

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,
APPELLEE

-vs-

EDWARD R. BRYANT
APPELLANT

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Case No. 2013-1838

APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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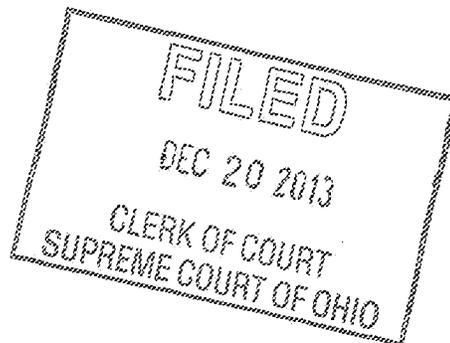


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ARGUMENT IN OPPOSITION TO JURISDICITON

The State of Ohio (hereinafter “Appellee) opposes Appellant’s request for jurisdiction because discretionary jurisdiction is not warranted when applying the guidelines outlined in Rule III of the Rules of Practice of the Supreme Court of Ohio. These guidelines require an Appellant to demonstrate either (1) the involvement of a substantial constitutional question; (2) the existence of a public or great general interest; or (3) in a felony case, an explanation as to why leave to appeal should be granted. S.Ct. Prac. R. III, § 1, (B)(2). Here, Appellant argues two of the above-mentioned prongs, namely that the case at bar involves public or great general interest and/or a substantial constitutional question. Specifically, Appellant states that inconsistent verdicts and a flawed identification procedure raise a great public interest and a substantial constitutional question. However, the issues presented by Appellant are exactly the type of discretionary argument that is precluded by this Court’s Rules of Practice.

Foremost, Appellant received a fair and complete review process from the jury, trial court, and Fifth District. This cuts hard against the argument that this matter involves a great general or public interest. At every step, Appellant received competent and zealous representation that examined every legal avenue for possible defenses and motions to suppress. This case did not, and would not, cause the people of Ohio to lose faith and confidence in our legal system, as Appellant posits in their argument for jurisdiction. Appellant received vigorous due process protections pursuant to US Constitution Amendment XIV and Ohio Constitution Article I § 16.

The fact that the result of the case was inconsistent verdicts was well within the province of the jury. In deciding this case on appeal, the Fifth District succinctly stated: “Where multiple issues are presented before a jury with regard to codefendants, consistent verdicts are not

required. Here, Appellant and his codefendant, Avery Brock's participation and identity were at issue; therefore, there is no requirement as to consistent verdicts between codefendants. While the substantive evidence presented on the counts were identical, the issues presented and developed varied in scope and degree as to each defendant. Testimony was offered at trial as to Appellant, including a specific motive to burglarize the residence, irrelevant to his codefendant. A review of the record demonstrates the jury was properly instructed as to motive and as to an accomplice jury instruction." *State v. Bryant*, 2013-Ohio-4446 (Ohio App. 5th Dist. October 7, 2013). In *Griffin v. State* (1868), 18 Ohio St. 438, the original rule as to inconsistent verdicts stated: "A verdict will not be set aside as inconsistent, or uncertain, because it finds differently as to counts in which there is no material difference." The case law is clearly delineated – inconsistent verdicts are permissible when multiple issues are presented as to codefendants, as was the case here. Therefore, this matter does involve public or great general interest and/or a substantial constitutional question with regard to the inconsistent verdict.

Appellant further argues the eyewitness identification violated his constitutional rights because the identification was impermissibly suggestive. Despite Appellant's contention, this matter does involve public or great general interest and/or a substantial constitutional question. "An identification of a defendant is unreliable only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Photographic identification procedures must be viewed under the totality of the circumstances." *Bryant* at ¶ 33, citing *Stoval v. Denno* (1967), 388 U.S. 296. The eyewitness identification was reliable that Appellant was the individual whom kicked in the door of the victim in this matter.

Appellant suggests, without providing example, the case law on eyewitness identification is not divided throughout the Appellate Courts. This statement is not true. The lynchpin of eyewitness identification is reliability. See *Stoval*, supra. In this matter, the individual whom identified Appellant as the assailant was his cousin, Joseph Barchetti. This did not involve a stranger situation where the police were searching for a person that the eyewitness did not know. Rather, the eyewitnesses were family and friends with Appellant and led the police to Appellant, not the other way around. The Fifth District pithily stated: “viewing the photographic identification made by Barchetti under the totality of the circumstances, while only one photograph was shown, Barchetti is Appellant's cousin; therefore, there was not a substantial likelihood of misidentification.” *Bryant* at ¶ 36.

