

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 10AP-599
	:	(C.P.C. No. 09CR-04-2515)
Dustin E. Hunter,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 22, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Law Office of Thomas F. Hayes, LLC, and *Thomas F. Hayes*, for appellant.

DORRIAN, J.

{¶1} Defendant-appellant, Dustin E. Hunter ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas finding him guilty of kidnapping, in violation of R.C. 2905.01, aggravated burglary, in violation of R.C. 2911.11, aggravated robbery, in violation of R.C. 2911.01, and having weapons while under disability, in violation of R.C. 2923.13, along with three firearm specifications pursuant to R.C. 2941.145. For the following reasons, we affirm.

{¶2} On April 20, 2009, at approximately 11:30 p.m., Columbus police officers were dispatched to 168 Calahan Road for an alleged home invasion. Upon arriving, officers apprehended a suspect while he was placing a safe in a Jeep Cherokee parked close-by. The suspect, later identified as co-defendant Joshua Bays, was very sweaty and wore latex gloves on his hands. Shortly after securing Bays, the officers discovered a black Lorcin .380 caliber handgun in a neighboring yard to the residence.

{¶3} After briefly speaking with the victims upstairs, the officers entered the basement and found Dan Coleman lying on the floor, bleeding from a gunshot wound to the leg. Officers remained at the residence for several hours photographing the crime scene and collecting evidence introduced at trial, including a black gun, latex gloves, live and spent bullet casings, and bloody clothing.

{¶4} Ashley Coleman, Dan Coleman's 18-year-old daughter, testified that earlier the same evening, between the hours of 9:00 and 10:00 p.m., appellant stopped over at the Coleman residence looking for her older brother, Dan Coleman, Jr.; however, he was not home. Appellant conversed for five to ten minutes with Carla Coleman, Ashley Coleman's mother, while Ashley Coleman listened from the adjoining living room. Ashley Coleman further testified that appellant visited the Coleman residence on three or four occasions prior to April 20, 2009, and that she heard appellant speak on multiple occasions.

{¶5} At approximately 11:30 p.m., Ashley Coleman and her boyfriend were watching television in the living room. Two men walked into the living room; both men carried guns, but only the second man wore a mask and neither man was wearing gloves. She described the first man as "really big and tall" with dark hair, a white shirt, and silver

pistol and the second man as wearing black pants, a black hoodie, a black mask, and a smaller black gun. (Tr. 78, 83.) Ashley Coleman did not recognize the first man, but later learned his identity as Joshua Bays.

{¶6} However, Ashley Coleman testified that she instantly recognized the masked man as appellant from the sound of his voice:

Q. Okay. And what did the guy in the mask do?

A. Stood at the basement door and just kept pointing the gun at me and Victor.

Q. Did he say anything to you?

A. Just kept repeatedly telling us he was going to kill us if we moved. Don't say anything. Just shut up and be quiet.

Q. And what did you do?

A. I just kept telling him, you know, don't do this. Why are you doing this? There's a baby in the house, 'cause Connor was back there crying, I could hear him screaming, and he was yelling, "Ashley, I'm so scared." He kept screaming and crying. I kept telling the guy, [t]here's a baby back there. Don't do this. And he kept telling me, "I know there's an effing baby back there. I already know this. Just shut up."

Q. Did you recognize that voice?

A. Yeah.

Q. When did you recognize that voice?

A. From the minute he talked to me.

Q. Okay. Who did you recognize it as?

A. Dustin Hunter.

Q. How did you know it was Dustin Hunter?

A. Because he was just over there right before it happened, so it was still stuck in my head.

(Tr. 81-82.)

{¶7} Ashley Coleman testified that, subsequent to her exchange with appellant, she heard gunshots in the basement. Upon hearing police sirens approaching, appellant opened the basement door, banged on the wall, and said, "[t]here's sirens. Come on, come on. There's sirens. Grab the whole safe. Get the whole safe." (Tr. 85.) After appellant warned Bays about the sirens, Ashley Coleman heard more yelling and another gunshot. Appellant went down into the basement right before Bays ran upstairs holding the safe. Ashley Coleman noticed that the men had switched guns and that appellant now had the silver pistol.

