[Cite as *State v. Tyson*, 2011-Ohio-4981.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-830 (C.P.C. No. 09CR-10-5923)
Marquan A. Tyson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 29, 2011

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

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Marquan A. Tyson ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict convicting him of burglary as a felony of the second degree, and robbery as a felony of the third degree. For the following reasons, we affirm that judgment.

{¶2} On September 8, 2009, several men trespassed inside the apartment of Kenneth Carter ("Mr. Carter"), a quadriplegic living at 1000 Mount Vernon Avenue, in Franklin County, Columbus, Ohio, and stole numerous items of personal property. As a result of this event, appellant was indicted by the Franklin County Grand Jury in a 12-

count indictment charging him with numerous counts of aggravated burglary, aggravated robbery, and robbery. All of these offenses were also indicted with firearm specifications.

{¶3} Prior to trial, the State dismissed Counts 2, 3, 7, 8, 9, 10, 11 and 12 of the indictment. As a result, this matter proceeded to trial on only one count of aggravated burglary, one count of aggravated robbery, and two counts of robbery.

{¶4} At trial, the State presented evidence establishing that Mr. Carter was paralyzed approximately 20 years ago after he fell off of a roof. Mr. Carter testified he has been living on his own for approximately 12 years, but receives home healthcare aid every day for approximately nine hours. Mr. Carter's home healthcare aids assist him with daily living tasks such as cooking, dressing, and bathing. Although he is able to leave the house using a wheelchair, he spends much of his time confined to a hospital-type bed.

{¶5} On September 8, 2009, Mr. Carter asked his home healthcare aid to go up the street and find someone who would sell him some cocaine. The home healthcare aid did so, bringing a drug dealer back to Mr. Carter's apartment. Mr. Carter asked his home healthcare aid to leave. He then completed the transaction and the dealer left, leaving Mr. Carter's door unlocked. Mr. Carter proceeded to get high. Shortly thereafter, the dealer returned with two other men. The men proceeded to ransack Mr. Carter's apartment, taking personal property, including clothing, an Adidas gym bag, a VCR/DVD player, a PlayStation, and a large screen television. The men made several trips back to the apartment, taking additional property with each trip. Mr. Carter testified that at one point, there were four men inside his apartment.

{¶6} Mr. Carter identified appellant as the individual who sat on the couch near his bed and watched him to "make sure I wasn't going to do nothing." (Tr. 57.) Mr. Carter testified appellant went into the back room of the apartment and took some of his clothing, and also helped the other men roll the television out of the apartment. Mr. Carter testified that during one of the final trips to the apartment, another man implied he had a weapon and lifted up his shirt to display something in his waistband when Mr. Carter reached for his call light to summon help. That same man said, "don't do it" and snatched the call light away from Mr. Carter. (Tr. 79.) Mr. Carter testified that he did not attempt to call for help earlier because he was afraid of the men. Because of his paralysis, Mr. Carter was unable to prevent the men from stealing his property, although he did plead with the men, asking them not to take his stuff.

{¶7} The State introduced evidence to show that the men took the items from Mr. Carter's apartment and immediately went to Lev's Pawn Shop, which was located across the street from Mr. Carter's apartment, in order to pawn the items. Specifically, the State introduced evidence showing appellant had used his identification to pawn Mr. Carter's VCR/DVD player. Fingerprints taken from the television found at the pawn shop were also linked to another man, Mario Green, who was later identified by Mr. Carter as one of the men who came into his apartment and stole his television and VCR/DVD player.

{¶8} During the course of the trial, the parties, by stipulation, introduced a recorded interview conducted by a Columbus police robbery detective. During that interview, appellant denied going into Mr. Carter's apartment, although he admitted to pawning a DVD player for a man who had approached him on the street. Appellant also

acknowledged that he had previously met Mr. Carter and claimed Mr. Carter owed him money.

