[Cite as *State v. Babyak*, 2010-Ohio-3820.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2009-10-023 CA2010-03-006
- vs -	:	O P I N I O N
	:	8/16/2010
ALEXANDER O. BABYAK,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CV07-08-3235

Stephen J. Pronai, Madison County Prosecuting Attorney, Kirsten J. Gross, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

Thomas J.C. Arrington, 67 East High Street, London, Ohio 43140, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Alexander O. Babyak, appeals his convictions for aggravated robbery and three counts of kidnapping from the Madison County Court of Common Pleas.

{¶2} At approximately 8:45 p.m. on January 23, 2009, appellant went to the Der Dutchman restaurant in Plain City to eat a meal with his sister and some friends. Appellant was a former employee of the Der Dutchman and was familiar with the assistant manager who was closing the restaurant that evening. After the restaurant

had closed, appellant and his sister went to the office to talk to the assistant manager. After they left, the assistant manager proceeded to close the restaurant and set the alarm. As she was walking out of the building, she encountered a man wearing a hooded jacket and carrying a bag entering the building through the breezeway-type entrance. She immediately flipped on the light switch and the man exited the breezeway. The assistant manager followed him out of the building asking if she could help. The man gave no response and walked briskly toward West Avenue.

{¶3} Around 9:56 p.m., one day later, on January 24, 2009, as an employee attempted to exit the employee door to leave the restaurant for the evening, the door hit a man wearing a hood, dark jeans, and carrying a bag. The employee reported the incident to the manager on duty. The manager called the police to report that a suspicious person was in the parking lot. Shortly thereafter, around 10:00 p.m., a person wearing a mask, gloves, dark hooded sweatshirt, and jeans brandishing a gun gained entry to the restaurant after closing while several employees remained in the building. The gunman confronted the manager near an office and ordered him to the floor. He took the manager's wallet, looked through it, and proceeded to tape the manager's hands. The gunman then ordered another employee to get down and crawl to the manager. He took and broke their cell phones and walkie-talkies. The victims were then ordered to sit in office chairs. He taped them into the chairs and wheeled the victims into a conference room, and the chairs were then tipped over. The gunman tampered with the restaurant's digital recording device by pushing a few buttons and pulling cords out from the back of it.

{¶4} Next, another employee encountered the gunman by the office. The gunman pointed the gun directly into his face and ordered the employee to the ground,

taking the employee's keys and breaking his cell phone. The employee's hands and feet were then bound with tape. He was then placed in an office chair in a similar fashion and wheeled into the room with the other victims. As the gunman pushed over the employee's chair, he warned that he better not hear sirens for ten minutes or he would come after the victims and their families. The gunman then exited the conference room. At no time did he ask where the money was located. After about five minutes, the victims were able to break free of the tape, block the door, and attempt to contact outside help. Contact via text message was made with a manager who was attending a conference in Florida. The broken cell phones were also able to connect to authorities, although the victims were not able to hear the dispatcher answer the call.

{¶5} Authorities from multiple jurisdictions were dispatched to the restaurant. It was discovered that the gunman stole money that was lying on a desk that had been counted but not secured for the evening and a bag of change from a floor safe that was not locked. Current, as well as former, employees were aware of the location of the floor safe. The manager was in the practice of locking money in the drawer of the desk because the lock on the floor safe had not been working. Current employees may have been aware of this situation, but former employees would not have known. The money locked in the desk drawer was not stolen. Each of the victims independently described the gunman as between 5'8" and 5'11" in height and between 170 and 175 pounds.

{¶6} A woman living in the neighborhood adjacent to the restaurant observed an unfamiliar car parked along the street on the evening of the robbery. Around 10:20 p.m., the woman left her residence to more closely examine the vehicle. She noted it was a dark blue or black Toyota Scion and believed the license plate to be DVR 2862. She observed that the car was no longer parked on the street between 10:30 and 10:40

p.m. Shortly thereafter, a deputy was dispatched to the neighborhood looking for a suspicious person. The woman described the vehicle to the officer and told him the license plate number, but she was only one hundred percent certain about the first four digits. Additionally, she told the officer that the front of the car was very clean and the back seat was a bench seat with clothes strewn across the seats. The upper right hand quadrant of the rear window contained a "Columbus State" sticker.

{¶7} An investigator with the Plain City Police Department ran the license plate information provided by the woman. The vehicle came back as a brown, 2001 Dodge Caravan. Because the van did not fit the description of a Toyota Scion, the investigator reran the license plate using on the first four digits that the woman had indicated she was sure about. Only one Toyota Scion was registered in the state of Ohio with the first four digits being "DVR 2." That vehicle was registered to appellant.

{¶8} The investigator conducted numerous interviews with appellant over the phone and in person. During a phone conversation on February 9, 2009, appellant denied being in Ohio on the night of the robbery. In a later conversation, appellant stated that he was home, in Plain City, the night of the robbery because he believed that was the night his sister got engaged. Appellant told the investigator that his car was light blue, when in fact it was dark blue, almost black. The investigator drove to Georgia where appellant was staying. The investigator found appellant's car parked on the street and noticed sticker residue in the same area of the window where the "Columbus State" sticker was observed.

{¶9} The Plain City Police also obtained appellant's cell phone records. Appellant's cell phone was involved in a call that was routed through the cell phone tower on West Jefferson Avenue, Plain City, near the restaurant at 10:30 p.m. on the

night of the robbery. Another call was placed from appellant's phone through a cell tower just south of the restaurant on Highway 42 at 10:37 p.m. Appellant drove through the night from Plain City to Georgia. Appellant placed two calls to his cousin on the night of the robbery.