{¶8} After appellant left the residence, Ashley Coleman stated that her 15-year-old brother, Joe Coleman, came out of the bedroom and said "[t]hat was Dustin." (Tr. 111.) Ashley Coleman replied, "I know. I done knew that." (Tr. 111, 143.)

{¶9} Kimberly Coleman, Dan Coleman's 17-year-old daughter, also testified that she recognized appellant by the sound of his voice. She stated that on the same evening, at approximately 5:00 or 6:00 p.m., appellant came over to the residence looking for her older brother and had a conversation with her mother. Kimberly Coleman further testified that she heard appellant's voice on two or three prior occasions and personally had a conversation with appellant during one of his visits to the Coleman residence. Throughout the duration of the home invasion, Kimberly Coleman stayed in her bedroom; however, she testified that she heard appellant arguing with her sister in the living room:

Q. And what did you hear go on?

A. I kept hearing * * * Dustin and my sister arguing. She kept telling him, "There's a baby in the house. There's a baby in the house." He said, "I know there is." That's why I don't want to do this." And --

* * *

Q. How did you recognize it as his voice?

A. I -- I knew it. I could tell and I could hear the fear in his voice. I knew it, especially since the other time I've talked to him, he's talked to Danny in front of the family, my brother.

Q. At what point did you recognize his voice?

A. Right when he -- when my sister yelled, "There's a baby in the house," and he said, "I know there is."

Q. Did you tell the police that night that you recognized his voice?

A. Yes.

(Tr. 123.)

{¶10} Carla Coleman, Dan Coleman's wife, testified that she too recognized appellant as one of the men participating in the home invasion by the sound of his voice. She stated that at approximately 7:00 p.m., that same evening, appellant stopped by her home looking for her oldest son; however, she advised him that he was not home. In addition, Carla Coleman testified that prior to April 20, 2009, she spoke with appellant regarding a barbeque grill that he was selling, and she also had the occasion to hear appellant speak approximately four to six additional times.

{¶11} Later that evening, Carla Coleman fell asleep in her bedroom, located in the basement, and awoke to arguing and screaming upstairs. She and her husband, Dan Coleman, ran up the stairs; however, they could not open the basement door. Her

husband pushed her back down the stairs and instructed her to call 911. After calling 911, Carla Coleman hid under some laundry in the basement and could still hear the voices upstairs. She recognized appellant's voice because he had been to the house earlier that evening. Carla Coleman testified: "I kept trying to listen. Are they going to mention names -- you know, talk to each other? But I never hear them say names, but then eventually it clicked into me that that was Dustin's voice. That's how I realized it sounded so familiar, because he had just been there." (Tr. 151.) At one point, appellant yelled "[g]o get the safe. It's in the bedroom." (Tr. 160.) When the police arrived, Carla Coleman immediately stated "[t]he man with mask, it was Dustin. It was Dustin." (Tr. 173.)

{¶12} Dan Coleman identified appellant as one of the intruders by viewing the side of appellant's face, through a lifted portion of the mask, during his struggle to push open the basement door. He testified that although the mask did not come completely off, he saw appellant's face "from about the nose over to the top of the ear," and recognized the thinly shaven beard from seeing appellant a few days prior. (Tr. 214, 232-33.) In addition, Dan Coleman stated that he had met appellant on "a couple other occasions" and that the physical size, height and weight of Dustin Hunter fit the intruder "to the T." (Tr. 231-33.)

{¶13} Bays testified that he met appellant through Lorena Workman, appellant's sister and Bays' former girlfriend. Bays originally faced a maximum sentence of up to 99 years; however, he reached a plea agreement with the state for 13 years, and the court sentenced him to 14 years. As a condition of the plea agreement, Bays had to cooperate by truthfully testifying against appellant.

