[Cite as *State v. Johnson*, 2012-Ohio-2325.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-717 (C.P.C. No. 09CR-04-2215)
Theodore Johnson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 24, 2012

Ron O'Brien, Prosecuting Attorney, and *Susan M. Suriano*, for appellee.

Robert D. Essex, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Theodore Johnson ("appellant"), appeals from a July 28, 2011 judgment of conviction and sentence entered by the Franklin County Court of Common Pleas, following a jury trial in which the jury returned a verdict finding appellant guilty of two counts of robbery in violation of R.C. 2911.02(A)(2) and (3), felonies of the second and third degree. For the following reasons, we affirm.

{¶ 2} On April 14, 2009, a Franklin County Grand Jury indicted appellant on one count of robbery in violation of R.C. 2911.02(A)(2) and one count of robbery in violation of R.C. 2911.02(A)(3). The indictment alleged that, on February 11, 2009, appellant, in attempting or committing a theft offense in respect to Kroger's, or in fleeing immediately after the attempt or offense, did: (1) recklessly inflict, attempt to inflict, or threaten to inflict physical harm on another, to wit: Randy Cohen and/or Norman Joseph Herron,

and (2) recklessly use or threaten the immediate use of force against another, to wit: Randy Cohen and/or Norman Joseph Herron.

{¶ 3} On May 6, 2009, appellant entered a plea of not guilty as to the charges in the indictment.

{¶ 4} On June 13, 2011, a jury trial commenced, wherein Norman Joseph Herron ("Herron"), Steven H. Henderson ("Henderson"), and Randy Cohen ("Cohen") testified on behalf of the State. Appellant did not call any witnesses to testify on his behalf.

{¶ 5} On June 15, 2011, the jury returned a verdict of guilty of robbery as charged in Counts 1 and 2 of the indictment. Because Counts 1 and 2 of the indictment merged, the State elected to proceed with sentencing on Count 1 of the indictment. On July 25, 2011, the trial court sentenced appellant to a mandatory four years of imprisonment at the Ohio Department of Rehabilitation and Correction and issued him 454 days of jail-time credit. Further, the trial court indicated that appellant's sentence in this matter was to run concurrently with appellant's sentence of 18 months in Franklin C.P. No. 09CR-5279, and with appellant's sentence of 12 months in Franklin C.P. No. 10CR-6480. The trial court journalized its judgment entry on July 28, 2011.

{¶ 6} On August 25, 2011, appellant filed a timely notice of appeal setting forth a single assignment of error for our consideration:

> Appellant's convictions were not supported by sufficient evidence and were against the manifest weight of the evidence.

{¶ 7} We first consider appellant's sufficiency challenge. "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. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶ 36, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In reviewing a challenge to the sufficiency of the evidence, an appellate court must 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 (1991), paragraph two of the syllabus, superseded by constitutional amendment on other grounds as recognized in *State v. Smith*, 80 Ohio St.3d 89, 102 (1997). "In this inquiry, appellate courts do not assess

whether the state's evidence is to be believed, but whether, if believed, the evidence admitted at trial supports the conviction." *State v. Gibson*, 10th Dist. No. 10AP-1047, 2011-Ohio-5614, ¶ 22, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80.

{¶ 8} In the present matter, a jury found appellant guilty of two counts of robbery in violation of R.C. 2911.02(A)(2) and (3). R.C. 2911.02(A) defines robbery as follows:

> No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> * * *
>
> (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
>
> (3) Use or threaten the immediate use of force against another.

Further, R.C. 2913.02(A)(1) defines the underlying theft offense as: "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: * * * Without the consent of the owner or person authorized to give consent."

{¶ 9} Here, appellant argues that there was insufficient evidence to sustain his robbery convictions. In support of this argument, appellant contends that: (1) the State presented no evidence that the alleged force used by appellant was in furtherance of the commission of the theft offense, as opposed to a mere attempt to escape, and (2) the State presented insufficient evidence that appellant used force. *See* appellant's brief, at 8-9.