{¶9} In addition, the State introduced the testimony of the Ohio State Highway Patrol trooper who commenced the polygraph examination of appellant. The trooper testified that after the pre-testing for the polygraph was completed, appellant refused to complete the examination. Instead, appellant asked to provide a handwritten statement. In that statement, appellant confessed that he took clothing from Mr. Carter's apartment, but claimed that he did so with Mr. Carter's permission. Appellant denied having any other involvement in the crime.

{¶10} After the State rested, appellant presented the testimony of two witnesses. Appellant's first witness, Fronrue Tarpeh ("Mr. Tarpeh"), testified he was approached by some men about buying a television. He was later asked to assist the men in moving the television from Mr. Carter's apartment. Mr. Tarpeh agreed to help. After he entered the apartment, Mr. Tarpeh realized the men were actually stealing the television. At that point, Mr. Tarpeh left the apartment. Mr. Tarpeh testified he never saw appellant inside the apartment. However, immediately after Mr. Tarpeh walked out of the apartment, he saw appellant walking towards the apartment.

{¶11} Appellant's second witness, Mercedes Rodriguez ("Ms. Rodriguez"), testified she was in the area of Mr. Carter's apartment on the day of the incident and she saw two or three men pushing a television down the street. According to Ms. Rodriguez, appellant was also in the area at the time she saw the men pushing the television down the street. However, she testified appellant was not one of the men pushing the television. Instead, appellant was walking down the street from another direction.

{¶12} On June 24, 2010, the jury returned its verdicts, finding appellant not guilty of aggravated robbery and not guilty of robbery as a felony of the second degree, but guilty of the lesser included offense of burglary and guilty of robbery as a felony of the third degree. The jury also found appellant not guilty with respect to the accompanying firearm specifications. The trial court sentenced appellant to seven years of incarceration on the burglary and two years of incarceration on the robbery, and ordered the sentences to run concurrently. This timely appeal now follows. Appellant presents a single assignment of error for our review:

> I. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶13} In his sole assignment of error, appellant asserts the State failed to present sufficient evidence to prove the element of force or threat of force as it relates to the robbery conviction. Appellant contends there is no evidence which demonstrates that he used force against Mr. Carter or that appellant was aware that someone else demonstrated such force. With respect to the burglary conviction, appellant submits the State failed to prove the elements of force, stealth, or deception. Appellant further asserts there is no evidence to demonstrate he or his co-defendants entered the premises with the intent to commit a criminal offense, arguing that because the door was unlocked, the individuals who entered the house may have formed the intent to commit the offense after they entered the apartment.

{¶14} Because of these purported failings, appellant argues there is insufficient evidence to support his convictions and the convictions are against the manifest weight of the evidence.

{¶15} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶16} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶17} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing

belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? Id. at ¶25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; See also *State v. Robinson* (1955), 162 Ohio St. 486 (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276.

{¶18} "When 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." *Wilson* at ¶25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶19} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court

finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶20} We shall begin by addressing appellant's challenges to the burglary conviction.

{¶21} In order to establish the crime of burglary, the evidence must show that appellant trespassed, by stealth, force, or deception, in an occupied structure, to wit: 1000 Mount Vernon Avenue, while Mr. Carter or another person other than an accomplice was present, with purpose to commit therein any criminal offense. See R.C. 2911.12.

{¶22} In the instant case, there is no question that the structure was indeed occupied and Mr. Carter was present at the time appellant and the others entered the apartment. The issues in dispute are whether appellant's presence constituted a trespass by force, stealth, or deception, and whether appellant and the others possessed the purpose to commit a criminal offense.

{¶23} Appellant submits that because the door to Mr. Carter's apartment was unlocked and because at least one of the men (the drug dealer) had recently been invited into the home, the trespass element cannot be established. We disagree.

{¶24} R.C. 2911.21(A)(1) defines "criminal trespass" as follows: "[n]o person, without privilege to do so, shall * * * [k]nowingly enter or remain on the land or premises of another[.]"