On April 20, 2009, Bays and Workman had dinner at appellant's residence, 2769 Shelly Avenue. Bays told appellant that he "was looking for a quick score," and appellant suggested they rob 168 Calahan Road. (Tr. 341-43.) Bays testified that he provided a .380 Lorcin, semiautomatic weapon, ammunition, and latex gloves, for himself and appellant, to perpetrate the robbery. In addition, Bays stated that he believed appellant wore gloves during the course of the robbery and, to the best of his knowledge, that appellant only handled the gun while wearing gloves. (Tr. 345.) Bays identified State's Exhibit G as the black Lorcin .380 caliber handgun used in the robbery and testified that after the robbery, appellant told him that he threw the gun "in a neighbor's backyard, over a fence." (Tr. 344, 357.) When asked "who did the home invasion with you," Bays unequivocally replied "Mr. Hunter." (Tr. 373.)

{¶14} Lorena Workman, appellant's sister, and Lori Tomlinson, appellant's girlfriend, both testified that, on the evening of April 20, 2009, they fell asleep with their two children in Tomlinson's daughter's bedroom, between the hours of 8:30 p.m. and 10:00 p.m. Workman testified that Bays woke her at some point after 9:00 p.m. to borrow her Jeep Cherokee in order to buy cigarettes and visit a friend. Workman and Tomlinson did not witness Bays or appellant leave the residence that evening. Both witnesses stated that they awoke to the sound of police sirens and flashing lights and that appellant was sitting on the couch watching television, but Bays and the Jeep Cherokee were gone. In addition, both witnesses testified that after searching the residence, the police did not find black pants, a black hoodie, or a black mask.

{¶15} The parties stipulated that, based upon the results of DNA analysis, Bays could not be excluded as a contributor on the Lorcin .380 caliber handgun, but that

appellant could be excluded as a contributor. In addition, the Lorcin .380 caliber handgun was processed for fingerprints with negative results.

{¶16} Appellant raises two assignments of error:

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF GUILT.

II. THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶17} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, paragraph two of syllabus. Nevertheless, we will discuss the assignments of error together because they address the single element of identity and because appellant supports both assignments of error with the same arguments.

{¶18} In reviewing a challenge to the sufficiency of the evidence, an appellate court must determine "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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶19} In contrast, "[w]hen 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." *Thompkins* at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 2220. "The 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." *Thompkins*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. This discretionary authority "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶20} Pursuant to the foregoing standards, we examine the record in a light most favorable to the prosecution to determine if it sufficiently proved beyond a reasonable doubt that appellant is guilty of the charged crimes. We further consider if the trier of fact "lost its way" such that a manifest miscarriage of justice occurred in convicting appellant.

{¶21} Here, appellant argues that the state presented insufficient evidence regarding his participation in the home invasion and that his convictions are against the manifest weight of the evidence because (1) the case was devoid of any forensic evidence, (2) the state relied on voice identification, and (3) Bays' testimony was not credible.

{¶22} In response, the state argues that the evidence sufficiently supports appellant's convictions and that the convictions are not against the manifest weight of the evidence. In support of its arguments, the state relies on the following evidence: (1) the testimony of Bays identifying appellant as an accomplice in the home invasion; (2) the testimony of three victims positively identifying appellant by his voice as the intruder; (3) the testimony of Dan Coleman visually identifying appellant as the intruder; and (4) that the intruder had some "inside" knowledge of the workings of the Coleman residence.

{¶23} First, we will address appellant's argument that the case was devoid of any forensic evidence. In support of this argument, appellant asserts that (1) the handgun recovered by the crime scene search unit did not have appellant's fingerprints, (2) DNA

testing excluded appellant as a contributor, (3) the black mask, black pants, and black hoodie were not recovered from appellant's residence, and (4) Ashley Coleman testified "no one was wearing gloves." (Tr. 116.)

