

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

PERRY MAURER

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 2013CA00224

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Case No. 2012CR0962

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 31, 2014

APPEARANCES:

For Plaintiff-Appellee

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Hoffman, P.J.

{¶1} Defendant-appellant Perry Maurer appeals his conviction and sentence entered by the Stark County Court of Common Pleas on one count of aggravated robbery. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On November 6, 2010, a masked person entered Gionino's Pizzeria in Louisville, Ohio, holding a pistol and demanding money from the cash register. The person instructed the pizzeria employee to put the money into a pizza box, lie on the ground and count to one hundred before getting up. The assailant then fled the scene.

{¶3} Samuel Moreland, the employee of the pizza shop, described the assailant as a 5'11 white male, with a very heavy build, weighing approximately 260 pounds. A woman in the parking lot of the pizza shop noticed a late model "fire engine red" Chevy Blazer with large mud tires parked beside the shop around the same time as the robbery. She noticed an individual hurrying to get into a fire engine red Chevy Blazer and she thought he was carrying a pizza box.

{¶4} Federal Bureau of Investigation Agent Jacob Kunkle was assigned to investigate a robbery of the Bank of Magnolia which occurred on December 24, 2010, after the incident herein. Agent Kunkle developed Appellant as a suspect for the robbery herein during his investigation of the bank robbery. Agent Kunkle noticed the suspect in the Louisville pizza shop robbery herein had similar characteristics to the bank robbery suspect he was investigating. Kunkle interviewed Appellant at the F.B.I. Stark County office for approximately 90 minutes, during which Appellant confessed to having committed the Magnolia Bank robbery. Appellant was notified of his Miranda

rights, waived the rights, and agreed to speak with Agent Kunkle. Appellant was not arrested after making the confession, and agreed to report to weekly meetings with the Magnolia Police Chief until an indictment was issued, at which time he would be expected to turn himself in to custody.

{¶15} Appellant was indicted on the bank robbery charge. However, Appellant failed to turn himself into custody and became a fugitive. As a result, a warrant was issued for his arrest.

{¶16} Appellant was arrested on November 11, 2011, in Fairlawn, Ohio. On November 14, 2011, Kunkle arrived in Summit County to transport Appellant to Federal Court in Akron, Ohio to make an initial appearance. Kunkle read Appellant his Miranda rights and he was asked to sign the federal form waiving same. Appellant signed the form, agreeing to talk to the two agents. The agents inquired of Appellant as to his conduct before the bank robbery. Once the focus of the interview was completed, Kunkle also inquired as to the pizza shop robbery. Appellant answered his motive for the pizza shop robbery was the same as for the bank robbery; that his mother was ill and his family needed money for medications and treatment. Appellant indicated he was unsure as to whether he had a gun during the pizza shop robbery, but one may have been in his back pocket. He mentioned he thought he had the employee put the money in a pizza box. Tr. at 41-43. He further indicated on the night in question, he drove his father's maroon Chevy Blazer.

{¶17} Appellant was indicted on one count of aggravated robbery with a firearm specification on June 29, 2012. On August 6, 2013, Appellant filed a motion to suppress his statement made to Agent Kunkle. Agent Kunkle testified at the

suppression hearing Appellant never requested counsel, was not represented by counsel, and would not be appointed counsel until his first appearance at federal court. The agents did not make threats or offer Appellant leniency in exchange for his statements.

{¶8} At the suppression hearing Appellant argued the interrogation continued despite his request for counsel, the confession was obtained under false pretenses, and was not knowingly, intelligently and voluntarily made. The trial court denied the motion to suppress.

{¶9} The case proceeded to trial before a jury on October 15, 2013. The jury found Appellant guilty of aggravated robbery with a firearm specification. The trial court sentenced Appellant to ten years in prison.

{¶10} Appellant appeals, assigning as error:

{¶11} "I. THE TRIAL COURT ERRED BY PERMITTING THE INTRODUCTION OF IRRELEVANT AND UNFAIRLY PREJUDICIAL TESTIMONY.

