

[Cite as *State v. Cook*, 2010-Ohio-2726.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-316
James E. Cook,	:	(C.P.C. No. 07CR09-6665)
Defendant-Appellant.	:	(REGULAR CALENDAR)
State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-317
James E. Cook,	:	(C.P.C. No. 08CR06-4488)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 15, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Tracy A. Younkin, for appellant.

APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, James E. Cook ("appellant"), appeals from the judgments of the Franklin County Court of Common Pleas, entered upon a jury verdict convicting appellant of two counts of aggravated robbery, multiple counts of robbery, one

count of kidnapping, and one count of safecracking, all with firearm specifications, and upon a finding of guilt by the trial judge as to one count of having a weapon under disability. For the following reasons, we affirm those judgments.

{¶2} Appellant's convictions arise from an incident that occurred on March 7, 2005, at 2781 Innis Road, in Columbus, Franklin County, Ohio. Kim Worthington ("Kim"), office manager of a family-owned residential moving company known as A Family Moving Company, had just arrived at work when two black men entered the office and shortly thereafter announced they were committing a robbery. The two men held Kim at gunpoint and forced her to unlock the company safe. The men took money and a handgun from the safe, along with Kim's wallet, cell phone, and other personal items. Then the men bound Kim with duct tape and forced her under a desk. They also duct taped another woman, Tina Kelly, who was living in the residential half of the building at 2781 Innis Road. The men then exited the building with the money and the handgun from the safe. As the two men were walking to their vehicle in the parking lot, Kim's husband,¹ Mike Worthington ("Mike"), was pulling into the lot. He was unaware of the robbery until he entered the building and found Kim. Mike then attempted to track down the robbers, but was unsuccessful.

{¶3} The investigation into the robbery stalled for a significant period of time until it was learned that Deon Cheeks, a man facing various federal charges, had confessed to the robbery as part of a federal plea deal and had implicated appellant as his accomplice. Based upon this information, Franklin County Sheriff Detective Chris Floyd prepared two photo arrays. One array contained a photo of appellant, while the second array contained

¹ Subsequent to the robbery, Kim and Mike Worthington divorced. However, at the time of the trial, the two were dating one another.

a photo of Deon Cheeks ("Cheeks"). Kim identified appellant as the robber with the gun but could not identify Cheeks.

{¶4} On September 12, 2007, appellant was indicted on three counts of aggravated robbery, three counts of second degree robbery, three counts of third degree robbery, two counts of kidnapping, and one count of safecracking.² All of these counts were indicted with firearm specifications. Additionally, appellant was indicted on one count of having a weapon while under disability.

{¶5} This matter proceeded to jury trial on January 5, 2009 on all offenses except the one count of having a weapon while under disability, which was tried to the court. Prior to taking evidence at trial and outside the presence of the jury, the trial court held a hearing on appellant's motion to suppress identification, which alleged the photo array procedure was suggestive, unreliable, and utilized impermissible procedures.

{¶6} Kim and Detective Floyd both testified at the suppression hearing. Kim testified that she was shown two photo arrays and that she identified appellant in one of those arrays as the man who held her at gunpoint during the robbery. Kim stated she had "[a]bsolutely no doubt" that she properly identified appellant as the robber with the gun. (Tr. 47.) She further testified that Detective Floyd never indicated to her which photo she should select. Detective Floyd testified as to how he prepared the "six-pack" photo arrays using the Identiview computer system. He stated Kim identified appellant without hesitation and that he did not influence her in any way. On cross-examination, he

² As a result of the Ohio Supreme Court's ruling in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, appellant was subsequently re-indicted under case No. 08CR-4488 on three counts of second degree robbery and three counts of third degree robbery, all with firearm specifications, so that the language in the indictment would properly reflect the necessary element of recklessness. At trial, the parties agreed to proceed under the original indictment, but to take the correct language used in case No. 08CR-4488 and essentially "paste" it into the original indictment so that the case could go forward under a single indictment.

admitted he had never heard of the "double blind" photo array procedure and did not use that procedure here.

{¶7} Following this testimony, the trial court overruled the motion to suppress the identification. The State of Ohio ("the State") then presented to the jury the testimony of five witnesses.

