robbery and he saw that Appellant had a gun concealed in the front waistband of his pants.

{¶12} Defense counsel objected to this testimony at trial. Appellee argued that the evidence complained of was admissible under Evid. R. 404(B) to show Appellant's identity at the time of the crime.

{¶13} The trial court immediately gave a limiting instruction, informing the jury as follows:

{¶14} "And the Court would instruct you that this defendant is not accused of, nor charged with, ah, stealing a bike, specifically this gentleman's bike. Ah, that that, ah, testimony is being elicited is only for the purpose of understanding why there was interaction, if there was interaction between this witness and the defendant.

{¶15} "So I do not want you to think that because a bike may have been stolen that this particular individual, the defendant, had anything to do with that, that he's accused of that.

{¶16} "Any testimony with regards to a weapon, ah, goes only to the issue of identification of the defendant, ah, and is not elicited to show the character of this defendant or that he acted in conformity with that, ah, character."

{¶17} We find this evidence to have been properly admitted, particularly in light of Appellant's argument that he did not have a gun on his person when he was arrested.

{¶18} Assuming, arguendo, that this evidence was admitted in error under Evid. R. 404(B), we would determine that the error was harmless. The Supreme Court of Ohio has held that error is harmless if "there is no reasonable possibility that the evidence may have contributed to the accused's conviction." *State v. Drew*, 10th Dist. No. 07AP-467, 2008-Ohio-2797, at ¶31, quoting *State v. Bayless* (1976), 48 Ohio St.2d 73, 357 N.E.2d 1035, paragraph seven of the syllabus. Moreover, it is appropriate to find error harmless where there is "either overwhelming evidence of guilt or some other indicia that the error did not contribute to the conviction." *State v. Ferguson* (1983), 5 Ohio St.3d 160, 166, fn. 5, 450 N.E.2d 265. "When considering whether error is harmless, our judgment is based on our own reading of the record and on what we determine is the probable impact the statement had on the jury." *State v. Drew*, supra, citing See *State v. Kidder* (1987), 32 Ohio St.3d 279, 284, 513 N.E.2d 311.

{¶19} We find this evidence to have been properly admitted, particularly we do not find that the admission of this evidence unfairly prejudiced Appellant; any error, if there was error, would be harmless. As previously stated, the admission of prior bad acts is deemed harmless unless there is some reasonable probability the evidence contributed to the accused's conviction, *City of Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 529 N.E.2d 1382.

{¶20} Because fairness is subjective, the determination whether evidence is unfairly prejudicial is left to the sound discretion of the trial court and will be overturned only if the discretion is abused. *State v. Robb* (2000), 88 Ohio St.3d 59, 68, 723 N.E.2d 1019. "As a legal term, 'prejudice' is simply "[d]amage or detriment to one's legal rights or claims." Black's Law Dictionary (8th Ed.1999) 1218. Thus, it is fair to say that all relevant evidence is prejudicial. That is, evidence that tends to disprove a party's rendition of the facts necessarily harms that party's case. Accordingly, the rules of evidence do not attempt to bar all prejudicial evidence - to do so would make reaching any result extremely difficult. Rather, only evidence that is unfairly prejudicial is excludable." *State v. Crotts* (2004), 104 Ohio St.3d 432, at ¶23, 820 N.E.2d 302.

{¶21} "'Exclusion on the basis of unfair prejudice involves more than a balance of mere prejudice. If unfair prejudice simply meant prejudice, anything adverse to a litigant's case would be excludable under Rule 403. Emphasis must be placed on the word "unfair." Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision. Consequently, if the evidence arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial. Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect.'" Id. at ¶24 quoting *Oberlin v. Akron Gen. Med. Ctr*. (2001), 91 Ohio St.3d 169, 172, 743 N.E.2d 890, quoting Weissenberger's Ohio Evidence (2000) 85-87, Section 403.3.

{¶22} We have reviewed the record, and we find there is no reasonable probability this evidence actually contributed to Appellant's conviction. There was a positive identification of Appellant by the victim, police officers found Appellant and

Cook quickly after the robbery, and Appellant was recorded at the jail stating that the police had found his “burn”, the gun which his DNA could not be excluded from.

{¶23} Appellant’s second assignment of error is overruled.

{¶24} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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	:	
ROBERT HOLLABAUGH	:	
	:	
Defendant-Appellant	:	Case No. 2009 CA 00313
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to Appellant.

_____
HON. PATRICIA A. DELANEY

_____
HON. JULIE A. EDWARDS

_____
HON. WILLIAM B. HOFFMAN