{¶24} "It is the province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness.'" *State v. Allison*, 10th Dist. No. 01AP-666, 2002-Ohio-522, quoting *State v. Lakes* (1964), 120 Ohio App. 213, 217. Further, in *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236, this court held that "[w]hile the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." See *State v. DeHass* (1967), 10 Ohio St.2d 230. In addition, we have previously stated that "the lack of physical evidence such as fingerprints linking defendant to the gun [does] not preclude the jury from concluding that defendant had handled the gun." *State v. Jackson* (Feb. 22, 2000), 10th Dist. No. 99AP-138, citing *State v. Townsend* (1991), 77 Ohio App.3d 651, 657.

{¶25} Here, Ashley Coleman testified that appellant was holding a small black gun and wearing a black mask, black pants, and black hoodie during the commission of the crimes. She also testified that "no one was wearing gloves." (Tr. 116.) Officer Baldwin, however, testified that Bays was wearing latex gloves at the time of his arrest. Further, Bays testified that he believed appellant wore gloves during the course of the robbery and, to the best of his knowledge, that appellant only handled the gun while wearing gloves. The jury, believing the testimony of Officer Baldwin and Bays, may have reasonably concluded that appellant wore latex gloves during the commission of the

crimes, and therefore found it reasonable that the gun tested negative for appellant's DNA and/or fingerprints. Also, it is within the province of the jury to rely upon Ashley Coleman's testimony regarding appellant's clothing, and that appellant held the gun, without corroborating physical evidence.

{¶26} Second, we will address appellant's argument regarding voice identification. In support of this argument, appellant asserts that "none of the victims stated the appellant had any distinct or particular characteristics to his voice and they all had only limited opportunities to hear the appellant speak." (Appellant's brief at 11.)

{¶27} Evid.R. 901(B)(5) states, in pertinent part, that a voice can be properly authenticated or identified "whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." "Evid.R. 901 does not require that a witness identifying a voice must have heard that voice on numerous occasions in order to identify it. The rule explicitly allows the witness, 'based upon hearing the voice *at any time under circumstances connecting it with the alleged speaker*,' to express her opinion." (Emphasis sic.) *State v. Hutson*, 11th Dist. No. 2007-P-0026, 2008-Ohio-2315, ¶15.

{¶28} In *State v. Parker* (1990), 53 Ohio St.3d 82, the Supreme Court of Ohio addressed the issue of voice identification in a case where a rape victim never saw the face of her attacker and identified him by the sound of his voice. The victim stated that she first spoke with the appellant several months earlier and that, two days prior to the attack, the appellant initiated a conversation with her which lasted about five minutes. *Id.* at 83. Subsequent to the attack, the victim immediately told the police that "she

recognized Parker's voice from previous contacts she had had with him." *Id.* The court stated that:

The facts indicate that [the victim], on her own initiative, first identified defendant as her assailant when [the police] arrived at her home shortly after the crime. Her voice identification of defendant was based on her previous contacts with him, the last of which was two days before the crime. The facts also show that [the victim] has ample opportunity to listen to defendant's voice during the commission of the crimes and thus was in a position to identify him. Under the circumstances, [the victim's] original identification of defendant * * * has sufficient indicia of reliability.

Id. at 87-88.

{¶29} Here, Ashley Coleman, Kimberly Coleman and Carla Coleman testified that they immediately recognized appellant's voice during the commission of the crime due to previous contacts with appellant, including the day of the home invasion. Carla Coleman testified that she immediately told the police she recognized appellant as one of the perpetrators of the crimes. In addition, Carla Coleman had several conversations with appellant, and Ashley Coleman and Kimberly Coleman had the occasion to hear appellant's voice on multiple occasions during his visits to the Coleman residence. Appellant's arguments regarding the absence of distinct vocal characteristics and limited opportunities to hear him speak are unpersuasive and unsupported by law, as there are no requirements for identifying a voice other than "hearing the voice at any time under circumstances connecting it with the alleged speaker." Evid.R. 901(B)(5).