{¶25} According to the evidence presented, appellant was not invited into Mr. Carter's residence. With the exception of the man who performed the initial cocaine transaction, none of the men were invited into Mr. Carter's apartment. Additionally, the

dealer's "invitation" to enter the apartment ended at the time the two men completed the drug transaction.

{¶26} Even if we were to assume, for the sake of argument, that appellant and the others had actually been invited to enter the apartment, the privilege of an initial invitation to enter can be revoked. See *State v. Steffan* (1987), 31 Ohio St.3d 111, 115 (a fact finder could infer the defendant's privilege to remain in the home terminated the moment he began assaulting her). Here, appellant testified that he pleaded with the men not to take his property. It is readily apparent that he did not want appellant and the other men inside his apartment. Even if one or more of the men were initially invited inside the apartment, that invitation was revoked when they began stealing items from Mr. Carter.

{¶27} As to the element of burglary requiring evidence of force, stealth, or deception, we find there is evidence of force.

{¶28} "Force" is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). In the instant case, the men had to open Mr. Carter's unlocked door in order to enter the apartment. Opening a closed but unlocked door meets the requirement of demonstrating "force." *State v. Lane* (1976), 50 Ohio App.2d 41, 46-47. In *Lane*, we determined that based upon the statutory definition of "force" set forth in R.C. 2901.01(A), there was no indication the General Assembly intended to exclude the forcing open of closed but unlocked doors from the definition of force or from the crime of aggravated burglary. Id. at 46. The same logic applies here. See also *State v. Tomak*, 10th Dist. No. 03AP-1188, 2004-Ohio-6441, ¶15 ("opening an unlocked door or entering through an open door

satisfies that element of the burglary offense"); *State v. Dixon* (May 16, 1989), 10th Dist. No. 88AP-558.

{¶29} Furthermore, there was testimony that one of the accomplices implied to Mr. Carter that he had a gun as part of his efforts to dissuade Mr. Carter from pushing the call light for help. In addition, Mr. Carter testified that same individual warned him not to press the call light and snatched the light away from him as he was reaching for it. Also, Mr. Carter testified that at certain points, appellant sat near him to make sure that he did not do anything. And throughout the event, Mr. Carter was pleading with the men not to take his property. All of these actions also go to the element of force.

{¶30} Appellant has also challenged the element of intent to commit a crime. In *State v. Flowers* (1984), 16 Ohio App.3d 313, we determined "[t]here is a reasonable inference that one who forcibly enters a dwelling, or a business place, does so with the intent to commit a theft offense in the absence of circumstances giving rise to a different inference." Id. at paragraph one of the syllabus. It is obvious that appellant and the other men intended to (and in fact did) commit a theft offense.

{¶31} Moreover, even if appellant did not form the purpose to commit the criminal offense until he was already inside the apartment and in the course of the trespass, it is of no consequence. "For purposes of defining the offense of burglary under R.C. 2911.12(A), a defendant may form the purpose to commit a criminal offense at any point during the course of a trespass." *State v. Moore*, 12th Dist. No. CA2005-06-148, 2006-Ohio-2800, ¶8. See also *State v. Fontes*, 87 Ohio St.3d 527, 530, 2000-Ohio-472 (for purposes of defining aggravated burglary, a defendant may form the purpose to commit a criminal offense at any point during the course of the trespass); and *State v. Frederick*,

9th Dist. No. 03CA0045-M, 2003-Ohio-7175, ¶22 (the intent to commit a criminal offense inside a residence may be formed at any time during the continuing trespass therein).

{¶32} Based upon our analysis as set forth above, we find there is sufficient evidence which, if believed, supports appellant's conviction for burglary.

