[Cite as *State v. Newman*, 2010-Ohio-4180.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-090735 TRIAL NO. B-0902268
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
WAND NEWMAN,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 8, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Christine Y. Jones, for Defendant-Appellant.

SYLVIA SIEVE HENDON, Judge.

{¶1} Following a jury trial, defendant-appellant, Wand Newman, was convicted of two counts of robbery. The court imposed consecutive five-year prison sentences. Newman now appeals.

Weight and Sufficiency of the Evidence

{¶2} In his first, second, and third assignments of error, Newman challenges the weight and sufficiency of the evidence upon which his convictions were based, as well as the trial court's denial of his Crim.R. 29 motions for acquittal. He contends that the state failed to prove that he was the perpetrator of either robbery.

{¶3} In reviewing a challenge to the weight of the evidence, we sit as a "thirteenth juror."[1] We must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.[2]

{¶4} To determine whether a trial court has erred in overruling a Crim.R. 29 motion for an acquittal, the question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt.[3] We make the same inquiry in reviewing the sufficiency of the evidence.[4]

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[1] See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.
[2] Id.
[3] See *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.
[4] See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶5} At trial, the state presented evidence that Newman had robbed the same Family Video store on two different occasions within a week.

{¶6} The first robbery occurred on March 26, 2009, minutes before the store closed at midnight. Erica Thompson, a store clerk, testified that she and a male clerk, Chris Culbertson, were behind the counter when a man entered the store, pointed a gun at them, and demanded money. The man handed them a floral-print pillowcase, and the clerks dumped the contents of the cash register's money drawer into it. Then they gave the pillowcase back to the man, and he left the store.

{¶7} Culbertson called the police. He reported that the robber had worn a tan Carhartt jacket, blue jeans, and a black ski mask. He described the robber as a black male, about six feet two inches tall, "a big assed dude," and said that he had used a silver revolver.

{¶8} The second robbery happened on April 1, 2009, just before midnight. Lathronia Jefferson, a store manager, and another clerk were working. A man entered the store, pointed a gun at them, and demanded that they put money in a pillowcase that he had handed to them. Jefferson described it as a "light-colored pillowcase * * * [that] may have had a print on it." In addition, the robber grabbed Jefferson's purse, removed her wallet, and threw the purse on the floor. Then he snatched the pillowcase from Jefferson's hand and ran out the door.

{¶9} When Jefferson called the police, she described the robber as a light-skinned black man who wore a dark hooded jacket with fur around its collar, a checkered bandanna on the lower part of his face, blue jeans, and plastic gloves.

{¶10} Jefferson testified that, during the robbery, she had noticed freckles and a pock mark on the man's face. She realized that she had seen him before, and

that he had been a frequent customer of the store. She recalled that he had come to the store numerous times to inquire about a specific movie, *Harold and Kumar Go to White Castle*. She also recalled that the same customer had applied for a job at the store.

{¶11} When the police arrived, Jefferson told them that she had recognized the robber. She located Wand Newman's name in the rental history for the *Harold and Kumar* movie. She also found Newman's earlier employment application.

{¶12} Cincinnati Police arrested Newman the following day. Officer Darren Sellers interviewed Newman. At first, Newman claimed that, on the previous night, he had left home around 11:00 p.m. and had gone to a friend's house. A few hours later, he had driven to the Argosy casino. Newman said that he had not gotten home until about 3:00 a.m.

{¶13} Newman told Officer Sellers that he was six feet three inches tall and weighed about 225 pounds. He said that he owned a Carhartt coat, but that it was burgundy-colored, not tan. He denied owning a coat with fur around the collar.

{¶14} While Newman was being interviewed, other police officers executed a search at his home, which was located directly across the street from Family Video. Police found two coats hanging on the back of a door in Newman's bedroom. One coat was tan, and the other was black with a fur-trimmed hood. In Newman's car, police found a BB gun, a light-colored, floral-print pillowcase containing cash and coins, a latex glove, and a black scarf.

{¶15} So Officer Sellers confronted Newman with the seized items. At that point, Newman admitted that, on April 1, he had walked into Family Video, pointed a gun at the employees, and told them to put the money in a tan pillowcase. He said

that he had been wearing a black coat with fur on the hood, and that he had covered the lower part of his face. He added that he had taken one female employee's wallet from her purse.

{¶16} At first, Newman denied that he had robbed Family Video on March 26, but he soon confessed. He said that he had used a silver "play gun" and a light-colored pillow case.

