[Cite as *State v. Gonzalez*, 2011-Ohio-1193.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-628
v.	:	(C.P.C. No. 09CR12-7265)
Juan A. Gonzalez,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 15, 2011

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Brehm & Associates, and *Eric W. Brehm*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Juan A. Gonzalez, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of one count of burglary, in violation of R.C. 2911.12(A)(1), a felony of the second degree. For the following reasons, we affirm.

{¶2} On November 27, 2009, at around 4:15 p.m., Batrese Jones was watching television in her home on Deephollow Drive in Columbus. Jones heard the doorbell ring

several times; she also heard the doorknob turn. Through the peephole of her front door, she saw a young Hispanic man, wearing a blue Notre Dame jacket, standing on the front porch ringing the doorbell. Out an adjacent window, she observed an older Hispanic man, wearing a dirty hooded sweatshirt and jeans, standing on the walkway leading to her front porch.

{¶3} Jones then observed the two men walk toward the rear of the house. Shortly thereafter, she heard the glass in a back window shatter and observed the younger man reach inside the window. After Jones yelled at the men that she had called the police, both fled on foot.

{¶4} Jones's next-door neighbor, John Parsley, witnessed the incident. Parsley observed two Hispanic men, one wearing a hooded sweatshirt, the other wearing a black and yellow jacket, walk toward the rear of Jones's house. The man in the jacket knelt by a back window; the man in the sweatshirt stood approximately five feet away. When Parsley walked out his back door to his deck, both men ran away.

{¶5} Officers Jason Burchinal and Russell Morrow separately responded to the scene within minutes of Jones's 9-1-1 call and interviewed Jones and Parsley. Based on these interviews, the officers aired descriptions of the two suspects. Within minutes, the officers were notified that two possible suspects had been apprehended at a nearby carryout. The officers separately transported Jones and Parsley to the carryout. Jones and Parsley independently identified the suspects as the two men who had attempted to enter Jones's home.

{¶6} Appellant was indicted on one count of burglary, a felony of the second degree. Appellant filed a motion to suppress Jones's and Parsley's out-of-court

identifications of appellant, arguing that the "show-up" identification procedure used by the police was unduly suggestive.[1] During the course of the trial, the trial court conducted four separate hearings involving four separate witnesses, Jones, Parsley, Burchinal, and Morrow, on the motion to suppress. Following each hearing, the trial court permitted the witness to testify during trial about the "show-up" identification procedure. At the conclusion of the trial, the jury found appellant guilty of burglary.

{¶7} Appellant filed this appeal, advancing two assignments of error:

> 1. THE TRIAL COURT DID ERR BY ADMITTING EVIDENCE OF AN UNDULY SUGGESTIVE IDENTIFICATION PROCEDURE.
>
> 2. THE TRIAL COURT DID ERR WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶8} In his first assignment of error, appellant argues that the trial court erred in denying his motion to suppress Jones's and Parsley's identifications of him. When a witness has identified a suspect in a pre-trial confrontation, due process requires a court to suppress the identification if: (1) the confrontation was unnecessarily suggestive of the suspect's guilt, and (2) the identification was unreliable under the totality of the circumstances. *State v. Gross,* 97 Ohio St.3d 121, 2002-Ohio-5524, citing *State v. Murphy,* 91 Ohio St.3d 516, 2001-Ohio-112.

{¶9} "To warrant suppression of identification testimony, appellant bears the burden of establishing that the identification procedure was 'so impermissibly suggestive

[1] Appellant filed a second motion, seeking suppression of statements he made to the police. The record reveals that appellant did not pursue this motion. No ruling on it appears in the record.

as to give rise to a very substantial likelihood of irreparable misidentification.' " *State v. Brown,* 12th Dist. No. CA2006-10-247, 2007-Ohio-7070, ¶14, quoting *Neil v. Biggers* (1972), 409 U.S. 188, 198, 93 S.Ct. 375, 381. Generally, a confrontation is unnecessarily or unduly suggestive when the witness views only one subject. Id., citing *Manson v. Brathwaite* (1977), 432 U.S. 98, 116, 97 S.Ct. 2243, 2254. However, that fact alone is insufficient to require suppression of the identification where the circumstances otherwise demonstrate the reliability of the identification. *Brown*, citing *Manson*, 432 U.S. at 115, 978 S.Ct. at 2253. Moreover, under certain circumstances, the viewing of a suspect in a one-person show-up near the time of the alleged criminal act may ensure accuracy. *Brown*, citing *State v. Madison* (1980), 64 Ohio St.2d 322, 332.