{¶33} In order to prove the offense of robbery as appellant stands convicted in this case, the State was required to prove that appellant recklessly used or threatened the immediate use of force against Mr. Carter while committing or attempting to commit a theft offense or while fleeing immediately after the attempt or the offense. See R.C. 2911.02(A)(3).

{¶34} In this case, there is sufficient evidence to demonstrate that a theft offense occurred. Mr. Carter testified as to the numerous items which were removed from his apartment without his permission, and the police recovered most, if not all, of those items from the pawn shop located across the street from Mr. Carter's residence. Thus, the only element at issue here involves the use of force and/or the threat of force. Appellant disputes the existence of sufficient evidence of the force or threat of force element of the robbery offense. Appellant argues there is no evidence demonstrating that he used force against Mr. Carter or that he knew someone else was using force against Mr. Carter.

{¶35} Despite appellant's contention, we find there is sufficient evidence to support the conviction for robbery.

{¶36} In *State v. Davis* (1983), 6 Ohio St.3d 91, paragraph one of the syllabus, the Supreme Court of Ohio determined that the use of force or the threat of the immediate use of force element in a robbery offense "is satisfied if the fear of the alleged victim was of such a nature as in reason and common experience is likely to induce a person to part

with property against his will and temporarily suspend his power to exercise his will by virtue of the influence of the terror impressed."

{¶37} In *Davis*, the court found the defendant's act of holding his hand under his shirt as if he was carrying a weapon while he was demanding and physically removing money could constitute the use of force and/or the threat of the use of force, despite his utterance of the phrase, "I'm not gonna hurt you[.]" Id. at 775. In *State v. Ellis*, 10th Dist. No. 05AP-800, 2006-Ohio-4231, ¶7-8, we came to a similar conclusion (informing a person that one possesses a gun, coupled with a demand for money, allows a reasonable inference of a threat of harm sufficient for robbery, and the type of force contemplated by the legislature in enacting the robbery statute is that which presents actual or potential harm).

{¶38} The " '[threat of] the immediate use of force against another' * * * can be proven by demanding words and a threatening demeanor, i.e., the offender using the particular demeanor of holding one of his hands under his clothing hidden from the victim's view as if carrying a firearm, even though the offender does not verbally threaten harm." *State v. Delany*, 10th Dist. No. 04AP-1361, 2005-Ohio-4067, ¶12.

{¶39} In the case sub judice, Mr. Carter is a quadriplegic who requires daily assistance in order to live on his own. Due to his mobility issues and his fear of the offenders, he was unable to protect his own property. When Mr. Carter pleaded with the men not to take his property, they laughed at him and told him to shut up. One of the participants in the crime indicated and/or implied he possessed a weapon at one point during the commission of the crime, and also stopped Mr. Carter from summoning help by

warning him not to press the call light. These threats and/or actions clearly had the effect of preventing Mr. Carter from taking action to protect his property.

{¶40} Appellant also challenges his robbery conviction on the grounds that he did not personally use or threaten the immediate use of force against Mr. Carter, nor did he have knowledge of such action on the part of the other participants. Despite this assertion, appellant's own statements to law enforcement belie his claim. For example, in his written statement given to the trooper following the polygraph pre-testing, appellant stated:

> * * * I am sorry that I didn't tell you the truth befor[e] but here's what happened. I Marquan Tyson did take some clothes from Mr. Carter['s] apartment but, he was willing to give me them, but as far as taking anything without Mr. Carter['s] p[er]mission I did not do such thing. I just feel like he had his doubt because I was there but I am just saying that whatever they did was wrong and I had nothing to do with it * * *.

State's exhibit No. 39.

{¶41} Appellant also gave a verbal statement to the trooper, in which he admitted he did take an article of clothing from Mr. Carter's apartment, while the other suspects also took property. Appellant advised the victim owed him money, so he believed he was permitted to take the clothes in lieu of payment. Although Mr. Carter did not specifically tell appellant he could take the clothing, appellant reported he heard Mr. Carter tell the others what they could and could not take. Appellant further claimed he knew the television was taken without Mr. Carter's permission and he intended to pawn it in exchange for half of the money received from the pawn shop. See State's exhibit No. 40.