{¶12} "II. MR. MAURER'S CONVICTION FOR A FIREARM SPECIFICATION WAS CONTRARY TO THE LAW BECAUSE THE STATE FAILED TO PRODUCE SUFFICIENT EVIDENCE THAT THE FIREARM WAS OPERABLE.

{¶13} "III. PURSUANT TO ARTICLE IV §3(B)(3) OF THE OHIO CONSTITUTION, THE VERDICT OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL AND/OR IS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND THEREFORE VIOLATES THE DEFENDANT'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FOURTH, FIFTH, AND SIXTH AND FOURTEENTH AMENDMENTS.

{¶14} "IV. THE TRIAL COURT ERRED BY ADMITTING MR. MAURER'S CONFESSION WHICH VIOLATES DEFENDANT'S RIGHTS AS PROVIDED FOR IN THE UNITED STATES CONSTITUTION UNDER THE 5TH AND 6TH AMENDMENT AND ARTICLE 1, SECTIONS 14 AND 15 OF THE CONSTITUTION OF THE STATE OF OHIO."

I.

{¶15} In the first assignment of error, Appellant argues the trial court erred in allowing evidence relative to the federal investigation for bank robbery.

{¶16} Initially, we note, the standard of review. The Ohio Supreme Court had held the admission or exclusion of relevant evidence rests soundly within the discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173.

{¶17} Prior to the commencement of trial, the court granted Appellant's motion in limine to exclude information regarding the bank robbery from being introduced at trial. Appellant argues, despite the trial court's ruling, the State on several occasions referenced Appellant's status as a fugitive and the federal investigation for bank robbery. Specifically, Appellant cites the following exchange at trial during the testimony of Detective Fenstermaker from the Louisville Police Department,

Q. Did Mr. Kunkle, did Agent Kunkle give you a reaction?

A. Yes, he did.

Q. And can you describe that reaction?

A. His reaction, ah, was immediate, immediate acknowledgment of the person he thought it was.

Q. Did you ask him for anything else?

A. Yeah, we asked him, he said that this person, ah, he had an open investigation with this person and he, he said that if we wished, ah, he had a good working relationship with that person at that moment and I asked him if he would do an interview for us.

Q. And are you aware did he do that? Are you aware if he did that? I'm sorry.

A. Oh, yes, he did do the interview with him.

Q. Now, was this still your case? Was this still your investigation?

A. Yes, it was.

Q. At no point did it get transferred to the FBI?

A. No, it did not.

Q. So it ended, started and ended with the Louisville Police Department?

A. Correct.

Q. And it was only Agent Kunkle's offer of assistance?

A. Correct.

Q. Did you do anything else in this case?

A. At that point we waited until, ah, Agent Kunkle got back with us, ah, we were advised that he actually, ah, this person that he thought it was, ah, had pending federal charges so - -

MR. ESKRIDGE: Objection.

THE COURT: Sustained.

{¶18} Tr. 222-223.

{¶19} Also, during the testimony of Agent Kunkle, the following exchange occurred on the record in the presence of the jury,

Q. Now, were you asked by the Louisville Police Department to get involved with, ah, a robbery, aggravated robbery that occurred at the Gionino's Pizza shop located at 2112 East Main Street in Louisville, Stark County, which occurred on November 6, 2010?

A. Yes.

Q. Do you recall, ah, do you recall how that happened? How did the agency involvement occur?

A. Ah, we had been investigating another crime and they contacted us with a similar crime that had happened.

Q. So, but you were just asked to work on this robbery with Gionino's; is that correct?

A. Yes. We were just made aware that it was ongoing and that characteristics were similar to the crime we were investigating.

Q. And how were you made aware, did they show you pictures or did they give you a description? What did they do?

A. Ah, received a copy of their case file and surveillance video that was taken on the night of the pizza shop robbery.

Q. And did you review that surveillance video?

A. I did.

Q. And when you reviewed it, did you recognize anything, did you know anything?

MR. ESKRIDGE: Objection.

THE COURT: Overruled.

A. Ah, I did recognize the individual in the surveillance photograph as having similar characteristics.

MR. ESKRIDGE: Objection.

THE COURT: Overruled.

