[Cite as *State v. Sherman*, 2016-Ohio-4967.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
DEVONTE L. SHERMAN,	:	Case No. 2015 AP 12 0067
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Tuscarawas County Court of Common Pleas, Case No. 2014 CR 11 0332
JUDGMENT:	Affirmed in part, reversed in part and remanded for imposition of costs
DATE OF JUDGMENT:	July 11, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MICHAEL J. ERNEST Assistant Prosecuting Attorney 125 E. High Avenue New Philadelphia, Ohio 44663	MARK A. PERLAKY Assistant Public Defender 153 N. Broadway St New Philadelphia, Ohio 44663

Baldwin, J.

{¶1} Appellant Devonte L. Sherman appeals a judgment of the Tuscarawas County Common Pleas Court convicting him of aggravated robbery (R.C. 2911.01(A)(1)) with a firearm specification (R.C. 2941.145(A)). Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On October 28, 2014, James Barnett and his girlfriend, Tiara Smothers, traveled from Canton to New Philadelphia, Ohio, to visit Barnett's friend, Kody Hidey. Appellant was also a friend of Kody Hidey. As Barnett and Smothers were returning to Canton, Barnett received a phone call from appellant, who was using Hidey's cell phone. Appellant asked for a gun.

{¶3} Barnett retrieved his roommate's gun, and Barnett and Smothers traveled back to New Philadelphia. Jeremiah Carlton also arrived at Hidey's apartment. Smothers overheard the group discussing "hitting a lick," or robbing someone. Tr. 247. Barnett gave the gun to appellant, and the men all left Hidey's apartment. Appellant was wearing all dark clothing, with a red bandana.

{¶4} Barnett drove appellant to the area of Marty's Coach's Corner, a convenience store in New Philadelphia. Barnett parked in a vacant church lot, while appellant left the vehicle. When appellant returned to the car, he had a bag of money with him. He told Barnett he got the money from Marty's.

{¶5} Appellant and the other men returned to Hidey's apartment about 30-45 minutes after they left. Smothers saw appellant dump a bag of money on the living room floor. The bag of money was in the form of bills and rolls of change. The men divided the money. Smothers heard appellant say that when he ran inside, he had to let them

know he meant business, so he cocked the gun. He noted that a bullet fell out when he cocked the gun.

{¶6} Appellant traveled back to Canton with Smothers and Barnett. In the car he said if they got caught, he would take the blame. The next day Smothers and Barnett dropped appellant off in Akron, and he apologized for putting them in this situation.

{¶7} Ben Cooley and Lee Stanley were working the night shift at Marty's on October 28, 2014. A man came into the store wearing a bandana pulled over part of his face, with a hood up. Because it was trick or treat night, Cooley thought the man was a customer playing a joke. Cooley was changing the trash at the time, and chuckled so as not to offend the customer, although he did not think the costume was funny. The man put a gun in Cooley's face and said, "This isn't a joke." Tr. 327. The man threatened to kill Cooley, and ordered him to get behind the counter. He then directed the gun at Stanley and told him to open the register. The man took a bag out of his pocket and told Stanley to put the money in the bag. While Stanley complied, the man poked Stanley in the ribs with the gun. He then asked Stanley where the safe was. Stanley then put rolled change from the safe into the bag. The gunman retrieved close to $1,000.00 from the store.

{¶8} Cooley described the gunman to police as an African-American man with medium complexion, who was slightly taller than Lee Stanley. Police received a tip from Charla Hamilton, appellant's ex-girlfriend, that appellant might be involved in the robbery. On the day of the robbery, she received text messages from Kody Hidey's phone that she believed to be from appellant, as he lost his phone and was using Hidey's phone. She received a text message on October 28, 2014, stating, "you got moves." Tr. 439. She

responded, "what you mean," to which appellant replied, "come ups." Tr. 439-440. She interpreted appellant's statements to mean that he was looking for a way to get money in an illicit manner.

{¶9} After receiving a tip from Hamilton, Det. Shawn Nelson of the New Philadelphia Police Department met with Barnett at Barnett's place of employment. Barnett blurted out that he was the wheel man, he had brought the gun from Canton, and they committed the armed robbery at Marty's.

{¶10} Police put together a photo lineup using a tool called The Lineup Wizard. Det. Chaz Willett of the New Philadelphia Police Department inserted relevant information regarding height, weight, age, hair color, and eye color into the program, and it generated individuals who fit similar categories with appellant. A lineup of six photos was supplied to Det. Nelson, who showed the photos to both Cooley and Stanley individually. Each man picked appellant out of the lineup as the man who robbed Marty's.