{¶ 10} In response, the State argues that the evidence sufficiently proved appellant's guilt because: (1) the statute does not require that the force used be in furtherance of the theft offense, and (2) the testimony and store surveillance footage is sufficient evidence to prove that appellant committed a theft offense, and in fleeing immediately after committing that theft offense, inflicted or attempted to inflict physical harm on Herron and Cohen, and used force against Herron and Cohen. *See* appellee's brief, at 5-6.

{¶ 11} We first address appellant's argument that the State presented no evidence that the alleged force used by appellant was in furtherance of the commission of the theft offense, as opposed to a mere attempt to escape. Specifically, appellant contends that over 12 minutes elapsed between the theft and the struggle and, as such, the struggle between appellant and the Kroger employees did not occur as a result of appellant fleeing immediately after the theft. *See* appellant's brief, at 9. In support of this position, appellant cites *State v. Thomas*, 106 Ohio St.3d 133, 2005-Ohio-4106.

{¶ 12} In *Thomas* at ¶ 2, the appellant left a grocery store with two bags of unpaid merchandise. Soon thereafter, the appellant dropped the bags of merchandise and continued walking. *Id*. A uniformed off-duty police officer working security at the grocery store followed the appellant into a nearby laundromat and told him to step outside. *Id*. The appellant complied with the police officer's order and they began walking back toward the grocery store. *Id*. Upon reaching the front door of the grocery store, the appellant attempted to run away and, in doing so, struck the police officer in the face with his head. *Id*. A jury found the appellant guilty of robbery, and the Eighth District Court of Appeals affirmed the conviction. *Id*. at ¶ 3.

{¶ 13} In reversing the appellate court's decision, the Supreme Court of Ohio found that, under this specific set of facts, the evidence was insufficient to show that the appellant was fleeing immediately after a theft when he inflicted harm upon the police officer. *Id*. at ¶ 16. Further, the Supreme Court stated:

> Had [the appellant] struggled with [the police officer] in an attempt to flee immediately after [the appellant] left the store, or after he dropped the stolen goods, or after being forced by [the police officer] to return to the store, then an ensuing injury, attempt to injure, or threat to injure might justify elevation of the offense from theft to robbery

Id.

{¶ 14} The Supreme Court also held that a plain reading of R.C. 2911.02 "indicates that the offense of robbery is committed when the offender, while fleeing immediately after a theft or an attempted theft, (1) attempts, threatens, or inflicts physical harm or (2) uses force or threatens to use immediate force. *The statute plainly does not require that 'the force attendant to the theft offense be inflicted in furtherance of a purpose to deprive*

another of property.' " *Id*. at ¶ 13, quoting *State v. Moody*, 104 Ohio St.3d 244, 2004-Ohio-6394, ¶ 15. (Emphasis added.)

{¶ 15} Here, State's exhibits A and B contain video footage of the February 11, 2009 incident. At approximately 10:36 a.m. to 10:40 a.m., the first video shows appellant walking through the store with a grocery cart, standing near the cigarette corral, reaching up over the cigarette corral and taking cigarettes, walking away from the cigarette corral, and then walking back to the cigarette corral and taking more cigarettes. *See* State's exhibit B, video 1. Then, at approximately 10:42 a.m., the video footage shows appellant running back up through the store without a grocery cart. *See* State's exhibit B, video 1.

{¶ 16} At approximately 10:40 a.m., the second video shows appellant leave his cart near the cash registers and walk past the cash registers toward the store's exit. *See* State's exhibit B, video 2. Then, at approximately 10:41 a.m., the video footage also shows appellant running back into the store. *See* State's exhibit B, video 2.

{¶ 17} At approximately 10:52 a.m., the fourth, fifth, and sixth videos show parts of the struggle between appellant and the Kroger employees, as well as appellant's escape into the Kroger parking lot. *See* State's exhibit A, videos 4, 5, and 6.