{¶17} For the defense, a friend of Newman's testified that, at 11:00 p.m. on April 1, Newman had dropped him off at his girlfriend's home. He said that Newman had sent him a text message an hour later stating that he was almost at the Argosy Casino.

{¶18} Newman's girlfriend and her mother testified that Newman had come to their home on March 25 and had never stepped out of their home until March 29.

{¶19} The robbery statute, R.C. 2911.02(A)(2), provides that "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, attempt to inflict, or threaten to inflict physical harm on another."

{¶20} With respect to both charges, a jury could have reasonably concluded that Newman had pointed a gun at his victims while he demanded and received money from them. This conduct constituted a threat to inflict harm "because it intimidate[d] the victim[s] into complying with the command to relinquish property without consent."[5] Consequently, we hold that the state presented sufficient evidence that Newman had committed both robbery offenses.

[5] *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶23.

{¶21} We cannot say that the jury lost its way in rejecting Newman's alibis and finding him guilty. Accordingly, we hold that Newman's convictions were not against the manifest weight of the evidence. We overrule the first, second, and third assignments of error.

Equivocal Invocation of the Right to Counsel

{¶22} In his fourth assignment of error, Newman argues that his statements to police should have been suppressed because they were obtained in violation of *Miranda v. Arizona*.[6] Specifically, he contends that the police had continued to question him despite his request for counsel.

{¶23} During his interview with Newman, Officer Sellers told Newman that he was wasting the officer's time. Newman responded, "Well, mean, I guess it's done, then. I can get a lawyer and then we can settle up from there." Newman argues that his response was an unequivocal invocation of his right to counsel, and that all questioning should have stopped at that point.

{¶24} Police officers must immediately stop questioning a suspect who clearly asserts his right to counsel.[7] But "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him."[8] A suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[9]

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[6] (1966), 384 U.S. 436, 86 S.Ct. 1602.
[7] *Edwards v. Arizona* (1981), 451 U.S. 477, 101 S.Ct. 1880.
[8] *Davis v. United States* (1994), 512 U.S. 452, 461-462, 114 S.Ct. 2350; see, also, *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, 839 N.E.2d 362, ¶93.
[9] *Davis*, supra, at 459.

{¶25} Courts have held that statements such as "maybe I should talk to a lawyer,"[10] "[w]hen I talk to my lawyer,"[11] or "I think I need a lawyer"[12] are not unequivocal assertions of the right to counsel. Similarly, we hold that Newman's statement that "I can get a lawyer" was not a clear assertion of his right to counsel. Under the circumstances, a reasonable officer would not have understood Newman's statement to have been a request for an attorney. Because Newman's statement did not meet the requisite level of clarity, the officers were not required to stop questioning him. Consequently, the trial court did not err in overruling his motion to suppress the statements that he had made to police. The fourth assignment of error is overruled.

The Sentence

{¶26} In his fifth assignment of error, Newman argues that the trial court abused its discretion by imposing an excessive sentence.

{¶27} Trial courts have full discretion to impose a prison sentence within the statutory range for an offense.[13] When exercising that discretion, trial courts must still carefully consider the statutes that apply to every felony case, including R.C. 2929.11, R.C. 2929.12, and any statutes that are specific to the case itself.[14]

{¶28} In this case, the prison term imposed for each of the felonies was within the statutory range. Although the trial court did not specifically state that it had

[10] Id.
[11] *Jackson*, supra, at ¶95.
[12] *State v. Henness*, 79 Ohio St.3d 53, 62-63, 1997-Ohio-405, 679 N.E.2d 686.
[13] *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of syllabus.
[14] *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶38.

considered R.C. 2929.11 and 2929.12, we may presume that it did.[15] In light of the foregoing, Newman's sentence was not contrary to law.

{¶29} Moreover, the court considered the overwhelming evidence of Newman's guilt. The court noted that Newman had committed the two robbery offenses less than two years after he had been released from prison following a 2006 aggravated-robbery conviction. The court further noted that, in the 2006 offense, Newman and several others had robbed a store and had struck a store clerk with a shotgun.

{¶30} Under the circumstances, we cannot say that the trial court abused its discretion in sentencing Newman. Consequently, we overrule the fifth assignment of error and affirm the trial court's judgment.

Judgment affirmed.

CUNNINGHAM, P.J., and **SUNDERMANN, J.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

[15] *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, fn. 4, citing *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, paragraph three of the syllabus.