A. Of having similar characteristics to the individual for whom I was investigating another crime.

Q. And can, after reviewing all that, did you offer your assistance?

A. At the time the individual that was suspected in the other crime was a fugitive. And I told, ah, Detective Fenstermaker that if we found him, ah, that we could talk to him about this crime as well. If he was willing to talk.

* * *

Q. Now, had you previously had contact with the defendant?

A. Yes, I have.

Q. And was that in, was that in the nature of, ah, interviews or meetings?

A. Yes.

Q. And how many times do you recall meeting with him?

A. Ah, I've met Mr. Maurer on two separate occasions prior to my involvement in this case.

Q. And what was your relationship with him? Was it cordial, what was the nature of it?

A. Ah, it was professional relationship. But, ah, cordial is fair.

Q. Now, do you recall when you met with him as part of the investigation of the Gionino's Pizza robbery?

A. Yes, I do.

Q. And what was that date?

A. Ah, it was November 14, 2011.

Q. And would it be correct in saying that you were in a motor vehicle at that time?

A. Yes, we were.

Q. And who was all in the motor vehicle?

A. Myself, Special Agent Frank Lukez and Mr. Maurer.

Q. Who was driving?

A. Special Agent Lukez was driving.

Q. And was there a discussion or a, were you, were you and mister, the defendant talking?

A. Ah, yes, we were.

Q. Now, and how did that discussion start? Did, did the discussion start with, ah, did you ask him to talk to you or how did you start it?

A. Ah, we were transporting Mr. Maurer in federal custody, so I advised him of his Miranda rights.

MR. ESKRIDGE: Objection.

THE COURT: Sustained. As to the answer.

Tr. at 236-240.

Agent Kunkle further testified,

Q. Did you ask anything specifically about the firearm?

A. Ah, I asked him, I think if it was the same firearm from the other crime that we were investigating.

{¶20} Tr. at 245.

{¶21} Appellant's objection to the testimony relative to his pending federal charges was sustained by the trial court, and the jury was instructed accordingly. Further, Counsel did not move for a curative instruction, did not move for a mistrial and did not allege prosecutorial misconduct. As to the testimony not objected to or not sustained, we find the trial court did not abuse its discretion in allowing the very limited references to the fact Kunkle was investigating another crime as the basis for the detectives' knowledge and familiarity with Appellant.

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

II. and III.

{¶23} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387,

1997–Ohio–52, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983).

{¶24} An appellate court's function when reviewing the sufficiency of the evidence is to 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*, 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus (1991).

{¶25} Initially, Appellant challenges his conviction on the firearm specification. Specifically, Appellant asserts the State failed to prove the firearm was operable during the robbery. Upon review, we find sufficient circumstantial evidence was presented at trial as to the operability of the firearm.

{¶26} Where 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 the firearm was operable or capable of being readily rendered operable. *State v. Reynolds*, 79 Ohio St.3d 158, 1997-Ohio-304. 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." R.C. 2923.11(B)(2). The State can rely upon "all of the surrounding facts and circumstances in establishing whether a firearm was used in the commission of a felony." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶27} Here, the State introduced the video surveillance of the robbery, as well as, the testimony of the victim employee, Samuel Moreland. Moreland testified,

A. And I left the mop bucket area, whenever I heard a door chime from our door, and went to walk towards the, went to walk towards the front of the store to greet the customer. And whenever I came, ah, there was, there was a sink there. I came up by the sink and then came around to where the employees entrance was to the back kitchen and there was a man standing there with - - I apologize. There was a man standing there, ah, with a mask on and then he, ah, he met me there. And he motioned me toward the cash register with a gun and he told me to get over to the cash register and put all the money in a pizza box.

* * *

Q. Now, you say he came in, you saw a firearm?

A. Yes.

Q. Saw a gun?

A. He had a gun, yes.

Q. Can you describe that for me?

A. Ah, the only thing that I remember about it at the time was that he, he had it in his hand down at his side. It was a full sized, it was full-sized pistol. It wasn't a revolver or, it was a full-size pistol and, you know, that's the only thing I can remember about it at this time.

