

[Cite as *State v. Minter*, 2010-Ohio-594.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-06-150
 :
 - vs - : OPINION
 : 2/22/2010
 :
 ANDRE MINTER, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-01-0125

Robin N. Piper III, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011-6057, for plaintiff-appellee

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YOUNG, P.J.

{¶1} Defendant-appellant, Andre Minter, appeals his firearm specification conviction in the Butler County Court of Common Pleas.

{¶2} Appellant was indicted in February 2009 on one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), with a firearm specification under R.C. 2941.145. The state alleged that on the evening of October 8, 2008, appellant along

with two masked men (one armed with a hammer, the other armed with a gun) forced their way into the apartment of Robert Hess where Hess and his friends were present. All three men, while walking around the apartment screaming, ordered Hess and his friends to "get the F on the ground *** [e]verybody shut the F up." While the masked man with the hammer guarded the front door, appellant and the masked man with the gun stole several items, including marijuana Hess was selling from his apartment. Hess was struck in the head with the gun three times requiring four staples as a result. Once it was over, appellant and the masked men quickly left the apartment together. The gun used against Hess was never recovered. It is undisputed that appellant never had or used the gun during the robbery. The two masked men were never identified or apprehended.

{13} Appellant was tried before a jury. At trial, the state presented the testimony of Robert Hess, Hess' girlfriend, a friend of Hess, and two law enforcement officers. Appellant did not testify or present evidence on his behalf. On April 7, 2009, the jury found appellant guilty as charged. The trial court sentenced appellant to seven years in prison for the aggravated robbery and to the mandatory three years in prison for the firearm specification, to be served consecutively.

{14} Appellant appeals his firearm specification conviction, raising two assignments of error which will be addressed together.

{15} Assignment of Error No. 1:

{16} "THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF A GUN SPECIFICATION PURSUANT TO R.C. 2941.145."

{17} Assignment of Error No. 2:

{18} "THE JURY'S FINDING OF GUILTY AS TO THE GUN

SPECIFICATION PURSUANT TO R.C. 2941.145 WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶9} Appellant argues that his firearm specification conviction under R.C. 2941.145(A) is not supported by sufficient evidence and is against the manifest weight of the evidence because the state failed to show beyond a reasonable doubt that the gun used during the robbery was operable.

{¶10} "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is 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. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶70, certiorari denied (2006), 548 U.S. 912, 126 S.Ct. 2940, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A reviewing court must not substitute its evaluation of the witnesses' credibility for that of the jury's. See *State v. Holdbrook*, Butler App. No. CA2005-11-482, 2006-Ohio-5841.

{¶11} When reviewing whether a conviction is against the manifest weight of the evidence, "[t]he 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 the conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. When reviewing the evidence, an appellate court must be mindful the original trier of fact was in the best position to judge the credibility of witnesses and weight to be given the evidence. *State v.*

DeHass (1967), 10 Ohio App.2d 230, paragraph one of the syllabus.

{¶12} R.C. 2941.145(A) requires that a mandatory three-year prison term be imposed upon an offender who "had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." R.C. 2923.11(B) defines "firearm" as:

{¶13} "(1) *** 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.

{¶14} "(2) When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm."

{¶15} To sustain a firearm specification, the state must prove beyond a reasonable doubt that the defendant possessed a firearm and that it was operable at the time of the offense. *State v. Murphy* (1990), 49 Ohio St.3d 206, syllabus.¹ In proving the operability of a firearm, the state need not produce the gun or offer direct, empirical evidence that the gun is operable. *Id.* at 209; *State v. Wilson*, Clermont App. No. CA2001-09-072, 2002-Ohio-4709, ¶38. Rather, "a firearm penalty-

1. A defendant may be convicted of an offense, which includes a firearm specification, where his co-defendant or uncharged accomplice utilized a firearm in the commission of the offense and the defendant is found to have acted as an accomplice. *State v. Salyer*, Warren App. No. CA2006-03-039, 2007-Ohio-1659, ¶30. In the case at bar, appellant was convicted of complicity to aggravated robbery in violation of R.C. 2911.01(A)(1) and an accompanying firearm specification in violation of R.C. 2941.145(A).

enhancement specification can be proven beyond a reasonable doubt by circumstantial evidence. In determining whether an individual was in possession of a firearm and whether the firearm was operable or capable of being readily rendered operable at the time of the offense, the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm." *Thompkins*, 78 Ohio St.3d at 385. Proof of the operability of the firearm can also be established "by the testimony of lay witnesses who were in a position to observe the instrument and the circumstances surrounding the crime." *Murphy* at syllabus.

{¶16} In the case at bar, Hess testified that as soon as he opened the front door (believing appellant was alone), "there was a pistol in [his] face." The pistol was held by one of the masked men. Hess' girlfriend described the gun as a pistol either silver and grey or silver and black which looked liked a police gun. A friend of Hess also described the gun as a pistol. Appellant and the masked men walked into the apartment and ordered Hess and his friends to "get the F on the ground [and to] shut the F up," all the while screaming. Then, as the masked man with the hammer stood guard at the front door, appellant and the man with the gun stole items all the while yelling. During the robbery, Hess was struck in the head with the gun three times.

{¶17} "[W]here an individual brandishes a gun and implicitly but not expressly threatens to discharge the firearm at the time of the offense, the threat can be sufficient to satisfy the state's burden of proving that the firearm was operable or capable of being readily rendered operable." *Tompkins*, 78 Ohio St.3d at 384. "*Thompkins* clarifies that actions alone, without verbal threats, may be sufficient circumstances to establish the operability of a firearm." *State v. Reynolds*, 79 Ohio

St.3d 158, 162, 1997-Ohio-304.

{¶18} Under the circumstantial test laid out in *Thompkins*, we find that the evidence presented at trial established beyond a reasonable doubt that the firearm used was operable. See *State v. Boddie*, Montgomery App. No. 18709, 2001-Ohio-7089 (pointing a gun at a robbery victim, even without an explicit threat to use it, constitutes an implicit threat sufficient to infer that the gun is operable). Appellant's firearm specification conviction is therefore supported by sufficient evidence and is not against the manifest weight of the evidence. Appellant's first and second assignments of error are overruled.

{¶19} Judgment affirmed.

BRESSLER and HENDRICKSON, JJ., concur.