

[Cite as *State v. Hubbard*, 2010-Ohio-3910.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23363
v.	:	T.C. NO. 2008 CR 3580
HAROLD HUBBARD	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

**OPINION**

Rendered on the 20<sup>th</sup> day of August, 2010.

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WILLAMOWSKI, J. (by assignment)

{¶ 1} Defendant-appellant Harold Hubbard (“Hubbard”) brings this appeal from the judgment of the Court of Common Pleas of Montgomery County finding him guilty of aggravated robbery with a firearm specification. For the reasons set forth below, the judgment is affirmed.

{¶ 2} On September 6, 2008, a BP Gas Station was allegedly robbed by Hubbard, Gregory McCrary (“McCrary”), and Charles Cooper (“Cooper”). Two men wearing pantyhose over their heads entered the store. One put a handgun to the head of the owner and demanded the money from the register. The victim then gave them \$176. They then told him to get the money from the safe. When the victim went to the back of the store and opened the door to the office, the victim's german shepherd escaped from the office and chased the men from the store. The victim then called 911 on his cell phone as he followed the men outside. Observing the men jumping into a red truck, the victim relayed the license plate number to the dispatcher.

{¶ 3} As the robbers left the store, they almost hit a vehicle traveling in the area. The driver and passenger of that vehicle, realizing something was wrong, called 911 and followed the truck. They continued to follow the truck while in contact with police until the police arrived and stopped the vehicle. The truck's license plate was matched to that relayed to the dispatcher by the victim. The driver of the truck was identified as Cooper and the passengers were identified as McCrary and Hubbard. The police recovered \$176 in cash from Hubbard.

{¶ 4} After the arrest, the police brought the victim to identify the robbers. The victim identified Hubbard as one of the robbers. The police also found pieces of black nylon pantyhose in the truck.

{¶ 5} The Montgomery County Grand Jury indicted Hubbard on October 7, 2009 on one count of aggravated robbery. On October 17, 2008, the Grand Jury re-indicted Hubbard on one count of aggravated robbery with a three year firearm specification added.

Hubbard filed a motion to suppress the identifications, but the motion was overruled. From March 16 to March 20, 2009, a jury trial was held against all three defendants. The jury convicted Hubbard on both the aggravated robbery and the firearm specification. On March 25, 2009, the trial court sentenced Hubbard to ten years on the aggravated robbery and a mandatory term of three years on the firearm specification. Hubbard appeals from these judgments and raises the following assignments of error.

#### First Assignment of Error

{¶ 6} “The trial court erred to the prejudice of [Hubbard] in overruling his motion to suppress identification testimony.”

#### Second Assignment of Error

{¶ 7} “The jury's verdict should be reversed as against the manifest weight of the evidence.”

#### Third Assignment of Error

{¶ 8} “The trial court abused its discretion by sentencing [Hubbard] to the maximum term of incarceration.”

{¶ 9} In the first assignment of error Hubbard alleges that the trial court erred in denying the motion to suppress the identification because it was overly suggestive. This identical argument was previously addressed by this court in the appeal of Hubbard's co-defendant, McCrary. See *State v. McCrary*, Montgomery App. No. 23360, 2010-Ohio-2011:

{¶ 10} “With respect to a motion to suppress, ‘the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of

witnesses.’ *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, 679 N.E.2d 321, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653, 645 N.E.2d 831. The court of appeals must accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. [*State v. Isaac*, Montgomery App. No. 20662, 2005-Ohio-3733], citing *State v. Retherford* (1994), 93 Ohio App.3d 586, 639 N.E.2d 498. Accepting those facts as true, the appellate court must then determine, as a matter of law and without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. *Id.*

{¶ 11} “Show-ups at or near the scene of a crime, that occur shortly after the crime, are not only permissible, but useful, since they can lead to an identification or non-identification while the characteristics of the perpetrator are still fresh in the witness's memory. *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401. However, the show-up must not be unduly suggestive. *Id.* The defendant bears the burden to prove that a show-up procedure was so suggestive of guilt that it requires suppression. *Id.* at 199; [*State v. Murphy*, 91 Ohio St.3d 516, 534, 2001-Ohio-112, 747 N.E.2d 765].”