{¶10} In a conversation with appellant, the investigator informed appellant that he knew appellant had contacted his cousin on the night of the robbery and planned to contact the cousin. According to the cousin, appellant returned from Georgia to speak with him in person. The cousin testified that appellant confessed tying people up at the restaurant and left with around $6,500 to $6,600. He also admitted to using a BB gun and using shoe polish to make himself look black. Appellant instructed his cousin to not say anything to the investigator.

{¶11} On January 25, 2009, appellant purchased a diamond ring at Costco located in Kennesaw, Georgia with cash in the amount of $3,123.99. The police obtained appellant's bank records from December 16, 2008 through January 16, 2009 to determine whether appellant had sufficient funds to purchase an engagement ring of that amount. The bank records indicated that appellant only received a total income of $2,355 in 2008. He received the money in three installments: a check for $730 on July 9, 2008; a check for $580 on July 25, 2008; and a check for $1,175 on September 23, 2008.

{¶12} Appellant was arrested on March 11, 2009. When his car was processed, the sticker residue had been completely removed. In the spare tire compartment, three CO2 cartridges for use with a BB gun were found. In an adjacent compartment, a loose bag of change, clear packing tape, and an out of service cell phone were discovered. In the console between the seats, the investigator found a Columbus State student

identification card. Records from Columbus State confirm that appellant was a student during the previous quarter and had been issued a parking sticker for the autumn quarter of 2008. Appellant was indicted on April 9, 2009 for one count of aggravated robbery with a firearm specification, three counts of kidnapping, each with a firearm specification, and one count of grand theft.

{¶13} The case proceeded to trial. In his defense, appellant submitted the testimony of his girlfriend. The girlfriend testified that appellant was with her on the night in question until 10:50 p.m. when he left her house to drive to Georgia. Appellant's uncle testified in an attempt to refute the prosecution's evidence regarding appellant's financial records. The uncle testified that he paid appellant $2,570 in cash on or about January 16, 2009. Appellant also offered alibi testimony from his mother and brother, who claimed that appellant left their home in Plain City to drive to Georgia on January 24, 2009 at exactly 10:15 p.m.

{¶14} Following a jury trial, appellant was found guilty of aggravated robbery, three amended counts of kidnapping, and grand theft. The count for grand theft was merged into the count for aggravated robbery. Appellant was sentenced to ten years in prison for aggravated robbery and eight years on each kidnapping count with each eight-year term to be served concurrently, but consecutive to the ten years for aggravated robbery. Appellant timely appeals, raising one assignment of error:

{¶15} "THE TRIAL COURT ERRED IN THAT THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶16} In his sole assignment of error, appellant argues that his convictions are against the manifest weight of the evidence. Appellant disputes the state's reliance upon circumstantial evidence and the testimony of appellant's cousin. Appellant

suggests that his cousin was confused regarding appellant's statements to him and his cousin was threatened by investigators with possible criminal charges. Further, appellant argues that the victims were unable to positively identify the gunman and no evidence was ever recovered from the scene of the crime proving that appellant was inside the Der Dutchman on the night in question. Appellant also claims an insufficient connection was established between the vehicle observed by the woman living adjacent to the restaurant and appellant's vehicle. Appellant claims that someone familiar with the restaurant would not have taken merely $6,300 when approximately $25,000 remained in the restaurant after the incident. Appellant also explains that he had sufficient funds to purchase the engagement ring. Finally, appellant contends that he had many conversations with investigators and never admitted any specific knowledge of or participation in the incident.

{¶17} A manifest weight challenge "concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other; weight is not a question of mathematics, but depends on its effect in inducing belief." *State v. Ghee*, Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶9. To determine whether a conviction is against the manifest weight of the evidence, an appellate court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether the trier of fact 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. "The power to reverse a judgment as against the manifest weight must be exercised with caution and only in the rare case where the evidence weighs heavily against conviction." *State v. Banks* (1992), 78 Ohio App.3d 206, 225.

When reviewing the evidence, an appellate court must be mindful that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶18} After review of the record, we cannot say the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. The prosecution presented significant, convincing evidence indicating that appellant committed the offenses at the Der Dutchman on January 24, 2009. Although much of the evidence was circumstantial, a conviction based on purely circumstantial evidence is no less sound than one based on direct evidence. *Michalic v. Cleveland Tankers, Inc.* (1960), 364 U.S. 325, 330, 81 S.Ct. 6. Circumstantial evidence and direct evidence have the same probative value, and in some instances, certain facts can only be established by circumstantial evidence. *State v. Mobus*, Butler App. No. CA2005-01-004, 2005-Ohio-6164, ¶51, citing *Jenks*, 61 Ohio St.3d at 272.

{¶19} The state provided proof of each element of the charges brought against appellant. The jury weighed the evidence and came to the conclusion, beyond a reasonable doubt, that appellant was the individual who robbed the Der Dutchman restaurant at gunpoint and tied up three employees in the process. The jury chose to credit the witnesses presented by the state and believe the prosecution's version of the events while discrediting appellant's witnesses. The jury was in the best position to hear the witnesses speak and view their demeanor. We find no indication that the jury lost its way or that the state's evidence was not credible.

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

{¶21} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.