{¶11} Det. Nelson then interviewed appellant, who denied any involvement in the robbery. He told Det. Nelson that his brother picked him up in New Philadelphia on October 28 and drove him to Akron. He also told Det. Nelson that he was unclear about the details of the day because he smokes a lot of marijuana.

{¶12} Appellant was indicted by the Tuscarawas County Grand Jury with one count of aggravated robbery with a firearm specification. A jury trial began on July 7, 2015. On July 10, 2015, the jurors sent a note to the court that they were deadlocked, 11 votes not guilty, one vote guilty. The note further stated that it was the consensus of the jury that this would not change with further deliberations. The trial court polled the jurors

individually, and all 12 jurors indicated that their votes would not change. The court declared a mistrial.

{¶13} On July 15, 2015, appellee filed a request to set a new jury trial. Appellant filed a motion to dismiss the indictment on August 27, 2015, alleging that the jury was improperly discharged in the first case and the mistrial was improper, and thus his retrial was barred by double jeopardy. A hearing on the motion was held before a different judge than the judge who declared the mistrial. The motion was overruled, and the case proceeded to a second jury trial. Appellant was convicted as charged, and sentenced to four years incarceration for aggravated robbery and three years incarceration for the firearm specification, to be served consecutively.

{¶14} Appellant assigns four errors on appeal:

{¶15} "I. THE TRIAL COURT ERRED BY NOT DISMISSING THE CASE UPON MOTION OF APPELLANT, AS DOUBLE JEOPARDY BARRED HIS RETRIAL.

{¶16} "II. THE TRIAL COURT ERRED BY ADMITTING TEXT MESSAGES AND PHOTOGRAPHS PURPORTEDLY SENT AND CREATED BY APPELLANT, AS APPELLEE FAILED TO LAY A PROPER FOUNDATION, AND SAID MESSAGES WERE HEARSAY NOT SUBJECT TO ANY EXCEPTION.

{¶17} "III. THE JURY'S VERDICT OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶18} "IV. THE TRIAL COURT ERRED IN FAILING TO ADDRESS THE IMPOSITION OF COURT COSTS IN OPEN COURT."

I.

{¶19} Appellant argues that his retrial was barred by double jeopardy. He argues that the court abused its discretion in failing to give the jury an instruction pursuant to *State v. Howard,* 42 Ohio St. 3d 18, 537 N.E.2d 188(1989) after they indicated that they were deadlocked, and that as a result there was no manifest necessity for a mistrial. As such, the jury was improperly discharged and jeopardy attached to his first trial, barring his retrial which resulted in conviction.

{¶20} When a judge discharges a jury on the grounds that the jury cannot reach a verdict, the Double Jeopardy Clause does not bar a new trial of the defendant. *Renico v. Lett,* 130 S.C.t 1855, 176 L.E.2d 678 (2010), citing *United States v. Perez,* 22 U .S. 579, 6 L.Ed. 165 (1824). In *Renico,* the United States Supreme Court provided guidance for reviewing a decision of a trial court to declare a mistrial based on a hung jury:

> In particular, '[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is ... accorded great deference by a reviewing court.' *Washington,* 434 U.S., at 510, 98 S.Ct. 824. A 'mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial.' *Id.,* at 509, 98 S.Ct. 824; see also *Downum v. United States,* 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963) (deadlocked jury is the 'classic example' of when the State may try the same defendant twice).
>
> The reasons for 'allowing the trial judge to exercise broad discretion' are 'especially compelling' in cases involving a potentially deadlocked jury. *Washington,* 434 U.S., at 509, 98 S.Ct. 824. There, the justification for deference is that 'the trial court is in the best position to assess all the factors

which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate.' *Id.,* at 510, n. 28, 98 S.Ct. 824. In the absence of such deference, trial judges might otherwise 'employ coercive means to break the apparent deadlock,' thereby creating a 'significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.' *Id.,* at 510, 509, 98 S.Ct. 824.