{¶10} In determining the reliability of a witness's pre-trial identification, the court examines the totality of the circumstances. Factors to be considered include: (1) the witness's opportunity to view the suspect at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the suspect, (4) the level of certainty expressed by the witness at the time of the identification, and (5) the length of time between the crime and the confrontation. *State v. Broom* (1988), 40 Ohio St.3d 277, 284, citing *Manson.*

{¶11} At the hearing on the motion to suppress, Jones testified when she first observed appellant, he was standing on the walkway near the window at the front of her house. She told the responding police officers that she got a "positive look" at the men and described the clothing they wore. (Tr. 30.) At the carryout, Jones sat in the police cruiser and observed the suspects, who were led one at a time from a police vehicle to the cruiser in which Jones was seated. Jones estimated that the suspects stood only a

few feet away from her during the identification process. Jones positively identified the suspects as the two men who attempted to enter her home. Jones testified that when the officer asked her if she was "sure" of her identification of appellant, she responded "[y]es." (Tr. 35.) Jones averred that the suspects were wearing the same clothing she had described to the police, and that the suspects' physical features matched the individuals she saw at her home. Jones testified that she was "very certain" that the suspects she identified at the carryout were the men who attempted to enter her home. (Tr. 28.) Jones averred that the police did not influence her identification of appellant in any way. Jones estimated that she identified the suspects within 15 minutes of observing them at her home.

{¶12} Parsley testified that he observed appellant and the other man at the back of Jones's house. He admitted that he did not see the men's faces; however, he was able to observe the type of clothing worn by both men. Parsley estimated that only 15 minutes elapsed between the time the police arrived at Jones's house and were notified that the two suspects had been apprehended. At the carryout, he positively identified the suspects as those he saw at Jones's house. Parsley admitted that he could not identify the suspects' faces; however, he did identify their clothing. Parsley testified that he was "a hundred percent sure" of his identification. (Tr. 85.)

{¶13} Burchinal testified that he transported Jones to the carryout. He briefly described the standard "show-up" identification procedure employed by the police department and averred that he followed that procedure and did not attempt to influence Jones's identification. Burchinal testified that Jones viewed each suspect independently and positively identified each suspect. Burchinal estimated that the "show-up"

identification occurred approximately 30 minutes after he and Morrow arrived at Jones's residence.

{¶14} Morrow testified that he transported Parsley to the carryout. Like Burchinal, Morrow briefly described the "show-up" identification protocol utilized by the police department and testified that he followed that protocol and did not attempt to influence Parsley's identification. Morrow testified that Parsley was "positive" of his identification of the suspects as those he had observed outside Jones's home. (Tr. 102.)

{¶15} Applying the factors set forth in *Broom* to the testimony provided at the hearings on the motion to suppress, we conclude that Jones's and Parsley's identifications of appellant were sufficiently reliable such that the trial court did not err in denying appellant's motion to suppress. Jones and Parsley each testified that they had an opportunity to view appellant at the time of the crime, and their testimony suggests that they were paying close attention at the time they observed appellant. Indeed, Jones testified that appellant was standing on the walkway near the window at the front of her house, and she reported to the responding police officers that she got a "positive look" at the men and described the clothing they wore. Parsley testified that he saw appellant and the other man at the rear of Jones's house. Parsley candidly admitted that he could not see the men's faces; however, he was able to observe the type of clothing they wore. Further, both Jones and Parsley provided accurate descriptions of the clothing worn by appellant at the time of the incident. Appellant was wearing the same type of clothing when he was apprehended.

