

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23075
v.	:	T.C. NO. 08 CR 2974
BRIAN J. JENKINS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 11th day of December, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Brian J. Jenkins, filed November 14, 2008. On August 5, 2008, Jenkins was indicted on one count of robbery (physical harm), in violation of R.C. 2911.02(A)(2), a felony of the second degree. On August 19, 2008, Jenkins pled not guilty. Following a trial by jury, Jenkins was found guilty and sentenced to four

years in prison. Jenkins was also ordered to pay restitution to the victim herein, 35 year old Amy Brinyark, in the amount of \$1200.00.

{¶ 2} The events giving rise to this matter began on July 16, 2008, at around 12:30 a.m, when Brinyark and her boyfriend, Darryl Scandrick, walked a block from their home on Larkspur Drive to the Prescott Drive-Thru, on Prescott Avenue, to purchase cigarettes. According to Brinyark, as she and Scandrick approached the store, “there were about 10 maybe 12 teenage girls and boys standing there. * * * One approached me and said, would you buy me a Cigarillo? And I said no, I said, - I said I have a young’un your age and I wouldn’t buy him tobacco products and I’m not going to buy you none.” Brinyark identified the man who approached her as Jenkins at trial. Jenkins then approached Scandrick and spoke to him. Scandrick then proceeded to the walk-up window and purchased a beer. According to Brinyark, “after Darryl bought the beer they all gathered around him and said, we gotta have that beer, we gotta have that beer. And Darryl started walking really fast in circles.” Shortly thereafter, Scandrick fled, leaving Brinyark behind.

{¶ 3} Brinyark began to walk away from the area, and four boys, including Jenkins, and a pregnant female, followed her in the direction of the IGA store across the street. Brinyark testified, “I started to cross the street and they grabbed my hair and yanked me back.

{¶ 4} “And he had my arm and yanked me back. And when he yanked me back he just got over me and started punching me repeatedly in my head and in my face and in my chest and I vividly passed out. And come to by the grace of god * * * . When I fell back he hit me up and that’s when my tooth and my root and all flew out.” Brinyark testified, “some girl said, ‘James, don’t be hitting her like that.’ ” Brinyark stated that she hung onto her purse until Jenkins

yanked it out of her hand and threw it to someone who ran away with it. Everyone else fled when an approaching car illuminated the area with its headlights.

{¶ 5} Brinyark stated that no one hit her but Jenkins, and she did not know who grabbed her hair and her arm. Brinyark was asked if she noticed “any distinguishing characteristics” about Jenkins, and she replied, “He had a leg brace on his right leg. It was round, below the knee, above the ankle * * *. Silver, if I’m not mistaken some red. Because when he was beating me I remember these headlights and that’s how I seen that leg brace.” Brinyark stated that it was “very distinct,” and had rods “holding the brace on.” According to Brinyark, she tried to grab the brace “to yank it right off his leg.” Brinyark stated that she saw Jenkins’ face “[v]ividly. But I was being hit so hard and it was so dark and he’s so dark and there was no street lights over there where we was.” Later, she was asked if she saw who hit her, and she replied, “Vividly. I seen more of the leg brace than I did him. * * * Because he had on shorts.”

{¶ 6} Brinyark went to the hospital later in the morning, where she spoke with Detective Eric Sheldon. Brinyark described her assailant as approximately 16 to 18 years old, weighing approximately 155 pounds and being about five feet nine inches tall. Sheldon testified that Brinyark described Jenkins’ leg brace as “a halo style leg brace on his lower right leg. And then I went on to ask her more questions to get additional detail about this leg brace since it would be a very defining characteristic of the suspect.” Brinyark described the brace in detail.

{¶ 7} Detective Sheldon testified that in the course of his investigation, on July 23, 2008, he observed “a group of black males, probably about eight or ten black males, walking westbound on Prescott directly in front of the market where the victim, Ms. Brinyark, had told me this assault had occurred. And in this group of black males I saw a black male wearing a very

specific leg brace, a halo leg brace, on his lower right leg which was consistent to the description given to me by Ms. Brinyark.” Sheldon stopped Jenkins, who was wearing the brace, and transported him to the detective section for an interview. Sheldon testified that Jenkins was 5'8" tall and weighed 145 pounds. Sheldon testified that Jenkins' full name is Brian James Jenkins, and Jenkins “has a tattoo on his right shoulder with the name James.”