{¶8} Kim testified that on the morning of the robbery, she received a phone call that had been forwarded from the office to her business cell phone. The caller asked to speak with Mike regarding a move that he was scheduling for his mother. Kim informed the caller that Mike was not available and the caller indicated he would try back later.

{¶9} When Kim arrived at the office a short while later, around 9:00 a.m., she made a few trips between her car and the building as she carried things inside. During this process, she observed two men in a car driving down the driveway, but did not give it a second thought as she continued into the building. She had just opened the business when two men, later identified as appellant and Cheeks, entered the business. One of the men stated he had called earlier about a move. Kim recognized his voice as the man with whom she had just spoken. The man again asked for Mike and Kim informed him Mike was not available. The man then asked to schedule the move on a specific date. As Kim was looking at the calendar, one of the men informed her they were there to commit a robbery.

{¶10} Appellant, whom Kim described as the heavier of the two men, had a handgun, which Kim described as a black revolver, similar to the one shown to her in court. She kept her attention focused on appellant, since he was the man holding a gun on her. Appellant kept the gun pointed at Kim and sometimes waived it in the air. Both men kept asking where the money was kept. Kim gave appellant the combination to the

safe, but appellant forced her to get on her knees and open the safe. Once she opened the safe, the thinner man without the gun (Cheeks) used duct tape to restrain her and forced her to lie on the floor while appellant searched the safe.

{¶11} Appellant retrieved a bag of money and a handgun which belonged to Mike. Kim described that gun as a light colored 9 mm or a .45, similar to the second gun shown to her in court. Appellant continued to demand she get the other bag of money, but Kim insisted there was no other bag of money. The men also went through her purse and took her wallet and cell phone. In addition, the robbers repeatedly asked Kim if there was anyone else in the building. Although she initially said no, she eventually told them there was a woman living in the residential part of the building. The robbers then restrained that woman, Tina Kelly, with duct tape and forced Kim under the desk. She was afraid the men were going to shoot her because they were not wearing masks and their faces were visible. However, they left the building, locking the door behind them.

{¶12} Kim testified she was able to partially free herself and free Tina Kelly, and within moments, Mike arrived. She reported the robbery to him and he chased after the suspects while she called the police.

{¶13} Kim identified appellant in court as the robber with the gun and also re-affirmed her identification of appellant via a police photo array first shown to her on July 18, 2007, approximately two and one-half years after the robbery. She stated the detective never suggested to her which photo she should select and she was 100 percent certain in her identification. She also testified that she had not recognized anyone in the other photo array (which contained a photo of Cheeks) shown to her on that same date.

{¶14} Upon cross-examination, Kim estimated the duration of her contact with the men during the robbery as 10 to 15 minutes. She also identified a computer-generated

sketch she had assisted the police in creating shortly after the robbery, which depicted a purported image of the robber brandishing the gun.

{¶15} Mike testified he arrived at A Family Moving Company on March 7, 2005, around 10:00 or 11:00 a.m. As he drove down the driveway in his work truck, he observed two black men exiting the office door. He described one as heavy and the other as tall and thin. He observed the men get into an older model vehicle and drive away.

{¶16} When Mike reached the office he discovered the door was locked, so he used his key to let himself into the building. Inside he found Kim still partially duct taped. She was shaking and crying. Kim informed him they had just been robbed. Upon hearing this, Mike testified he ran outside and tried to chase after the men in his truck, but could not locate them.

{¶17} Mike testified he was shown two photo arrays in July 2007 but was unable to identify anyone. Mike also described the handgun he kept in the safe at A Family Moving Company as a black, .45 caliber, semi-automatic handgun with a clip. He recalled placing the gun in the safe the night before the robbery. He testified that his gun was operable and capable of being fired and expelling a projectile. During trial, he was shown a .45 semi-automatic, which he testified he believed was his gun, based upon the gun's black rail and the unusual type of ammunition found inside the gun.