{¶ 18} In distinguishing the present matter from *Thomas*, the record before us indicates that appellant did not leave Kroger for any period of time prior to engaging in a physical altercation with Kroger employees. Instead, the video footage shows that at approximately 10:40 a.m., appellant walked back over to the cigarette corral, took more cigarettes, attempted to leave the store and, approximately one minute later, ran back into the store after a failed attempt to flee from Kroger security. *See* State's exhibit B, videos 1 and 2. Although some time elapsed between appellant's first attempt to flee, his struggle with Kroger employees, and his ultimate escape, appellant was clearly trying to find a way to immediately leave the store.

{¶ 19} Additionally, appellant's argument that no evidence was presented that appellant had any of the property on his person at the time the struggle ensued is meritless because the statute plainly does not require that the force used be in furtherance of a purpose to deprive another of property. *See Thomas* at ¶ 13

{¶ 20} Therefore, in viewing the foregoing evidence in a light most favorable to the prosecution, we find sufficient evidence to prove, beyond a reasonable doubt, that appellant attempted to flee from Kroger immediately after the theft or attempted theft.

{¶ 21} We now address appellant's argument that the State presented insufficient evidence that appellant used force. We note that, pursuant to R.C. 2911.02(A)(2), appellant does not specifically challenge whether there was sufficient evidence that he inflicted, attempted to inflict, or threatened to inflict physical harm on Herron or Cohen.

{¶ 22} As stated above, R.C. 2911.02(A)(3) defines robbery as:

> No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> * * *
>
> (3) Use or threaten the immediate use of force against another.

Additionally, R.C. 2901.01(A)(1), defines force as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." Further, "This court, as well as other Ohio appellate courts, have determined that the type of force envisioned by the General Assembly in enacting R.C. 2911.02 is that which involves actual or potential harm to the victim." *State v. Green*, 10th Dist. No. 03AP-813, 2004-Ohio-3697, ¶ 17.

{¶ 23} In the present matter, the State's evidence shows that, on February 11, 2009, after concealing a pack of lighters and two cartons of cigarettes in the waistband of his sweatpants, appellant attempted to leave Kroger. (Tr. 30.) At that time, Herron, a loss prevention officer who had been observing and videotaping appellant's actions, walked up and identified himself as Kroger security. (Tr. 30-32, 34.)

{¶ 24} Herron testified that, upon showing appellant his badge, appellant reentered the store, ran down the back side to the cash registers, and ran by the pharmacy where there is another door. (Tr. 32.) According to Herron, appellant then turned around, ran back up through the store, and exited through the entrance door. (Tr. 32.) At that time, two other Kroger employees attempted to stop appellant at the door. (Tr. 40.)

{¶ 25} Further, Herron described the struggle that ensued between appellant, himself, and other Kroger employees, which was also partially depicted in the videos labeled State's exhibits A and B:

> Q. The video that we just watched, were you depicted in that particular video?
>
> A. No. I'm to the right of it entering the vestibule as I'm a little bit slower, bigger.
>
> Q. Did you see what happened?
>
> A. Yes, I did.
>
> Q. And what was [appellant] doing?
>
> A. Well, Randy [Cohen] tried to stop him at the door. [Appellant] ran over Randy; at which time Randy wrestled with him, grabbed his arm, his sweater. At which time another store employee pushed the cart in front of him from exiting the store. Then [appellant] headed towards the other exit door where I was at.
>
> * * *
>
> Q. Did that lead to what we just saw in the previous video?
>
> A. Yes. Yes, sir. And that's me going to help [Randy] and [appellant] runs over me and then we had the little scrimmage. [Appellant] come at me with his shoulder down like a fullback and run over me, knocked me backwards. And then when [appellant] started to exit, I grabbed his hoody at which time his hoody came off of him and he got away.
>
> Q. What happened after he got away?
>
> A. One of the employees ran out - - he got into a car, a small - - I don't know what type of car it was but he got into the passenger side of the car. One of the employees ran out behind him and got the license plate number of the vehicle.
>
> Q. Okay. During this incident did you get hurt at all?
>
> A. Feelings hurt because he got away.