{¶ 8} William Elzholz, a Dayton Police detective, interviewed Brinyark on the 17th, having received Sheldon's report from the day before. Brinyark described her assailant as “5'7", 5'8", 150, 45, 50 pounds, black male, curly black hair,” and she described his leg brace. Brinyark also told Elzholz that Jenkins had been called by the name of “James” in the course of the robbery. Brinyark stated that she told Elzholz that she could definitely identify Jenkins “[f]rom that brace. He had a distinct leg brace on.” Elzholz showed Brinyark a photo spread on July 23rd, after Jenkins had been located. Brinyark was unable to identify Jenkins. According to Brinyark, the pictures were “really small, my eye was really messed up, and I just glanced at them and I said, lord, them pictures are too small, I do not have my glasses.” Although she was unable to identify Jenkins' picture from the lineup, she testified that she “picked out two of the other boys that was there that night.”

{¶ 9} On August 1, 2008, a preliminary hearing was held, during which Jenkins was brought into the courtroom in Brinyark's presence. According to Brinyark's testimony at trial, “I was sitting there and they brought him out of a back door and I looked at him and I seen his posture, his big (indiscernible - sobbing) and I seen his figure, I seen - that's him.” At the preliminary hearing Jenkins was wearing pants. The transcript of that hearing is not before us.

{¶ 10} At trial, during recross-examination, the following exchange occurred regarding

Jenkins' identity.

{¶ 11} "Q. * * * And the prosecutor just asked you whether you got a little bit of a look at the face of the person who hit you?

{¶ 12} "A. It was dark, he was dark and -

{¶ 13} "Q. But you told Detective Elholz you could definitely identify the person who hit you?

{¶ 14} "A. Well, I thought I could. But when I looked at that picture all those little young colored boys all looked the same to me in them pictures. They was that small and my eye was big as a baseball and I told that detective before I looked at them pictures I barely glanced at them at Naboli's parking lot where I met him. I said, them pictures are too small.

{¶ 15} "Q. Do you remember testifying that you could vividly - you vividly saw his face? Do you remember saying that?

{¶ 16} "A. No. What do you mean by vividly?

{¶ 17} "Q. Well -

{¶ 18} "A. Do you mean by a long look, a short look?

{¶ 19} "Q. You got a good look at his face?

{¶ 20} "A. No.

{¶ 21} "Q. Well, do you remember last time we were in court testifying under oath that you vividly saw his face?

{¶ 22} "A. I vividly saw his face."

{¶ 23} In his brief, Jenkins directs our attention to the following exchange when Brinyark was questioned about the contents of her purse:

{¶ 24} “Q. Did you have any credit cards or any additional cash in there?”

{¶ 25} “A. No. Thank god Darryl had all that in his wallet. Thank god.

{¶ 26} “Q. Have you had any -

{¶ 27} “A. That’s why my mother give me this little - this little black - this little black - right here. I carry my ID, my check cashing card, my credit card in here and when I go out where I know I’m not going to be safe I stick it in my bra. She told me to stick it in my bosoms. So (indiscernible - sobbing) so I don’t lose my ID. Because shortly after this happened I was held at gunpoint

{¶ 28} “Q. Now -

{¶ 29} “A. - by his same friends -

{¶ 30} “Q. Now, ma’am.

{¶ 31} “A. - and they took my pocketbook.

{¶ 32} “Q. Ma’am, we don’t talk about other incidents or anything else. Okay? We’re just here for the one. All right?”

{¶ 33} The defense immediately requested a sidebar and moved for a mistrial, arguing that “the jury has now heard that my client sicced his friends on her with a gun which is not in any discovery.” The trial court overruled the motion, and it gave the jury the following instruction: “* * * you heard reference to facts for which there is not going to be relevance in this case and that is reference to some friends of the defendant allegedly approaching the witness. The court is instructing you that that is not evidence you are to consider in this case and we instruct you to disregard that. Okay? And the defendant’s motion to strike is accordingly sustained.”