This is not to say that we grant *absolute* deference to trial judges in this context. *Perez* itself noted that the judge's exercise of discretion must be 'sound,' 9 *Wheat,* at 580, 6 L.Ed. 165, and we have made clear that '[i]f the record reveals that the trial judge has failed to exercise the "sound discretion" ' entrusted to him, the reason for such deference by an appellate court disappears.' *Washington,* 434 U.S., at 510, n. 28, 98 S.Ct. 824. Thus 'if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate.' *Ibid.* Similarly, 'if a trial judge acts irrationally or irresponsibly, ... his action cannot be condoned .' *Id.,* at 514, 98 S.Ct. 824 (citing *United States v. Jorn,* 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), and *Somerville, supra,* at 469, 93 S.Ct. 1066).

We have expressly declined to require the 'mechanical application' of any 'rigid formula' when trial judges decide whether jury deadlock warrants a mistrial. *Wade v. Hunter,* 336 U.S. 684, 691, 690, 69 S.Ct. 834, 93 L.Ed. 974 (1949). We have also explicitly held that a trial judge declaring

> a mistrial is not required to make explicit findings of 'manifest necessity' nor to 'articulate on the record all the factors which informed the deliberate exercise of his discretion.' *Washington, supra,* at 517, 98 S.Ct. 824. And we have never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse. In 1981, then-Justice Rehnquist noted that this Court had never 'overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the "manifest necessity" standard had not been met.' *Winston v. Moore,* 452 U.S. 944, 947, 101 S.Ct. 3092, 69 L.Ed.2d 960 (opinion dissenting from denial of certiorari). The same remains true today, nearly 30 years later. *Id.* at 1863–64.

{¶21} In making a determination as to whether a jury is deadlocked, the court must evaluate each case based on its own particular circumstances. *State v. Mason*, 82 Ohio St.3d 144, 167, 694 N.E.2d 932 (1998). There is no bright-line test to determine what constitutes an irreconcilably deadlocked jury. *State v. Brown*, 100 Ohio St.3d 51, 60, 2003-Ohio-5059, 796 N.E.2d 506, 516, ¶ 37.

{¶22} In *Howard, supra,* the Ohio Supreme Court set forth a supplemental jury instruction to be used in cases when the court sends a deadlocked jury back for further deliberations. However, nothing in the *Howard* decision suggests that the court does not possess the discretion to declare a mistrial when a jury is deadlocked without first giving

the *Howard* charge and sending them back for further deliberations. Accordingly, a trial court's decision whether to give a *Howard* instruction is within its discretion. *State v. Howard*, 2nd Dist. Montgomery No. 23795, 2011-Ohio-27, ¶ 63.

{¶23} In the instant case, we find no abuse of discretion in the trial court's decision to grant a mistrial rather than sending the jury back for further deliberations with a *Howard* instruction.

{¶24} The transcript of July 10, 2015, reflects that after deliberating for about one day, reviewing the audio recordings of the testimony of Barnett, Cooley, and Nelson, and viewing again the police interview of appellant and the security tape from Marty's, the foreman asked the judge what happens if they cannot unanimously agree. The court explained that after a reasonable period of time, as determined by the judge, if the jury remained deadlocked the court could declare a mistrial. The court told the jury to not consider the judge's authority to declare a mistrial in their deliberations, and to go back to the jury room and continue deliberations. Tr. 7/10/15, 2.

{¶25} Later the same day, after deliberating seven or eight hours over two days, the jury sent a note saying, "We, the jury, are deadlocked. 11 votes not guilty, one vote guilty. The consensus of the jury is that this will not change with further deliberation." The judge indicated to counsel that he would bring the jury into the courtroom and question each one individually as to whether further deliberations would result in a unanimous verdict, and if the jurors indicated that their vote would not change, he would declare a mistrial. Counsel for appellant indicated that he felt it would be appropriate for the court to read "the typical instruction" when a jury is deadlocked and send them back for further deliberations. Tr. 7/10/15, 6. However, counsel then indicated that perhaps it

would be best to declare a mistrial. Tr. 7/10/15, 7. After discussing the issue with appellant, counsel indicated that he would like the instruction read. The court declined to give the instruction but indicated to counsel that if there was any doubt in his mind after questioning the jury that further deliberations could result in a unanimous verdict, he would send them back to continue deliberations.

{¶26} The jury was brought into the courtroom, and the judge questioned each juror individually. Each juror answered that no matter how long they deliberated, they would not change their vote. The trial court then declared a mistrial and discharged the jury.

{¶27} We do not find that the court abused its discretion in declaring a mistrial rather than giving the jury the *Howard* instruction and sending them back for further deliberations. The jury had deliberated for seven or eight hours, and had reviewed substantial portions of the testimony from the audio recordings. The note sent to the court indicated that they were deadlocked and this would not change with further deliberation, and each juror individually represented that their vote would not change with further deliberations. The trial court was in a better position than this Court to observe the jurors and determine whether they were irreconcilably deadlocked or whether further deliberations would result in a unanimous verdict.