{¶18} Officer Adam Hicks of the Columbus Division of Police testified that on May 1, 2005, he initiated a traffic stop on an older model vehicle where the driver failed to signal. Appellant was later identified as a passenger in that vehicle. Officer Hicks testified that, as he approached the vehicle, appellant was moving about as if he was attempting to hide or retrieve an object. Officer Hicks removed the driver of the vehicle, whom he described as a thin, black male, in order to pat him down. As Officer Hicks was

walking the driver back to the cruiser, the driver escaped and was never apprehended. In conducting an inventory search of the vehicle, the police discovered two loaded firearms, a black or gray .45 caliber Smith & Wesson and a black .38 caliber Smith & Wesson. Officer Hicks identified those weapons during the trial.

{¶19} On cross-examination, Officer Hicks testified he later learned the driver who had escaped was Cheeks. He further testified that he requested firearms testing and fingerprint testing on the recovered weapons but never received any results.

{¶20} Detective Chris Floyd testified that he responded to the robbery scene on Innis Road and later became the lead detective in April 2007 after the original detective transferred to another division. Detective Floyd stated he received a summary from an FBI agent which provided the names of two potential suspects, appellant and Cheeks. Based upon that information, he developed two photo arrays using those suspects.

{¶21} Detective Floyd described the procedure for compiling the photo array. Initially, he used a computer program which allowed him to enter various physical characteristics that matched the characteristics of appellant. The computer system then selected a pool of potential photographed individuals who displayed characteristics similar to those of appellant. From that pool of photos, Detective Floyd ultimately selected five photos of men with physical characteristics similar to appellant to be included in the six-person photo array with appellant. He repeated the procedure for Cheeks. Detective Floyd testified he showed the photo arrays to Kim and Mike separately. Kim selected appellant as one of the robbers but did not identify Cheeks. Detective Floyd testified that Kim identified appellant without hesitation, but Mike was unable to identify anyone from either photo array.

{¶22} Cheeks testified he is currently a federal prisoner incarcerated in Allenwood, Pennsylvania, and he is scheduled to be incarcerated until 2020. Cheeks testified about the federal proffer he provided to the United States Attorney's office in Toledo, Ohio after he was arrested for bank robbery charges. In September 2005, Cheeks agreed to cooperate with the federal government and confessed to his involvement in various armed robberies, including the armed robbery at A Family Moving Company. Cheeks also revealed that appellant had been his accomplice during that robbery. Cheeks positively identified appellant in court during the trial.

{¶23} Cheeks testified he and appellant received information about A Family Moving Company from an alleged former employee who indicated there was money in the safe inside the office. The former employee also warned the men not to conduct the robbery if Mike was present. Based on this information, Cheeks and appellant developed a plan to rob the moving company.

{¶24} While driving to the business, they called the moving company to ensure Mike was not present. Upon arrival, they entered through the back door and found a woman with dark hair (Kim). After again confirming that Mike was not present, appellant pulled out a handgun and ordered the woman to get down on the floor. They restrained her with duct tape. Then Cheeks went to the next room and located a second woman and her dogs. He could not remember whether or not he used duct tape to restrain the second woman. During that time, appellant remained with Kim and obtained the money from the safe, which totaled over \$1,500. Cheeks soon learned appellant had also removed a handgun from the safe.

{¶25} Cheeks testified the entire encounter lasted 10 or 15 minutes. When he and appellant left the building, Kim was tied up on the floor with duct tape. Once he was

outside, Cheeks observed a truck coming down the driveway. As they were leaving, Cheeks saw a white male in his late 30s or early 40s exit the truck and enter the building. Cheeks and appellant later split the money and each man took one of the guns.

{¶26} Several weeks later, Cheeks and appellant were pulled over by Columbus police for a traffic violation. Cheeks was the driver of the vehicle and appellant was the front seat passenger. Cheeks provided the officer with a fake identification. Because Cheeks and appellant were moving around in the vehicle, the officer wanted to search the vehicle. Cheeks testified the two firearms used and/or taken during the robbery were in Cheeks' vehicle during the traffic stop. Consequently, Cheeks testified he took off running but appellant remained behind and was arrested for the two handguns. During the trial, Cheeks identified the gun used in the robbery, as well as the gun taken from the safe.

{¶27} Cheeks testified that as a result of his cooperation with the federal government, he received a reduced federal sentence. Had he not cooperated with the federal government, he would have been facing a federal sentence of 151 to 188 months. Due to his cooperation, his criminal offense level under the federal sentencing guidelines was reduced and his potential sentence was reduced to 92 to 115 months. He ultimately received a sentence of 92 months.