> * * *
>
> Q. Okay. Did [appellant] cause you any pain or discomfort during this incident?
>
> A. Maybe a little discomfort but not nothing to go to the hospital over or anything like that. Because when [appellant] hit me I just went backwards basically.
>
> Q. You said that he - - I think you said [appellant] bowled you over or he ran into you?
>
> A. He came at me like a halfback with the shoulder down.
>
> Q. And did that hurt at all when he hit you?
>
> A. A little bit.

(Tr. 40-43.)

{¶ 26} Henderson, an employee at the Henderson Road Kroger, testified that, on February 11, 2009, he "saw there was a commotion out in the cart bay where security and one of the cashiers was wrestling with somebody." (Tr. 63.) Henderson described the incident as follows:

> Q. What did you see when you looked out into that entry area?
>
> A. I saw at least three people wrestling around. And I knew that something was going on with possibly a shoplifting because I heard the risk management guy say that when he was running through there, when he was running toward the cart bay.

(Tr. 64.)

{¶ 27} Cohen, a cashier at the Henderson Road Kroger, testified that, on February 11, 2009, Herron asked him to "try to keep an eye on a gentleman casing the cigarette corral." (Tr. 78.) In his testimony, Cohen admitted that he did not notice anything until Herron began chasing appellant at the pharmacy exit door. (Tr. 78-79.) Cohen, in a failed attempt to prevent appellant from leaving the store, confronted him at the entrance doors located in the lobby of the store. While viewing parts of this confrontation contained on State's exhibit A, Cohen testified as follows:

Q. What was going on at that point?

A. Basically confronted him, kind of as, like I would say, a football player, [appellant] tried to cut through me. I was trying to tackle him. I didn't. And at this point see me back into the screen. I was still hanging on to his gray sweatshirt, hoodie.

Q. When you said like a football player, did [appellant] run around you or did he try to run through you? How did he get past you?

A. He tried to get through me, basically.

Q. Okay. Did he run into you?

A. Yes.

* * *

Q. Do you see another guy on the screen?

A. Yes.

Q. Do you know who that is?

* * *

A. Yes. His name is Mike Morris.

Q. What happened right there?

A. Just kind of flung him down, flung him around. Mike actually tried to use the cart to prevent [appellant] from going out the door.

Q. The two of you manage to prevent him from going out of the door?

A. Yes.

Q. Did you fall down at that point?

A. Yes.

* * *

> Q. Did you yourself get hurt at all in this altercation?
>
> A. No, not really. Like I said, [appellant] ran into me, got through me, but nothing, no serious physical injuries.
>
> Q. Did it hurt a little?
>
> A. It might have, but not - - hey, I played football so I'm not going to worry about it.

(Tr. 82-83, 86.)

{¶ 28} Finally, the parties stipulated that appellant is, in fact, the individual depicted in State's exhibits A, B, and C, and also that appellant is the same individual discussed by the witnesses in their testimony regarding the person they interacted with on February 11, 2009.

{¶ 29} In viewing the evidence in a light most favorable to the prosecution, we conclude that there is sufficient evidence to prove, beyond a reasonable doubt, that appellant inflicted, attempted to inflict, or threatened to inflict physical harm upon Herron and/or Cohen, and used force against Herron and/or Cohen, in violation of R.C. 2911.02(A)(2) and (3). The testimony of Herron, Henderson, and Cohen confirms that, in his attempt to flee after the theft or attempted theft, appellant engaged in a physical altercation with Herron, Cohen, and another Kroger employee. Further, Herron testified that he saw appellant run over Cohen, and that appellant came at Herron with his shoulder down like a fullback, ran him over, and knocked him backwards. Finally, Cohen testified that appellant tried to cut through him like a football player and that, in trying to prevent appellant from going out the door, he fell down. Although the record indicates that Herron and Cohen did not seek medical attention after this incident, it is reasonable to believe that appellant's actions could have potentially caused physical harm to either Herron or Cohen.