Appellant advocates a clarification of the police technique of showing a single photograph to an eyewitness. However, the eyewitnesses knew Appellant and were merely trying to confirm his name for the police. This Court should not take jurisdiction to answer the question of identifying known suspects. The reliability of identifying people to the police that you know, is not in doubt, and carries an inherent reliability.

Therefore, Appellant failed to show this Court that that the inconsistent verdicts and alleged flawed identification procedure raised a great or general public interest and/or a substantial constitutional question.

STATEMENT OF FACTS AND CASE

On October 10, 2011 around 5 p.m., Appellant along with his codefendant, Avery Brock, burglarized the residence at 53 Neil St., Apt. 4, Delaware, Ohio. Larry Harris, a neighbor, testified that on October 10, 2011 he witnessed two individuals; both with dark hair, throwing a

bicycle through the back window at 53 Neil St.¹ Mr. Harris observed the two individuals over his six foot tall privacy fence in his back yard. Tr. Vol. I at pg. 39-43. From a distance of about a half a city block, Rafael Rizzo, another neighbor, testified he witnessed a short black male, wearing gloves, kick in the door at 53 Neil St. Rizzo stated that he saw a black male enter the residence and when the black male left stated, “I’ll be back bitch.” Rizzo further testified that he would not be able to identify the person who kicked in the door. Tr. Vol. I at 49-61.

Inside 53 Neil St. were the victims, Rickie Servert (“Rickie”), his girlfriend and child’s mother, Cassandra Wooten (“Wooten”), and their infant child, Rhylan. Tr. Vol. I at 68-121. After smashing the back window, Appellant and codefendant were positively identified by Joseph Barchetti (“Barchetti”) as the individuals who went around to the front door, kicked it open, and entered. Tr. Vol. I at 179. Moreover, Barchetti identified codefendant as wearing gloves when the front door was kicked in. Tr. Vol. I at 182. After knocking the door down, Appellant and codefendant entered the apartment and ransacked the place—destroying most everything on the first floor. Id. Appellant’s purpose was to find Rickie and get the drugs that Rickie stole from Appellant earlier on October 10, 2011. Id. While Appellant destroyed the house, Barchetti and Chloe Chambers (“Chambers”) watched from the vehicle. Tr. Vol. I at 181.

Fortunately for the safety of their infant child, Rickie and Wooten hid in an upstairs attic during this entire incident and called 911. Tr. Vol. I at 133. Wooten testified that she saw Barchetti and Chambers outside the house during the incident. Id. Further, Wooten stated she has no reason to be scarred of Barchetti because he is like a brother to her. Tr. Vol. I at 150. Despite seeing Barchetti, a friend, Wooten continued to hide in the attic because she heard two large males inside her home destroying the first floor, coming up the stairs, and she did not want her baby to get hurt. Tr. Vol. I at 150. Ultimately, Appellant, along with codefendant, left the

¹ The Appellant has dark hair.

apartment without locating the family because Barchetti yelled that the police were coming before Appellant made it up the stairs where the victims were hiding. Tr. Vol. I at 180. Earlier on October 10, 2011, Rickie testified that he and a friend, Zach, went to Columbus and stole \$150 worth of heroin from Appellant. Tr. Vol. I at 72.² Wooten testified that Rickie developed this plan to steal from Appellant with Zach earlier on October 10, 2011. Tr. Vol. I at 146. Shortly after stealing drugs from Appellant, Rickie admitted to using the heroin. Id at 73. After the theft, Appellant made plans to get the drugs back from Rickie. Thereafter, Appellant, known as “Black Rob,” contacted his first cousin, Barchetti, and told him that he needed a ride to Rickie’s apartment because he (Rickie) stole drugs. Tr. Vol. I at 157-199. In exchange for driving, Appellant forgave a debt that Barchetti owed. Barchetti and his girlfriend, Chambers, picked up codefendant, known as “Buck,” and along with Appellant, went to Rickie’s apartment.

Rickie and Barchetti knew each other for most of their lives, and both acknowledged that they were like “brothers” to each other. Rickie testified, however, that he owed Barchetti money for fronting him drugs about two months prior to October 10, 2011. Tr. Vol. I at 75. Despite being owed this money, Rickie testified that Barchetti never threatened him and did not believe that Barchetti would destroy his house. Tr. Vol. I at 77. Importantly, Barchetti testified that he told Rickie to pay him back when he (Rickie) could get to it. Tr. Vol. I at 159. Rickie further testified that the only two people he saw that day were Barchetti and Chambers, while looking out the peephole at the front of the apartment. At the time of looking out of the front door peephole, Rickie testified that at that same moment he continued to hear noises coming from the back of the apartment, indicating there were additional people there. Tr. Vol. I at 87.