{¶28} Cheeks testified he did not know appellant was facing charges out of this incident or that he had been subpoenaed to testify until just a few days before the trial was scheduled to begin. Although he received no promises from the State with respect to his testimony in the trial against appellant, Cheeks testified that he hoped to use this continued cooperation to petition for a further reduction in his federal sentence.

{¶29} On cross-examination, Cheeks admitted he believed he should receive a further reduction of his 92-month sentence in exchange for his testimony and that he, in fact, would seek a reduction of 92 months, which would thereby completely eliminate his sentence in the federal bank robbery case. He further admitted that he had not been charged with any offenses arising out of the robbery that occurred at A Family Moving Company. In addition, he admitted he received a benefit from the federal government because of his confession regarding his involvement in this and various other crimes.

{¶30} After the State rested, the trial court dismissed the aggravated robbery and two robbery counts relating to Tina Kelly, pursuant to Crim.R. 29. The defense then rested without presenting any witnesses. On January 9, 2009, the jury returned guilty verdicts on all of the remaining counts and the corresponding specifications, except for the kidnapping count relating to Tina Kelly. The trial judge subsequently found appellant guilty of having a weapon while under disability. Appellant received a total aggregate sentence of 23 years of incarceration.

{¶31} Appellant filed a timely appeal, asserting the following assignments of error for our review:

ASSIGNMENT OF ERROR ONE

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND DEPRIVED DEFENDANT-APPELLANT OF DUE PROCESS OF LAW BY ENTERING A JUDGMENT OF CONVICTION AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW.

ASSIGNMENT OF ERROR TWO

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL ERROR BY ADMITTING EVIDENCE OF AN UNRELIABLE IDENTIFICATION BASED UPON AN UNNECESSARILY SUGGESTIVE METHOD OF PRESENTING A PHOTO ARRAY.

ASSIGNMENT OF ERROR THREE

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PREJUDICIAL ERROR BY ADMITTING EVIDENCE OF AN UNRELIABLE IDENTIFICATION BASED UPON THE IDENTIFICATION OF THE DEFENDANT BY A WITNESS RECEIVING CLEAR AND SUBSTANTIAL BENEFIT FOR HIS TESTIMONY.

{¶32} For ease of discussion, we shall begin our analysis by discussing appellant's second and third assignments of error together. Both these assignments of error challenge the admission of allegedly unreliable identification evidence. In his second assignment of error, appellant contends the out-of-court identification of appellant was unreliable because the method of presenting the photo array was unnecessarily suggestive. In his third assignment of error, appellant asserts the unindicted co-defendant's identification was unreliable because the co-defendant received a significant benefit in exchange for his testimony. Collectively, appellant appears to argue that the failure to utilize the double-blind method in presenting the photo array, coupled with the general unreliability of the testimony of an unindicted accomplice who significantly benefited from his cooperation with the government, constitutes unreliable identification evidence which should have been excluded by the trial court. We disagree.

{¶33} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961; *State v. Sage* (1987), 31 Ohio St.3d 173. Unless the trial court has clearly abused its discretion, thereby resulting in material prejudice to the defendant, an appellate court should be reluctant to interfere with a trial court's decision in this regard. *State v. Hymore* (1967), 9 Ohio St.2d 122. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or

unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, quoting *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶34} Appellant seems to argue that, because Detective Floyd failed to use a procedure known as the "double blind" method, the photo array procedure utilized in this case was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification and therefore, the resulting identifications were so unreliable as to warrant suppression. When a police agency uses the double-blind method, a photo array is shown by a neutral officer without knowledge of who the targeted suspect is so that the officer cannot subconsciously or unintentionally communicate to the witness which photo he/she should select. Here, the double blind method was not used, as the photo array was shown by Detective Floyd, who had knowledge of the targeted suspect.

{¶35} Prior to suppressing identification testimony, a trial court must engage in a two-step analysis. First, there must be a determination that the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375. Second, it must be determined that the identification itself was unreliable under the totality of the circumstances. *Id.* See also *State v. Sherls*, 2d Dist. No. 18599, 2002-Ohio-939.