{¶42} Appellant's own statements acknowledge he was inside the apartment and took clothing, although he seems to claim he believed he was entitled to do so. Yet, it is

apparent that appellant was also aware of the wrong doing of the other participants. He admitted to participating in pawning the television, knowing it was taken without permission. In addition, when asked about appellant's role in the commission of the crime, Mr. Carter testified appellant "did everything with them." (Tr. 58.)

{¶43} Furthermore, the jury was provided with a complicity instruction and was instructed that it could find appellant guilty of the crime charged if it found appellant, in acting with the culpable mental state required for the commission of that offense, aided and abetted another in the commission of the offense. The trial court defined "aid" as "to help, assist or strengthen." The trial court went on to define "abet" as "to encourage, counsel, incite, or assist." (R. 189 at 12.)

{¶44} To prove complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the prosecution must show "the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, syllabus; see also *State v. Jackson*, 10th Dist. No. 03AP-273, 2003-Ohio-5946, ¶32; *State v. Chatman*, 10th Dist. No. 08AP-803, 2009-Ohio-2504, ¶26. Intent may be inferred based upon the circumstances surrounding the crime. *Johnson* at syllabus.

{¶45} In addition, aiding and abetting may also be established through overt acts of assistance. *State v. Trocodaro* (1973), 36 Ohio App.2d 1, 6. However, " 'the mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor.' " *State v. McWhorter*, 10th Dist. No. 08AP-263, 2008-Ohio-6225, ¶18, quoting *State v. Widner* (1982), 69 Ohio St.2d 267, 269.

Furthermore, aiding and abetting requires the accused to have taken some role in causing the offense. *McWhorter* at ¶18, citing *State v. Sims* (1983), 10 Ohio App.3d 56, 59.

{¶46} In the instant case, the evidence went well beyond appellant's "mere presence" at the scene. The evidence demonstrates that appellant took some role in causing the events to occur and in committing the offense of robbery. There was evidence presented to demonstrate appellant played a role in stealing items from Mr. Carter's apartment and in keeping an eye on Mr. Carter to ensure that he did not attempt to call for help. Furthermore, appellant participated in pawning at least one of the items taken from Mr. Carter's residence.

{¶47} Even though appellant was not the individual in possession of the purported weapon used to impliedly threaten the victim, such possession is unnecessary to prove the required elements of the offense as it relates to appellant. See *State v. Letts* (June 22, 2001), 2d Dist. No. 15681 (an accomplice can be found to have committed every element of the offense committed by the principal). See also *State v. Kimble*, 7th Dist. No. 06 MA 190, 2008-Ohio-1539, ¶27 (the elements of the principal offense, which were committed by the principal, can be imputed to the aider and abettor).

{¶48} While appellant may not have been the one to use or threaten the use of force against Mr. Carter (although, based upon the evidence, it would be reasonable to infer appellant used or threatened the use of force by sitting on the couch and watching the paralyzed victim to ensure he did not do anything while the others proceeded to steal his property), appellant obviously took on other roles in the execution of the crime at issue. Thus, he aided and abetted in the commission of the robbery.

{¶49} As a result, we find there is evidence demonstrating appellant and/or the other offenders recklessly used or threatened the immediate use of force against Mr. Carter during the commission of a theft offense or during flight immediately thereafter. Therefore, we find sufficient evidence to support the robbery conviction and we find appellant aided and abetted others in the commission of this offense.

{¶50} Appellant has also argued that his convictions for both offenses are against the manifest weight of the evidence. We reject this assertion, based on our analysis as set forth above. We cannot say, after reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, as well as resolving any conflicts in the evidence, that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed.

{¶51} Accordingly, we overrule appellant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and TYACK, JJ., concur.