{¶16} In addition, both Jones and Parsley were unwavering in their identifications of appellant. Jones testified that she told Burchinal at the carryout that she was "sure" of

her identification of appellant. She also testified that she was "very certain" that the suspects she identified at the carryout were the men who attempted to enter her home. She further averred that the police did not influence her identification in any way. Parsley testified that he was "a hundred percent sure" of his identification.

{¶17} Finally, the evidence establishes that very little time elapsed between the time the crime was committed and the identifications occurred. As noted above, Jones testified that she identified the suspects within 15 minutes of observing them at her home; Burchinal estimated that the identifications occurred approximately 30 minutes after he and Morrow arrived at Jones's residence.

{¶18} Based upon the foregoing evidence, we conclude that the trial court did not err in denying appellant's motion to suppress, as appellant has failed to establish that the "show-up" identification procedure was either unnecessarily suggestive of his guilt or unreliable under the totality of the circumstances. Appellant's first assignment of error is overruled.

{¶19} Appellant's second assignment of error contends his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence.

{¶20} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally adequate to support a verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. Whether the evidence is legally sufficient to support a verdict is a question of law. Id.

{¶21} In determining whether the evidence is legally sufficient to support a verdict, " 'the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

crime proven beyond a reasonable doubt.' " *State v. Robinson,* 124 Ohio St.3d 76, 2009-Ohio-5937, ¶34, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A reviewing court will not disturb a verdict unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4.

{¶22} In a sufficiency inquiry, reviewing courts do not assess whether the prosecution's evidence is to be believed, but whether, if believed, the evidence supports the conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence); *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶4 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime").

{¶23} Appellant was convicted of burglary in violation of R.C. 2911.12(A)(1), which provides in relevant part that "[n]o person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense." Appellant contends his burglary conviction was not supported by sufficient evidence because the state offered no evidence that he participated in the burglary. We disagree.

{¶24} "Although a defendant may be charged in an indictment as a principal, the court may instruct the jury on complicity where evidence at trial reasonably supports a finding that the defendant was an aider or abettor." *State v. Blackburn*, 5th Dist. No. 06 CA 37, 2007-Ohio-4282, ¶41, citing *State v. Tucker*, 8th Dist. No. 88231, 2007-Ohio-1710, ¶15. Here, the trial court instructed the jury that appellant could be convicted of burglary as an aider or abettor. The complicity statute, R.C. 2923.03(A), provides in pertinent part that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * *: (2) [a]id or abet another in committing the offense."

{¶25} To aid and abet means " '[t]o assist or facilitate the commission of a crime, or to promote its accomplishment.' " *State v. Johnson*, 93 Ohio St.3d 240, 243, 2001-Ohio-1336, quoting Black's Law Dictionary (7th Ed.Rev.1999). In *State v. Pruett* (1971), 28 Ohio App.2d 29, 34, the court stated that a common purpose among two people "to commit crime need not be shown by positive evidence but may be inferred from circumstances surrounding the act and from defendant's subsequent conduct." "Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed." Id.

{¶26} The evidence presented by the state in this case establishes that appellant was complicit in the burglary. Appellant and his companion approached Jones's home together. While his cohort rang the doorbell, appellant stood only a few feet away. The two men walked together to the rear of Jones's house, and appellant stood only five feet away when his companion broke Jones's window and reached into the house. The two men ran away together when Jones informed them she had called the police, and they were apprehended together a short distance from Jones's house.

{¶27} Construing the foregoing evidence in a light most favorable to the state, it was reasonable for the jury to conclude beyond a reasonable doubt that appellant and his cohort acted in concert in committing the burglary, and, as such, appellant is fully responsible for the crime.

{¶28} Appellant's second assignment of error also challenges his conviction as being against the manifest weight of the evidence. Appellant does not, however, address this argument in his brief. App.R. 16(A)(7) states, in relevant part, that an appellant's brief shall include "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions." App.R. 12(A)(2) states that "[t]he court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)."

{¶29} Accordingly, pursuant to App.R. 12(A) and 16(A), we decline to address appellant's manifest-weight argument, given that he has failed to present "reasons in support of the contentions" behind the argument. Having rejected appellant's sufficiency argument, we overrule the second assignment of error.

{¶30} Having overruled both of appellant's assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and KLATT, JJ., concur.

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