{¶ 12} *McCrary*, *supra* at ¶37-38. Since Hubbard failed to show that the show-up procedure was overly suggestive, we affirm the trial court's denial of his motion to suppress the victim's identification testimony.

{¶ 13} The victim was brought to the area where Hubbard was arrested within ninety minutes of the robbery. Deputy Kyle Baranyl brought the victim to the scene. He testified that he told the victim that he was taking him to the scene where the police had three individuals detained in order to determine whether the victim recognized any of them.

Nothing more was told to the victim prior to the identification. Once there, the victim immediately recognized the vehicle and immediately identified Hubbard as one of the two men who robbed him. The victim's identification was based upon the sixty to ninety seconds he had observed them inside the brightly lit store. The robbery occurred during mid-afternoon on a bright, sunny day. The victim did not identify Cooper.

{¶ 14} The record is lacking any indication that the show-up identification was improperly conducted. The victim was merely asked to look at the individuals to see if he recognized any of them. This neutral statement is not impermissibly indicative of guilt. See *State v. Carruth*, Montgomery App. No. 19997, 2004-Ohio-2317, ¶16. Hubbard presented no evidence that the police pressured the victim to identify anyone or to corroborate the officer's suspicion of guilt. Most importantly, the victim was able to distinguish between the two robbers and a third man he could not identify. Thus, the show-up identification was not inherently suggestive and the trial court did not err in denying the motion to suppress the identification by the victim. The first assignment of error is overruled.

{¶ 15} Hubbard next claims that the verdict was against the manifest weight of the evidence.

{¶ 16} “Under a manifest-weight standard, an appellate court sits as a ‘thirteenth juror’ and may disagree with the fact finder's resolution of the conflicting testimony. \* \* \* The appellate court, ‘ “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 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 conviction.” ’ ’ ”

{¶ 17} *State v. Jackson*, 169 Ohio App.3d 440, 2006-Ohio-6059, ¶14. Although the appellate court may act as a thirteenth juror, it should still give due deference to the findings made by the fact-finder.

{¶ 18} “The fact-finder \* \* \* occupies a superior position in determining credibility. The fact-finder can hear and see as well as observe the body language, evaluate voice inflections, observe hand gestures, perceive the interplay between the witness and the examiner, and watch the witness's reaction to exhibits and the like. Determining credibility from a sterile transcript is a Herculean endeavor. A reviewing court must, therefore, accord due deference to the credibility determinations made by the fact-finder.”

{¶ 19} *State v. Thompson* (1998), 127 Ohio App.3d 511, 529.

{¶ 20} A review of the record indicates that the victim identified Hubbard as one of the two men who robbed him at gunpoint. The victim indicated that Hubbard came around the counter and took the money from the cash register. The victim then indicated that he saw one of the robbers get into the passenger seat of a red pickup truck and one in the truck bed. The victim identified the truck by its license plate number. This truck was then followed by two witnesses who observed it constantly until the police arrived. When the truck was stopped, Hubbard was in the passenger seat. He was found with \$176 balled up in his pants pocket, the exact amount stolen from the BP Gas Station. The police found pieces of black pantyhose in the back of the truck, which was what the robbers had over their

faces during the robbery. Although no gun was found in the truck, the robbers had opportunities in which to dispose of it. Hubbard presented no defense other than to deny he was involved. Given the evidence before it, this court does not find that the jury lost its way and created a manifest miscarriage of justice. Nor does this court find that the evidence weighs heavily against conviction. Thus, the second assignment of error is overruled.