{¶ 34} Jenkins later renewed his motion for a mistrial, arguing, “The testimony was that at some date subsequent to the events for which my client is indicted, my client’s friends pursued or approached the complainant with a gun or guns and nothing of that kind appears in any discovery I’ve been provided to date. I understand the prosecutor is not aware of any such information as well. And I believe it taints this panel in that it suggests even a more serious threat toward the witness from my client than the one for which he’s indicted. * * *

{¶ 35} “And I understand that the court has given a curative instruction, but I don’t feel frankly that the curative instruction cures the problem. Because if I’m correct, what the court told the jury was that they were to disregard facts to which there will not be evidence. And I don’t mean to split hairs, but the suggestion that the story about the gun was a fact may potentially compound the problem.”

{¶ 36} The court responded, “* * * knowing that the court is not going to sustain a motion for a mistrial, I’ll leave it up to the defendant whether he would prefer yet another curative instruction to clean up any alluding to that statement that it was a fact for which there was no evidence. I think it would do more harm than good to bring it up again.” Jenkins decided to “let the record stand.”

{¶ 37} The court gave a general instruction before the jury’s deliberations as follows: “* * * Statements or answers that were stricken by the court or which you were instructed to disregard are not evidence and must be treated as though you never heard them. You must not speculate as to why the court sustained an objection to any question or what the answer to such question might have been. You must not draw any inferences or speculate on the truth of any suggestion included in a question that was not answered.”

{¶ 38} Jenkins asserts two assignments of error. His first assignment of error is as follows:

{¶ 39} “THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING DEFENSE COUNSEL’S MOTION FOR A MISTRIAL. ADDITIONALLY, THE COURT’S CURATIVE INSTRUCTION WAS INSUFFICIENT TO REMEDY THE PREJUDICE OWING TO THE IMPROPER TESTIMONY OF THE STATE’S WITNESS.”

{¶ 40} “The decision whether to grant a mistrial lies within the sound discretion of the trial court. *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, ¶ 42, citation omitted. “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.” *State v. Dixon*, Montgomery App. No. 21823, 2008-Ohio-755, ¶ 40.

{¶ 41} Having thoroughly reviewed the record herein, we do not find an abuse of discretion. Brinyark’s statement that Jenkins’ friends robbed her at gunpoint was volunteered and the court promptly gave a curative instruction. “The jury can be presumed to have followed the court’s instructions, including instructions to disregard testimony. *State v. Zuern* (1987), 32 Ohio St.3d 56, 62, * * * .” *State v. Goldick*, Montgomery App. No. 22611, 2009-Ohio-2177, ¶ 42. Pursuant to Ohio Jury Instructions, § 409.03(2), the following instruction is appropriate in the context of a motion to strike: “(Statements)(Answers) that were stricken by the court or which you were instructed to disregard are not evidence and must be treated as though you never heard them.” This instruction was in fact given verbatim to the jurors at the conclusion of the case. On this record, we conclude that Brinyark’s testimony did not deprive Jenkins of a fair trial. Accordingly, Jenkins’ first assignment of error is overruled. The judgment of the trial court is

affirmed.

{¶ 42} Jenkins' second assignment of error is as follows:

{¶ 43} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 44} "When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 45} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 46} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at

its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 47} R.C. 2911.02(A) provides: “No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another.”

{¶ 48} Having thoroughly reviewed the entire record, weighed all of the evidence and all the reasonable inferences, and considered the credibility of the witnesses, we cannot conclude that Jenkins’ conviction is against the manifest weight of the evidence. Jenkins was observed with a group of males by Sheldon in the area where the assault occurred, and he was wearing the “very specific leg brace” that Brinyark described in detail. Brinyark identified Jenkins at the preliminary hearing and repeatedly at trial as her assailant. In the course of the assault, Jenkins was called “James” by one of his companions, and Sheldon testified that Jenkins’ full name is Brian James Jenkins, and that the name “James” is tattooed on his right shoulder. The jury found Brinyark’s testimony to be credible that it was Jenkins who severely beat her and stole her purse, and we cannot determine that the trier of facts lost its way. Since Jenkins’ conviction is not against the manifest weight of the evidence, his second assignment of error is overruled. The judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.

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