Q. Can you remember the color at all?

A. No.

Q. How much do you know about firearms?

A. A good deal.

Q. Could you explain how much you know?

A. I current - - ah, I mean, I, myself, own several handguns and several, several riffles and everything, myself. So, I mean, I have a, a, I belong to a gun club and shoot frequently, so I know a definite amount about firearms.

Q. How long have you owned or worked with firearms?

A. I had been using rifles and shotguns since I was a kid. Ah, and then once I, ah, once I turned 21, I purchased a handgun and then started shooting handguns, as well.

Q. So about how long?

A. Ah, for handguns, for four years. For regular guns, I guess my whole life.

Q. How old are you?

A. Twenty-four.

Q. With your experience with firearms, can you tell whether or not it was real or fake?

A. It was real.

{¶28} Tr. at 170-174.

{¶29} Based upon the above, we find the jury was entitled to believe the evidence regarding the firearm and its operability; therefore, the jury did not lose it way in convicting Appellant on the gun specification.

{¶30} Further, upon review of the testimony and the evidence presented at trial, we find Appellant's conviction for aggravated robbery was not against the manifest

weight nor sufficiency of the evidence. Moreland described the robbery with the use of the firearm, and being ordered to put the money into a pizza box and to lie on the ground. An eye witness identified an individual leaving the store in a hurry, in a vehicle similar to his father's vehicle he drove on the night of the incident. The variance in the descriptions of the vehicles is more consistent than inconsistent. Moreland described an individual with approximate measurements similar to Appellant, and any variance in description by the other witnesses we find likewise more consistent than inconsistent. Appellant's vehicle and physical description do not contradict those described in the aggravated robbery.

{¶31} Further, and more importantly, Appellant confessed to F.B.I. agents he committed the robbery of the pizza shop.

{¶32} Appellant's second and third assignments of error are overruled.

IV.

{¶33} In the fourth assignment of error, Appellant argues his confession to law enforcement officers violated his constitutional rights.

{¶34} Specifically, Appellant argues his statements were in violation of *Miranda v. Arizona*, (1966) 384 U.S. 436, after he had invoked his right to counsel.

{¶35} Agent Kunkle testified Appellant had signed a Miranda waiver prior to questioning. Agent Kunkle testified,

Q. So take us to November 14th. What happened on that day?

A. My partner Frank Lukez and I went to the Summit County Jail to pick Mr. Maurer up. We signed him out approximately 9:35 or so was when we signed the papers. By the time we got done out processing him,

getting his things, securing him, getting him to vehicle and everything we departed the jail for the federal courthouse.

When we got in the car when - - Mr. Maurer had previously when I arrested him on the 11th started to make a statement to me and I told him I did not want him to say anything at that point, that I would talk to him when I picked him up for court. And after we got out of the sally port there at the jail and got on the road I advised Mr. Maurer that I could speak with him at that time. I read from our Miranda form all of his rights to him and I filled in the form at that time and had him read the statement on the bottom and then sign the form if he agreed to talk to me, which he did, and then we questioned him.

Q. So he tried to talk to you on November 11th and you said not right now?

A. Yes.

Q. And then you gave him another opportunity to talk to you on November 14th?

A. Yes.

Q. Your Honor, may I approach the witness?

THE COURT: Yes, you may.

BY MS. SCHNELLINGER:

Q. Handing you what's been previously marked as State's Exhibit 1, do you recognize that document?

A. Yes, I do.

Q. What is that document?

A. This is the fax copy of the advice of rights that I provided to Mr. Maurer on November 14th, 2011.

Q. Is that a true and accurate representation of the original?

A. Yes, it is.

Q. Did Mr. Maurer sign that document?

A. Yes, he did.

Q. You witnessed him signing that document?

A. Yes, I did.

Q. Did anybody else sign that document?

A. I signed it and Frank Lukez also signed it.

Q. What's the time on that document?

A. The time that I began the document to fill it out was 9:55 a.m. The time I completed it was 9:57 a.m.

Q. So what happened next? He signed the document and then what happened?

A. I began to ask Mr. Maurer questions about where he had been in the months that he was trying to elude law enforcement.