{¶36} Pretrial identifications may be suppressed only if they are both unnecessarily suggestive and unreliable under the totality of the circumstances. *State v. Broomfield* (Oct. 31, 1996), 10th Dist. No. 96APA04-481. "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243, 2253. Therefore, even if the identification procedure was suggestive, the subsequent identification is still admissible as long as it is reliable. *Id.*; *State v. Moody* (1978), 55 Ohio St.2d 64, 67. "Where a witness has been confronted

by a suspect before trial, that witness' identification of the suspect will be suppressed if the confrontation procedure was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under the totality of the circumstances." *State v. Brown* (1988), 38 Ohio St.3d 305, 310, citing *Manson*.

{¶37} It is the defendant's burden to prove that the procedures utilized were both suggestive and unnecessary *and* that the testimony was or will be unreliable based upon the totality of the circumstances test. *State v. Taylor*, 3d Dist. No. 1-03-20, 2003-Ohio-7115; *State v. Green* (1996), 117 Ohio App.3d 644. If the defendant fails to meet the first part of his burden, the court need not consider the totality of the circumstances test. *Green* at 653. See also *State v. Brown* (Aug. 17, 1994), 1st Dist. No. C-930217; *State v. Dunham* (May 25, 1983), 1st Dist. No. C-820391; *Reese v. Fulcomer* (C.A.3, 1991), 946 F.2d 247.

{¶38} In the instant case, appellant fails to articulate specifically what he believes was suggestive about the identification procedure, aside from his general complaint that the police failed to utilize the double-blind method in presenting the photo array. While ignoring the requirement that he demonstrate that the identification procedure was unnecessarily suggestive, appellant only argues that the identification was unreliable based upon the totality of the circumstances. In arguing the identification was unreliable based upon the totality of the circumstances, appellant cites to: the unreliability of Cheeks' information, given the substantial benefit Cheeks received in his federal case, in exchange for his identification of appellant as his accomplice; the two-and-one-half year lapse of time between the commission of the crime and the subsequent identification; and the failure to utilize the double-blind method, which he submits increased the possibility of influencing Kim's identification of the suspect.

{¶39} As noted above, appellant has failed to demonstrate how the procedure used was suggestive. Suggestiveness depends upon a variety of factors, such as the size of the array, its manner of presentation, and its contents. *Reese*, citing *United States v. Maldonado-Rivera* (C.A.2, 1990), 922 F.2d 934. Here, appellant contends the failure to use the double blind-method in presenting the photo array in and of itself makes the procedure impermissibly suggestive. We disagree.

{¶40} Detective Floyd testified as to how he prepared the photo arrays using the Identiview computer system, as we noted above. He testified that he followed department protocol. He further testified he selected five black males, all of whom were in similar jail attire, had short hair, similar facial features, and appeared to be of approximately the same age. In addition, all of the photographs were black and white and there were no markings on the photo arrays at the time they were viewed by either Kim Worthington or Mike Worthington. Detective Floyd showed the photo arrays first to Kim, and then to Mike. In addition, he testified Kim's identification of appellant was without hesitation. Detective Floyd also testified he did not suggest to Kim which photo she should select.

{¶41} Furthermore, Kim testified that Detective Floyd never suggested to her that she should select a particular photo and there is no evidence Detective Floyd said or did anything which would have suggested that Kim should choose appellant from the photo array. Kim also testified that she had absolutely no doubt that the man she selected in the photo array was the man with the gun who robbed her and A Family Moving Company.

{¶42} Based upon this and the evidence contained in the record, there is nothing about the identification procedure that was suggestive. As a result, we need not discuss

whether the identification was unreliable under the totality of the circumstances test. The trial court did not abuse its discretion in declining to suppress the photo array identification testimony or in permitting this evidence to be presented to the jury.

{¶43} Furthermore, the trial court did not abuse its discretion nor commit error by allowing the identification testimony presented by Cheeks. Notably, appellant did not move to suppress Cheeks' testimony, nor did appellant object to Cheeks' testimony during trial, thereby waiving all but plain error. See generally *State v. Smith*, 80 Ohio St.3d 89, 115, 1997-Ohio-355; *State v. Santiago*, 10th Dist. No. 02AP-1094, 2003-Ohio-2877; *State v. Clemons*, 82 Ohio St.3d 438, 1998-Ohio-406.