{¶ 21} Finally, Hubbard alleges that the trial court erred in sentencing him to the maximum sentence. Hubbard argues that the trial court's sentence is an abuse of discretion because he received the maximum sentence under R.C. 2929.14. The standard of review for sentences was set forth in the plurality opinion of *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. In *Kalish*, four panel members<sup>1</sup> noted that R.C. 2953.08(G) requires that appellate courts require appellants to meet a clearly and convincingly contrary to law standard of review when reviewing a sentence. *Id.* For example, if the sentencing court ignored R.C. 2929.12, that would be clearly and convincingly contrary to law. However, if the appeal is based upon the proper application of R.C. 2929.12 (B) through (D), four panel members<sup>2</sup> in *Kalish* determined the appropriate standard of review is abuse of discretion. *Id.*

{¶ 22} “A common rule of statutory interpretation requires that a specific statute prevail over a general statute. See generally *State v. Taylor*, 113 Ohio St.3d 297, 2007-Ohio-1950, 865 N.E.2d 37, at ¶14 (holding that R.C. 2925.11, which prescribes

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<sup>1</sup>Justices Pfeifer, Lundberg Stratton, Lanzinger, and Judge Willamowski, sitting by assignment, all reached the same conclusion.

<sup>2</sup>Justices O'Connor, Moyer, O'Donnell, and Judge Willamowski, sitting by assignment, concurred in this position, although the first three would use both

specific sentences, controls over the more general sentencing statutes). A statute setting forth its own standard of review contrary to the standard of review found in a more general statute is no different than a statute setting forth specialized punishments, which would take precedence over a general sentencing statute.

{¶ 23} “Additionally, this court has held that a trial court's findings under R.C. 2929.12 would not be reversed absent an abuse of discretion. See *State v. Arnett*, 88 Ohio St.3d [208, 217], 724 N.E.2d 793.

{¶ 24} “In my opinion, R.C. 2953.08(G) is not, and has never been, applicable to R.C. 2929.12(B) through (D). However, R.C. 2953.08(G) is, and has always been, applicable to R.C. 2929.11. R.C. 2953.08(G) is also applicable to R.C. 2929.12 only insofar as reviewing whether the trial courts bothered to consider the factors of divisions (B) through (D). If they did consider the factors of divisions (B) through (D), then their consideration of these factors is reviewed under an abuse-of-discretion standard, since they are specifically indicated by R.C. 2929.12 to be discretionary.”

{¶ 25} *Id.* at ¶40-42, concurring opinion. The use of an abuse of discretion standard as to the application of R.C. 2929.12(B) through (D)<sup>3</sup> is supported by four panel members<sup>4</sup> making it the majority opinion as to the standard of review in that situation. The majority of panel members held that the remaining statutes are reviewed using only a clearly and

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standards of review in all cases.

<sup>3</sup>R.C. 2929.12(E) was not an issue in *Kalish*.

<sup>4</sup>Justices O'Connor, Moyer, O'Donnell, and Judge Willamowski, sitting by assignment, concurred in this position, although the first three would use both standards of review in all cases.



convincingly contrary to law standard of review as set forth in R.C. 2953.08(G).<sup>5</sup>

{¶ 26} Here, Hubbard's appeal is based upon R.C. 2929.14 and accordingly, he must show that his sentence is clearly and convincingly contrary to law. The sentence imposed was ten years. Hubbard was convicted of a first degree felony, which carries a sentence range of three to ten years in prison. In addition, the firearm specification mandates a prison term of three years to be served consecutively to the prison term imposed for the primary offense. Hubbard's sentence was within the range allowed by the statute. Additionally, the trial court knew that Hubbard had previous felony convictions and was still under sentence at the time he committed the aggravated robbery. Given the facts before the trial court when it sentenced Hubbard, the sentence was not clearly and convincingly contrary to law. Thus, the third assignment of error is overruled.

{¶ 27} The judgment of the Court of Common Pleas of Montgomery County is affirmed.

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FAIN, J. and FROELICH, J., concur.

(Hon. John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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<sup>5</sup>Justices Pfeifer, Lundberg Stratton, Lanzinger, and Judge Willamowski, sitting by assignment all reached this conclusion, making it the majority opinion.