² According to Wooten, she and Rickie bought drugs on a regular basis from the Appellant. Tr. Vol. I at 128. Rickie indicated in his testimony that he only met the Appellant two or three times. However, Rickie stated that he knew that all the drugs he was buying, which were copious amounts, came from the Appellant. Tr. Vol. I at 71.

After the incident, Barchetti and Chambers cooperated with law enforcement and were able to identify Appellant, also known as “Black Rob,” as the perpetrator. Barchetti and Chamber both told Officer Graham of the Delaware Police Department that they transported two individuals known by their street names as “Black Rob” and “Buck” to Rickie’s apartment at 53 Neil St. Barchetti and Chambers gave a detailed description of the events that occurred at 53 Neil St. related to the burglary. Additionally, Barchetti told Officer Graham that “Black Rob” had a tattoo on his right arm stating “DBLOCK.” Officer Graham was able to confirm this through a booking photograph taken of Appellant’s right arm by the Columbus Police Department. Therefore, at that time, law enforcement knew who the alleged perpetrators were, but only by their street names. On November 7, 2011, Officer Graham, using information gathered through the Drug Task Force, showed a single “OHLEG” photograph of Appellant to Barchetti and Chambers and both *immediately* identified the suspect as “Black Rob.”³

Finally, Appellee does not take issue with Appellant’s recitation of the procedural history in this case.

APPELLEE’S RESPONSE TO APPELLANT’S POTENTIAL ASSIGNMENTS OF ERROR

I. APPELLANT’S CONVICTION WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

Appellant alleges that his conviction is against the manifest weight of the evidence presented at trial. The *Thompkins* Court stated that the weight of the evidence concerns:

[t]he inclination of the *greater amount of credible* evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their [sic] verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them.

³ In hindsight, we know that Barchetti is the Appellant’s first cousin; however, that information did not come out until trial. Tr. Vol. I at 201.

Weight is not a question of mathematics, but depends on its *effect in inducing belief*. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. (Emphasis in original). The Court went on to say that in weighing the evidence, an appellate court sits as a thirteenth juror in resolving *conflicts* in the evidence. *Id.* (Emphasis added). The weight of the evidence and the credibility of the witnesses, though, are determined by the trier of fact. *State v. Yarbrough* (2002), 95 Ohio St.3d 227, 231.

“Judgments supported by some competent, credible evidence going to all the elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *State v. Husted*, 83 Ohio App.3d 809, 812 (Ohio App., 4th Dist., 1992). “This standard assumes that an appellate court will consider whether the evidence is reasonably credible or fundamentally incredible, contradicted or uncontradicted, reliable or unreliable, certain or uncertain, and whether the testimony was effectively impeached.” *State v. Sorrels*, 71 Ohio App.3d 162, 166 (Ohio App., 1st Dist., 1991). “The power to reverse a conviction on the manifest weight of the evidence ... should be exercised with caution, and an appellate court should reverse only if the evidence weighs heavily against conviction.” *State v. Allen*, 69 Ohio App.3d 366, 374 (Ohio App., 1st Dist., 1990). A “reviewing court should exercise its power to reverse on the weight of the evidence only in exceptional cases because the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact, and an appellate court should not substitute its judgment.” *Sorrels*, 71 Ohio App.3d at 166, citing *State v. DeHass* (1967), 10 Ohio St.2d 230.

A common thread wove itself into the fabric of this trial: Rickie went to Appellant’s home on October 10, 2011 to steal drugs, particularly heroin, and succeeded in the theft. Tr. Vol. I at 72, 146. Rickie, Wooten, and Barchetti all testified that Appellant had about \$150

worth of heroin stolen that day by Rickie—which provided the jury with the motive for Appellant going to Rickie’s apartment. *Id.* Being the victim of a drug theft, Appellant called a person whom was like a brother to Rickie, his first cousin, Barchetti. *Tr. Vol. I* at 166. Barchetti and Appellant have known each other their entire lives. See *Tr. Vol. I* at 157-199. However, when asked initially, Barchetti did not tell law enforcement that “Black Rob” was his cousin. *Tr. Vol. I* at 201. The fact that Barchetti did not want to name his cousin should come as no surprise to this Court, or the jury. The jury heard arguments from Appellant through cross-examination and closing arguments as to that fact and still found Appellant guilty beyond a reasonable doubt.