{¶44} Plain error is limited to the exceptional case in which the error, which was not objected to during the trial, " 'rises to the level of challenging the legitimacy of the underlying judicial process itself.' " *Santiago* at ¶11, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122, 1997-Ohio-401. We find no plain error here. Instead, appellant is, in essence, simply challenging the credibility of Cheeks.

{¶45} The credibility of witnesses and the weight to be allocated to particular evidence are both primarily issues to be decided by a jury as the trier of fact. *State v. Gray* (Mar. 28, 2000), 10th Dist. No. 99AP-666. Appellant exercised his right to cross-examine Cheeks at trial and explored Cheeks' motivation for testifying, including his self-interest. In addition, the jury was provided with an instruction advising it that accomplice testimony should be subjected to "grave suspicion" and "weighed with great caution." (Jury Instructions; R. 69 at 5.) A jury can be presumed to have followed a trial court's instructions. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190. Furthermore, the jury was also provided with an instruction regarding its duty to evaluate the credibility of the witnesses and to determine which testimony it found worthy of belief. (Jury Instructions;

R. 69 at 5.) See also *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶67. Therefore, we find no error, plain or otherwise, with respect to the admission of Cheeks' identification testimony.

{¶46} Accordingly, we overrule appellant's second and third assignments of error.

{¶47} In his first assignment of error, appellant asserts his convictions are against the manifest weight of the evidence. Appellant argues the State failed to prove beyond a reasonable doubt that appellant was the individual who brandished the gun and committed the aggravated robbery, robbery, safecracking, and kidnapping at A Family Moving Company. He asserts there is no physical evidence to prove his guilt and argues the testimony of the two witnesses who identified him is subject to doubt. In addition, appellant challenges his conviction for having a weapon while under disability, arguing there is no evidence to demonstrate that the weapon was operable, other than the testimony of Mike Worthington.

{¶48} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? *Id.* at ¶25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; See also *State v. Robinson* (1955), 162 Ohio St. 486 (although there is sufficient evidence to sustain a guilty verdict, a court

of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276.

{¶49} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Wilson* at ¶25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶50} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶51} Appellant again challenges his convictions based upon the identification and testimony provided by Cheeks, claiming Cheeks' self-interest gave rise to a motive to lie and likely caused him to falsely accuse appellant, while protecting his true accomplice and lessening his own federal sentence at the same time. However, as previously noted, the jury instructions provided by the court contained language advising the jurors that the

complicity of a witness may affect a witness' credibility, and therefore, the testimony of an accomplice was "subject to grave suspicion" and should be "weighed with great caution." (Jury Instructions; R. 69 at 5.) The jury was also instructed that it must consider the credibility of the witnesses in its decision and determine what weight, if any, it should give to a witness' testimony. The issues of credibility and the weight to be assigned to the evidence are primarily issues for the jury as the trier of the facts. *State v. Wiley*, 10th Dist. No. 03AP-340, 2004-Ohio-1008.

{¶52} Moreover, Cheeks testified that although he did receive consideration for his cooperation with respect to his federal sentence, no additional promises had been made to him with respect to his trial testimony, other than it would be taken into consideration if he petitioned for a sentence reduction.

{¶53} In addition, the testimony of Officer Hicks corroborates Cheeks' testimony as to the connection between Cheeks and appellant and the incident at A Family Moving Company. Officer Hicks testified as to the May 1, 2005 traffic stop in which appellant and Cheeks were in the same vehicle with two weapons which were strikingly similar to those used in the aggravated robbery that occurred at A Family Moving Company approximately two months earlier.

{¶54} Furthermore, much of the information provided by Cheeks with respect to the aggravated robbery and kidnapping corroborated Kim Worthington's testimony about the incident. Kim testified that appellant was the one who brandished the gun and, as a result, she paid close attention to appellant. She was also able to provide a general description of the men and the clothing they were wearing. While she may have been scared and somewhat distracted during the event, she certainly had a significant

opportunity to observe appellant and to see his face, thereby allowing her to identify him over two years later, and she was very adamant in her identification.