{¶ 30} Therefore, pursuant to R.C. 2911.02(A)(2) and (3), we find sufficient evidence in the record to uphold appellant's robbery convictions.

{¶ 31} Appellant also contends that his robbery convictions were against the manifest weight of the evidence. "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." *Cassell* at ¶ 38, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, citing *Thompkins* at 386. "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." *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). " 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). This discretionary authority " 'should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175

{¶ 32} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967). The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶ 58; *State v. Clarke*, 10th Dist. No. 01AP-194 (Sept. 25, 2001). The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973 (2002); *State v. Sheppard*, 1st Dist. No. C-000553 (Oct. 12, 2001). Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶ 22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶ 17.

{¶ 33} We note that although appellant alleged that his convictions were against the manifest weight of the evidence, appellant failed to set forth any specific arguments regarding the same. However, based upon the testimony of Herron, Henderson and Cohen, along with the video footage contained in State's exhibits A and B, the jury could have reasonably believed that appellant committed or attempted to commit a theft, and in fleeing or attempting to flee from Kroger: (1) inflicted, attempted to inflict, or threatened to inflict physical harm on Herron and Cohen, and (2) used or threatened the immediate use of force against Herron and Cohen.

{¶ 34} Further, in its jury instructions, the trial court explained:

> You are the sole judges of the facts, the credibility of the witnesses and the weight of the evidence.
>
> To weigh the evidence, you must consider the credibility of the witnesses. You will apply the tests of [truthfulness] which you apply in your daily lives.
>
> These tests include the appearance of each witness upon the stand; the witness' manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see, hear, and know the things concerning the testimony; the accuracy of the witness' memory; frankness, or lack of it; intelligence; interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper.
>
> You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

(Tr. 126-27.)

{¶ 35} Here, the jury heard testimony from Herron regarding the details of the theft and the ensuing struggle. In his testimony, Herron explained that he has been a loss prevention officer for Kroger for 21 years and that he saw appellant steal two cartons of cigarettes and a pack of lighters. (Tr. 27-28.) Further, Herron described how appellant wrestled with Cohen and ran him over. (Tr. 40.) Herron also described how appellant

came at him with his shoulder down like a fullback, ran him over, and knocked him backwards. (Tr. 41.) The jury also heard Henderson testify that he saw three people wrestling around and that "it was just kind of a mess of bodies." (Tr. 64.) In addition, the jury heard testimony from Cohen that appellant tried to cut through him like a football player. (Tr. 82.) Finally, the jury also had the opportunity to watch the video footage of the theft and appellant's subsequent escape on State's exhibits A and B.

{¶ 36} As previously stated, "The determination of weight and credibility of the evidence is for the trier of fact." *State v. Shamblin*, 10th Dist. No. 06AP-249, 2006-Ohio-6001, ¶ 22. Further, "[t]he trier of fact is free to believe or disbelieve all or any of the testimony." *Id*.

{¶ 37} We decline to substitute our judgment for the trier of fact regarding the credibility of the witnesses or the weight to be given to their testimony. After reviewing the record in its entirety, we conclude there is nothing to indicate that the trier of fact clearly lost its way or that any miscarriage of justice resulted in convicting appellant of robbery in violation of R.C. 2911.02(A)(2) and (3). Consequently, we do not find that the jury's verdict is against the manifest weight of the evidence.

{¶ 38} Accordingly, appellant's single assignment of error is overruled.

{¶ 39} Having overruled appellant's single assignment of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and DORRIAN, JJ., concur.

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