{¶28} Because the court did not err in granting a mistrial, jeopardy did not attach to his first trial and the court did not err in overruling his motion to dismiss the indictment on double jeopardy grounds. The first assignment of error is overruled.

II.

{¶29} In his second assignment of error, appellant argues that the court erred in admitting the text messages from Kody Hidey's phone to Charla Hamilton, as they were not properly authenticated and constitute inadmissible hearsay.

{¶30} Under Evid.R. 901(A), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This rule invokes a very low threshold standard, requiring only sufficient foundational evidence for the trier of fact to conclude that the item is what the proponent claims it to be. *State v. Roseberry,* 197 Ohio App.3d 256, 268, 2011-Ohio-5921, 967 N.E.2d 233, 242, ¶ 65 (8th Dist.). This standard is less demanding than preponderance of the evidence. *Id*. The proponent must demonstrate only a "reasonable likelihood" that the evidence is authentic, which may be supplied by the testimony of a witness with knowledge. *Id.;* Evid.R. 901(B).

{¶31} In *State v. Huge*, 1st Dist. Hamilton No. C-120388, 2013-Ohio-2160, the court found that the witness's testimony that texting was her normal means of communication with the defendant, and that the text message had been sent from the defendant and saved to her phone, was sufficient to authenticate the message under Evid.R. 901. *Id.* at ¶29. The defendant's argument alleging a lack of proof that he had actually sent the message concerns the weight of the evidence, rather than its authenticity. *Id.*

{¶32} In the instant case, Charla Hamilton was the recipient of the text messages at issue. Det. Nelson seized Hidey's phone, which was sent to BCI and data was copied from the phone. BCI copied this data and provided the results to the New Philadelphia Police Department, as testified to by Special Agent Richard Warner. Hamilton identified

the messages on the printout that she received on her cell phone from Hidey's phone as coming from appellant, as appellant had lost his phone and was using Hidey's phone to communicate with her. She testified that she had no reason to communicate with Hidey, and Hidey would never text her. She spoke directly to appellant on Hidey's phone on the same day. During the time that Hamilton believed she was texting with appellant on Hidey's phone, she received a text that said Hidey needed the phone that night, lending further credence to her belief that she was communicating with appellant and not with Hidey. Although he denied using the phone on October 28, 2014, appellant did admit to Det. Nelson that he sometimes used Hidey's phone. Further, James Barnett testified that appellant called him from Hidey's phone on the day of the robbery to tell Barnett that he needed a gun. The testimony was sufficient to authenticate the text messages as coming from appellant.

{¶33} Appellant also argues that the State did not lay a proper foundation for admission of the records under the "business records" exception to the hearsay rule found in Evid. R. 803(6). He argues that the person who testified concerning the records was an employee of BCI and not of the cellular phone company, and this witness could not lay a proper foundation for admission of the records pursuant to the business records exception to the hearsay rule.

{¶34} However, Evid. R. 801(D)(2) provides that a statement is not hearsay if it is offered against a party and is the party's own statement. As discussed above, there was evidence presented that the text messages sent from Hidey's phone to Charla Hamilton were the statements of appellant, as appellant used Hidey's phone on October 28, 2014, having lost his own telephone. The statements were not hearsay pursuant to Evid. R.

801(D)(2), and therefore the State did not need to lay a foundation for their admission under the business records exception to the hearsay rule found in Evid. R. 803(6).

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

III.

{¶36} In his third assignment of error, appellant argues that the judgment convicting him of aggravated robbery is against the manifest weight and sufficiency of the evidence.

{¶37} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts 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 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.'" *State v. Thompkins*, 78 Ohio St. 3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983).

{¶38} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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*, 61 Ohio St. 3d 259, 574 N.E.2d 492, paragraph two of the syllabus (1991).

{¶39} Appellant was convicted of aggravated robbery in violation of R.C. 2911.01(A)(1):

{¶40} "(A) 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:

{¶41} "(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[.]"

{¶42} Appellant argues that the lineup presented to Cooley and Stanley was compiled without regard to skin tone of the perpetrator, and that appellant never admitted to perpetrating the robbery during his interrogation by Det. Nelson. He argues that Barnett did not know him very well, could not account for the whereabouts of the other co-defendants, could not explain why appellant was gone for half an hour prior to the commission of the offense, and admitted to drinking and smoking marijuana that night. He argues the text messages were not properly authenticated, that Hamilton admitted that appellant had never asked her a question before about locations that would be easy to rob, and that he denied involvement when she confronted him about the robbery at Marty's.