{¶30} Third, we will address appellant's argument regarding Bays' testimony. In support of this argument, appellant asserts that Bays is a co-defendant with a prior history

of violent crimes and that Bays received a plea agreement for a lesser sentence by agreeing to testify against appellant.

{¶31} The Supreme Court of Ohio instructed that "accomplice testimony alone can sustain conviction." *State v. Mills* (1992), 62 Ohio St.3d 357, 368; see also *State v. Flonnory* (1972), 31 Ohio St.2d 124. In *Mills*, the appellant raised a sufficiency of the evidence argument regarding whether the state established his identity as the "St. Bernard and Bond Hill robber." *Id.* In support of the state's case, an accomplice in one of the bank robberies testified "at length" regarding the appellant's involvement in the crime, in addition to presenting the testimony of four eyewitnesses who identified appellant as the "gunman." *Id.* The Supreme Court concluded that "[t]he jury's responsibility was to assess the credibility of the witnesses, and, as construed in favor of the prosecution, the evidence was more than sufficient." *Id.*

{¶32} In *State v. Lowry*, 10th Dist. No. 03AP-415, 2004-Ohio-759, ¶19, this court also held that "[a] jury is not precluded from basing a criminal conviction on the uncorroborated testimony of an accomplice." See *State v. O'Dell* (1989), 45 Ohio St.3d 140, 145. In *Lowry*, the state's chief witness was an accomplice to the crimes of breaking into vehicles and receiving stolen property. *Id.* at ¶7-9. Similar to the present matter, the accomplice received a plea bargain for a lesser sentence if he agreed to testify against the appellant. *Id.* at ¶7. The accomplice identified the appellant as a perpetrator in the vehicle break-ins by testifying that "he saw appellant break into the cars" on the night in question. *Id.* at ¶9. This court held that "a jury could have convicted appellant on [the accomplice's] testimony alone, as long as it heard credible evidence on each and every

element of the crime, sufficient to permit a finding of guilt beyond a reasonable doubt." *Id.* at ¶19.

{¶33} Here, Bays testified that on April 20, 2009, while having dinner at appellant's residence, appellant suggested they rob the Coleman residence at 168 Calahan Road. Further, Bays stated that he and appellant drove to the residence in appellant's sister's Jeep Cherokee and that appellant got "cold feet" regarding the robbery just before entering the residence. Bays also testified that after appellant expressed his reservations, appellant followed him inside the residence and fully participated in the crimes. During his testimony, Bays disclosed that he received a reduced sentence by agreeing to truthfully testify against appellant. Further, the trial court instructed the jury that "the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution." (Tr. 508.) Therefore, the jury was fully apprised of Bays' alleged motivation for testifying against appellant and could assess his credibility accordingly.

{¶34} Finally, we note that the state presented additional evidence in support of appellant's convictions: (1) Dan Coleman visually identified appellant, and (2) appellant had inside knowledge of the workings of the Coleman residence. Dan Coleman testified that upon a partial unmasking of appellant, he recognized certain features, such as facial hair, consistent with appellant's appearance a few days prior to April 20, 2009, and that the physical size, height and weight of appellant fit the intruder "to the T." (Tr. 231-33.) Further, Ashley Coleman, Kimberly Coleman and Carla Coleman testified that, during the commission of the crimes, appellant stated that he knew there was a baby in the house and that the safe was located in the basement bedroom.

{¶35} In viewing the evidence in a light most favorable to the prosecution, we find sufficient evidence to support the guilty convictions such that any rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt.

{¶36} Further, after careful review of the entire record, we cannot find that the trier of fact clearly lost its way in reaching its verdict. Nor can we find that the convictions create a manifest miscarriage of justice. Therefore, for the reasons outlined above, we find that appellant's convictions are not against the manifest weight of the evidence.

{¶37} Having found these convictions supported by sufficient evidence and not against the manifest weight of the evidence, we overrule both of appellant's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