Q. Then did you inquire regarding the Gionino's Pizza robbery?

A. Yes, I did.

Q. What did he tell you?

A. He told me that he basically had the same rationale for robbing the Gionino's as he did the bank, that his mother was ill, her medications were expensive and his family was behind in their bills.

Q. Explain to me where he was sitting in the vehicle?

A. He was sitting in the rear passenger side seat.

Q. And was he handcuffed, shackles?

A. He had shackles on and there was a belly chain around his waist with handcuffs in the front.

Q. And you said you took him from Summit County Jail and you were going to the federal courthouse; is that correct?

A. Yes, ma'am.

Q. How long is that drive?

A. Approximately 15 minutes.

Q. At any point did anybody make any threats to Mr. Maurer?

A. No.

Q. Not at all?

A. No.

Q. What about any promises of leniency?

A. No.

Q. Any promises about anything at all, wouldn't be arrested for this robbery, he wouldn't be charged with it, any promises whatsoever?

A. No, ma'am. The only thing I said to him after the interview was I thanked him for his cooperation and told him that I would tell the prosecutor that he was cooperative and honest.

Q. But that was after the interview?

A. Yes.

Q. Now, you had given him Miranda one other time; is that correct?

A. Yes.

Q. Can you describe his state of mind when you gave him Miranda this time?

A. Seemed to be the same as the previous time.

Q. What was that?

A. He was calm. I think he was a little bit nervous because he was going before the court. But he was in his right mind. He had to sit in jail for the weekend, but he had looked much better when he came out of jail because he had an opportunity to have his hair cut and get a shower and things.

Q. Did he seem like he was under the influence of anything?

A. No, ma'am.

Q. Now, you were accompanied by Special Agent Lukez; is that correct?

A. Yes.

Q. L-U-K-E-Z; is that right?

A. Yes.

Q. Had he been with you on any of the other occasions?

A. Yes, he had been with me on the other occasion as well.

Q. So would you say Mr. Maurer was comfortable with you?

A. Yes. He called me by my first name on the day that I arrested him and apologized.

Q. I'm sorry, apologized?

A. Yes.

Q. What did he apologize for?

A. For I think for running. When I saw him he looked over his left shoulder at me and I said to him Toby, that's what he goes by, keep your hands on the vehicle. And he looked over his left shoulder and I said you know what this is about and he nodded his head and said I'm sorry, Jake.

Q. You go by Jake; is that right?

A. Yes.

Q. Now, on the way to the jail - - from the jail to the federal courthouse what did you do?

A. We talked about where he had been, what he had been doing. We talked about where he had been, what he had been doing. We talked about the Gionino's robbery and we weren't done talking when we got close to the federal courthouse so we pulled into the parking lot at Luigi's restaurant and finished our interview and then brought him to the courthouse after the interview was complete.

Q. You say Luigi's parking lot. Where is that located in relation to the federal courthouse?

A. It's probably five minutes away from the courthouse.

Q. That's a parking lot?

A. Yes.

Q. It's not an alley?

A. No.

Q. It's an area with a restaurant and other businesses; is that correct?

A. The restaurant is there. I'm not sure what else is around there. I just know the restaurant.

Q. Now, you had been talking the entire time; is that right?

A. Yes.

Q. And he had previously already signed this document right in the very beginning of your conversation; is that correct?

A. Yes, before I asked him any questions.

Q. When I say the document, I am referring to Exhibit 1. So what was - - how long were you in the parking lot?

A. Maybe 10 minutes, 15 minutes tops.

Q. You were in the parking lot the whole time or that's how long you were on the ride?

A. No, that was in the parking lot. We probably talked for maybe 20 minutes an hour that day.

Q. At any point during this time did Mr. Maurer request counsel?

A. No.

{¶36} Tr. at 13-20.

{¶37} Based upon the above, we do not find Appellant's statements were made in violation of *Miranda* or in violation of his constitutional rights. The trial court properly found Appellant waived his right to counsel, and confessed to his actions. We find, the trial court did not err in allowing the testimony at trial.

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

{¶39} Appellant's conviction in the Stark County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Delaney, J. and

Baldwin, J. concur