Appellant suggests that his conviction was completely reliant on the photo identification of one witness, Barchetti. This argument is without merit and is not supported by the record. Barchetti’s testimony was corroborated by key pieces of eyewitness testimony—namely, Rickie’s, Mr. Harris’ and Mr. Rizzo’s. Barchetti testified that he initially approached Rickie’s back door and began to bang on it, telling Rickie to come out. *Tr. Vol. I.* at 178. Thereafter, Barchetti went around to the front door and continued to try and get Rickie outside. *Id.* As Barchetti banged the front door, Appellant was around back where he broke the window with a bicycle. *Id.* Mr. Harris told the jury that he saw two men with black hair throw a bicycle through the back window of Rickie’s apartment. *Tr. Vol. I* at pg. 39-43.⁴ Further, Rickie testified that when he saw Barchetti out his front peep hole, he (Rickie) continued to hear noises coming from the back of the apartment where the window was smashed. This line of testimony confirmed that there were additional people there besides Barchetti and Chambers. After breaking the back window, Appellant and codefendant came around to the front where Barchetti stated they both took turns kicking in the door until it exploded, and while doing this, codefendant was wearing gloves. *Tr. Vol. I* at 182. Mr. Rizzo told the jury that the person he

⁴ Appellant has dark hair.

saw kicking in the door was wearing gloves. Again, Mr. Rizzo's testimony buttresses Barchetti's account of the burglary. Tr. Vol. I at 49-61.

And finally, Wooten testified that she saw Barchetti and Chambers standing outside the apartment when two large males were coming up the stairs as she hid for her life. Tr. Vol. I at 150. When asked, Wooten said that she has no reason to hide from Barchetti because he was like a brother to her and Rickie. *Id.* Rather, Wooten was hiding from whoever was destroying her home. Again, Barchetti testified that after the door exploded, both Appellant and codefendant went inside and began to destroy the home—this lines up with Wooten's description of two large males coming up the stairs. Tr. Vol. I at 150. This common thread, naming Appellant throughout the incident as the individual with the primary motive to go to Rickie's home and get stolen drugs back, concretely shows that the jury clearly did not lose its way when it found Appellant guilty. Moreover, Appellant's attempt to argue inconsistent verdicts as to codefendants under the guise of manifest weight is not the law.

A. OHIO LAW DOES NOT REQUIRE THAT VERDICTS ON A COUNT OF AN INDICTMENT BE CONSISTENT AS TO CODEFENDANTS

In this case, Appellant was found guilty of both Burglary and Criminal Damaging, while codefendant was acquitted of all charges. Appellant contends the only substantive evidence to point towards Appellant's guilt was the testimony of Barchetti. Based on the acquittal of codefendant, Appellant argues that the jury did not believe Barchetti's testimony because the substantive evidence against Appellant and codefendant was identical. In his jurisdiction appeal, Appellant is again attempting to creatively argue inconsistent verdicts as it relates to codefendants. In *State v. Adams* (1978), 53 Ohio St.2d 223, this Court enumerated the general rule as it relates to inconsistent verdicts for single defendants: "consistency between the verdicts on the several counts of an indictment...is unnecessary where [a] defendant is convicted on one

or some counts but acquitted on others, and the conviction will generally be upheld irrespective of its rational incompatibility with the acquittal.” Building upon this standard, there is no requirement that verdicts on the same count of an indictment be consistent as to codefendants. See *State v. Morris* (1975), 42 Ohio St.2d 307, 325; *State v. Hirsch*, 101 Ohio App. 425 (Ohio App. 8th Dist. 1956); *Cleveland v. Ryan*, 106 Ohio App. 110 (Ohio App. 8th Dist. 1958).

Therefore, the jury did not lose its way in finding Appellant guilty and codefendant not guilty.

Moreover, the contention that Barchetti had just as much motive was considered by the jury and dismissed. All parties agreed that Barchetti, Rickie, and Wooten were like family to one another and the money that Rickie owed Barchetti was not a driving factor. Tr. Vol. I at 158. Individuals lend money to close family and friends all the time—a higher standard of suspicion should not be placed upon Barchetti and Rickie just because drugs were involved. There was no testimony whatsoever that Barchetti went to Rickie’s home on October 10, 2011 with intention of collecting money that Rickie owed to him. Appellant is the only one to suggest this possibility and argued that fact to the jury, despite no testimony supported this conclusion. Moreover, the jury was properly advised as to any motives of Barchetti through an accomplice jury instruction by the trial court. Tr. Vol. II at 320.

The State proved its case beyond a reasonable doubt. This is not an exceptional case as provided in *Sorrels, supra*. This Court should deny jurisdiction because the conviction was not against the manifest weight of the evidence, and the issues before this Court do not involve a public or great general interest and/or a substantial constitutional question.

II. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS

Appellant argues that the trial court violated his right to a fair trial and due process by failing to grant Appellant's motion to suppress out of court identification by Barchetti and Chambers. This argument is without merit. An identification of a defendant that is unreliable due to impermissibly suggestive identification procedures may be a violation of that defendant's due process rights. *Stoval v. Denno* (1967), 388 U.S. 296. The Supreme Court expounded on that decision in *Simmons v. U.S.* (1968), 390 U.S. 377, stating:

“* * * [W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in *Stovall* at 301-302, and with decisions of other courts on the question of identification by photograph.” *Id.* at 384.

Thus, the court summarized, questions of flawed identification procedures must be viewed in the totality of the circumstances surrounding the identification. *Id.* at 383, citing *Stovall*, 388 U.S. at 302. If the identification is reliable, it is admissible notwithstanding the flaws in the identification process. *Stovall*, 388 U.S. at 302.

Continuing to define the law, the Court in *Neil v. Biggers* (1972), 409 U.S. 188, then developed a set of guidelines to assist in weighing the totality of the circumstances, asserting:

“[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty

demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” *Id.* at 199-200.

These factors are to be “weighed against the corrupting effect of the suggestive procedure in assessing reliability.” *Manson v. Braithwaite* (1977), 432 U.S. 98, syllabus. The practice of showing only one photograph to a potential eyewitness is not encouraged; however, such measures have been shown to be both reliable and unnecessary. *See State v. Battee*, 72 Ohio App.3d 660 (Ohio App. 11th Dist., 1991).

Applying this standard to the facts in the above captioned case, any possible flaws in the identification procedure are greatly outweighed by the totality of the circumstances surrounding the crime and the identification. The Trial Court correctly found that this matter was not one of eyewitness identification, and that it did not fall under the purview of ORC § 2933.83. However, looking at the standard set forth in *Biggers, supra*, Appellant’s arguments are without merit

First, this Court must consider the opportunity of the witness to view the criminal at the time of the crime. In this case, Barchetti and Chambers were face to face with Appellant for an extended period of time (in the daytime around 5 p.m.) as they drove together to the scene of the crime. Further, Barchetti and Chambers knew Appellant prior to going to the Rickie’s apartment. In past cases where the eyewitness of a crime had a “clear and lengthy” view of the defendant, this factor has held significant weight. *See State v. Madison, a.k.a. Branch* (1980), 64 Ohio St.2d 322, 332.

Second, the Court must consider the witness’s degree of attention. In the case sub judice, there is no question that Barchetti and Chambers’ attention was trained fully on Appellant as Rickie’s home was destroyed.

Third, the Court must look to the accuracy of the witness's prior description. In this case, Barchetti was able to provide a blow-by-blow run down to Officer Graham of how the entire altercation transpired at Rickie's apartment, which was supported and buttressed by eyewitness neighbor testimony. Thus, where the description of the entire incident is completely accurate, that factor should carry heavy weight.

The fourth factor to consider is the level of certainty of the witness in making the identification. Here, Barchetti and Chambers were certain. The two were so certain that they provided additional information to Officer Graham that Appellant had a tattoo on his right arm: "DBLOCK." Officer Graham was able to confirm this unsolicited information through booking photos from the Columbus Police Department. Moreover, we now know, through trial testimony, that Barchetti is the first cousin of Appellant. Hindsight only lends further credence to the testimony of Officer Graham at the suppression motion.

Finally, a Court must examine the length of time between the crime and the identification. In this case, a little over a month passed before the photo identification. Given the intensity of the situation, a month duration did not clear away the memory of this brutal home invasion, where Barchetti and Chambers already knew Appellant. In fact, Barchetti and Chambers were able to provide unsolicited information that Appellant had "DBLOCK" tattooed on his right arm, which was verified by Officer Graham. The five factors set forth by *Biggers*, supra, definitively shows that the identification of Appellant was reliable based upon the totality of the circumstances. Moreover, identification procedure used in this case does not present a public or great general interest and/or substantial constitutional question.

CONCLUSION

Therefore, the State of Ohio would respectfully ask this Court deny jurisdiction because Appellant failed to show that this case is of a public or great general interest and/or presented a substantial constitutional question.

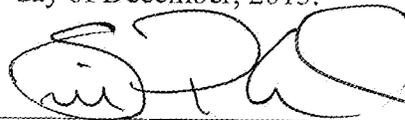
Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a true and accurate copy of the foregoing document was served upon Appellant #A675-753 via regular mail to 670 Marion Williamsport Rd. PO Box 1812 Marion, Ohio 43301-1812 this 20th day of December, 2013.



Eric Penkal (0084240)