{¶55} Based upon this, we cannot say that a reasonable jury would not carefully examine each witness' testimony and, considering the corroborating testimony of the other witnesses, conclude that appellant was the man with the gun who committed the offenses of aggravated robbery, robbery, kidnapping, and safecracking at A Family Moving Company and against Kim Worthington. There is nothing to indicate that the jury clearly lost its way or created a manifest miscarriage of justice with respect to its verdicts on these counts.

{¶56} Appellant has also challenged his conviction for the offense of having a weapon while under disability, arguing the State failed to prove that the weapon was operable. Appellant argues operability evidence is lacking because the State failed to offer lab results demonstrating that either weapon involved was operable. However, we disagree that lab results were necessary to prove operability under these circumstances.

{¶57} Appellant signed a jury waiver with respect to the weapon under disability count and that count was tried to the court. The statute governing this offense provides that a person under disability shall not knowingly acquire, have, carry, or use any firearm or dangerous ordnance. Furthermore, unless relieved of disability, a person who has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse is considered to be under disability. See R.C. 2923.13.

{¶58} A firearm is defined under R.C. 2923.11 as "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or

combustible propellant. 'Firearm' includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable." R.C. 2923.11(B)(1).

{¶59} Clearly, there is no dispute here as to appellant's prior conviction, as the State introduced a certified copy of appellant's 2001 conviction for felony drug trafficking and appellant stipulated to that prior conviction. However, appellant disputes the trial court's finding of operability, which was based upon Mike Worthington's testimony that the .45 caliber handgun removed from the company safe was in fact operable.

{¶60} Laboratory testing results are not the only admissible evidence that can be considered in determining whether or not a firearm was operable. Proof of operability may also be established by circumstantial evidence, which may include the actions of the individual with control over the firearm. *State v. Whiteside*, 10th Dist. No. 07AP-951, 2008-Ohio-3951, ¶17. Also, a trial court evaluates the evidence of a firearm's operability by examining the totality of the circumstances. *State v. McElrath* (1996), 114 Ohio App.3d 516, 519, citing *State v. Murphy* (1990), 49 Ohio St.3d 206, 208. The State need not introduce empirical evidence that the gun is operable; rather, it may establish operability through the testimony of lay witnesses who had an opportunity to observe the weapon and the surrounding circumstances. *McElrath; Murphy*. Furthermore, under R.C. 2923.11(B)(2), in determining whether or not a firearm is operable, the trier of fact may rely upon circumstantial evidence, including the representations and actions of the individual exercising control over the firearm. See also *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52; *Murphy*.

{¶61} Here, Mike Worthington's testimony established, beyond a reasonable doubt, that the .45 caliber semi-automatic handgun contained within the safe was capable of being fired and expelling a projectile, and thus was operable. Mike was familiar with

the weapon, as he had just observed it in the locked safe less than 24 hours before the robbery, and he knew it was operable. No lab reports were necessary to establish this. He also identified the .45 caliber handgun shown to him in the courtroom as the gun that was stolen from the safe.

{¶62} Even assuming, for the sake of argument, that the .45 caliber handgun recovered from the traffic stop was *not* Mike Worthington's gun, the evidence still demonstrates that appellant removed Mike's gun from the safe where Mike had placed it the night before, used it in the facilitation of the crime, and took it with him when he left the building, thereby establishing that appellant acquired, had, carried, or used an operable firearm while under disability. Furthermore, both weapons recovered as a result of the traffic stop were loaded. Because operability may be established by circumstantial evidence, at least one Ohio court has held that the recovery of a loaded weapon that is submitted into evidence with the bullets is sufficient to reasonably infer operability. See *State v. Berger* (Feb. 19, 1998), 8th Dist. No. 71618.

{¶63} Based on our analysis as set forth above, we overrule appellant's first assignment of error, as his convictions were not against the manifest weight of the evidence.

{¶64} In conclusion, we overrule appellant's first, second, and third assignments of error. The judgments of the Franklin County Court of Common Pleas are affirmed.

Judgments affirmed.

KLATT and BRYANT, JJ., concur.