{¶43} Tiara Smothers testified that on October 28, 2014, she traveled with her boyfriend James Barnett from Canton to New Philadelphia. She overheard appellant, Hidey, and Barnett talking about robbing someone. She saw Barnett hand a gun to appellant. The group of men left and then returned to the apartment, where Smothers was waiting. Appellant dumped a sack of money on the floor which the men divided. She testified that appellant said when he ran inside the convenience store, he had to let them know he was serious and so he cocked the gun. She heard appellant say that a bullet

fell out when he cocked the gun, and evidence was later presented that a bullet was found at the scene. While driving back to Stark County with appellant in the car, appellant said if they got caught he would take the blame, and the next day he apologized for putting them in this situation.

{¶44} James Barnett testified that appellant called him from Hidey's phone on October 28, 2014, and said he needed a gun. Barnett took his roommate's gun to appellant. He drove appellant to the area of Marty's Coach's Corner, and waited in a vacant church parking lot. When appellant returned, he had a bag of money, which he said he got from Marty's.

{¶45} Ben Cooley and Lee Stanley testified that they were working the night shift at Marty's on October 28, 2014. A man came into the store wearing a bandana pulled over part of his face, with a hood up. Because it was trick or treat night, Cooley thought the man was a customer playing a joke. Cooley was changing the trash at the time, and chuckled so as not to offend the customer, although he did not think it was funny. The man put a gun in Cooley's face and said, "This isn't a joke." Tr. 327. The man threatened to kill Cooley, and ordered him to get behind the counter. He then directed the gun at Stanley and told him to open the register. The man took a bag out of his pocket and told Stanley to put the money it. While Stanley complied, the man poked Stanley in the ribs with the gun. He then asked Stanley where the safe was. Stanley then put rolled change from the safe into the bag. The gunman retrieved close to $1,000.00 from the store. Cooley described the gunman to police as an African-American man with medium complexion, who was slightly taller than Lee Stanley. Both Cooley and Stanley picked appellant's picture from a lineup, and identified appellant in the courtroom as the man

who robbed Marty's. Although appellant argues that the lineup did not include men of similar complexion to appellant, he does not challenge admission of the lineup identification on appeal, and the jury had the opportunity to view the lineup and consider appellant's argument that it did not include others who matched Cooley's description of the robber as having a medium complexion.

{¶46} Charla Hamilton testified that she received messages from appellant, who was communicating with her on Hidey's phone, asking "you got moves." Tr. 439. When she asked what he meant, he said, "come ups." Tr. 440. She interpreted the messages as referring to getting money in an illicit manner. She further identified appellant on the security video of the robbery of Marty's Coach's Corner.

{¶47} The state presented sufficient evidence, if believed by the jury, to convict appellant of aggravated robbery. Further, the jury did not lose its way in finding appellant guilty, and the judgment is not against the manifest weight of the evidence.

{¶48} The third assignment of error is overruled.

IV.

{¶49} In his final assignment of error, appellant argues that the court erred in failing to address the imposition of court costs at his sentencing hearing.

{¶50} The Supreme Court of Ohio has held that although R.C. § 2947.23(A)(1) mandates that in all criminal cases the court shall include in the sentence the costs of prosecution, it is error for the trial court to impose those costs without orally notifying the defendant at the sentencing hearing. *State v. Joseph,* 125 Ohio St.3d 76, 2010–Ohio–954, 926 N.E.2d 278, ¶ 22. The remedy for the omission is to remand the case for the

limited purpose of allowing the defendant an opportunity to move the court for a waiver of the payment of those costs. *Id.* at ¶23.

{¶51} The record of the sentencing hearing reflects that the trial court failed to address the imposition of costs, and both parties agree that a limited remand is thus appropriate in this case.

{¶52} The fourth assignment of error is sustained.

{¶53} The judgment of the Tuscarawas County Common Pleas Court is reversed only as to the imposition of costs. In all other respects, the judgment is affirmed. This cause is remanded for proper imposition of costs in accordance with R.C. 2947.23(A)(1). Costs of the appeal are to be assessed 75% to appellant and 25% to appellee.

By: Baldwin, J.

Gwin, P.J. and

Hoffman, J. concur.