[Cite as *State v. Brewley*, 2012-Ohio-2525.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-567 (C.P.C. No. 10CR-08-4742)
Allesta G. Brewley,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 7, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Brian J. Rigg, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Allesta G. Brewley ("appellant"), appeals from a judgment of conviction entered following a jury trial in which he was convicted of one count of robbery as a felony of the second degree, along with a one-year firearm specification. For the reasons that follow, we affirm the judgment of the Franklin County Court of Common Pleas.

{¶ 2} On August 12, 2010, appellant was indicted for aggravated robbery, robbery, and felonious assault, along with the accompanying firearm specifications, as a result of an altercation that occurred with Cherone Hood ("Hood") involving lawn care equipment and payment for work performed by appellant.

{¶ 3} A jury trial commenced on May 2, 2011. The State of Ohio ("the State") produced the testimony of several witnesses, including Hood, Christopher Hewlett ("Hewlett"), and several police witnesses. The following testimony was established.

{¶ 4} Hood testified he owned a landscaping business and had employed appellant to perform yard work. On August 5, 2010, Hood drove to 3107 Karl Road, in Columbus, Ohio, to check on the progress of the job appellant was performing with Hewlett, who is Hood's son. Upon arrival, Hood discovered that appellant was mishandling the lawn mower and had torn off the side of the lawn mower while trying to run the mower through some bushes. Hood admonished appellant. A short time later, appellant advised Hood the lawn mower was broken. Hood informed appellant he was fired and stated he (Hood) would finish the job himself.

{¶ 5} Appellant became very upset and demanded that he be paid for his work immediately. Hood advised appellant he would be paid for his work, but at a later date. Appellant stated he was taking the lawn mower. Hood told appellant he could not take the lawn mower. Hood and appellant struggled over the lawn mower. Appellant and Hood continued to argue. Appellant threatened to beat up Hood and to "prove that you're a bitch in front of your daughter and your son." (Tr. 19.) Appellant was also shouting obscenities. Hood's six-year-old daughter witnessed the altercation. She was sitting in a nearby vehicle with appellant's wife, Sonequa Brewley ("Sonequa"), who was babysitting the little girl.

{¶ 6} Hood testified the struggle continued for a long time. Several minutes into the struggle, Hood was able to snatch the lawn mower away from appellant and push it toward the street. Hood instructed Hewlett to put the lawn mower into the truck. Appellant ran at Hood and pushed him and grabbed the mower again and the altercation continued. At one point, they were on the ground fighting over the lawn mower. After approximately 20 or 25 minutes of struggling and tussling, Hood wanted to diffuse the situation and end the altercation. Hood finally told appellant to just take the lawn mower as payment. However, appellant was not in agreement with that proposal. Appellant shouted, "Oh, no, no, it's not going to be like that. It's not going to be like that." (Tr. 24.) Appellant then grabbed the weed whacker.

{¶ 7} Hood and appellant struggled and tussled over the weed whacker. Like with the lawn mower, the two men ended up on the ground fighting over the weed whacker. Hood believed appellant was going to strike him with the weed whacker. Hood told appellant, "You got one swing with that weed whacker because I'm about to [f***] you up right now." (Tr. 34.) At that point, appellant dropped the weed whacker and ran to his wife's vehicle, a green Range Rover, to retrieve his gun. Hood heard appellant telling his wife he needed the gun to kill Hood. Hood's daughter jumped out of the vehicle to warn Hood that appellant had a gun and was going to use it to kill him. Appellant pointed the gun towards Hood. Hood took off running and heard two popping sounds. Hood believed appellant had fired his gun at him.

{¶ 8} Hood called 911. Afterwards, when Hood returned to his truck, he noticed three windows had been broken. Hood also testified he saw blood on his vehicle from where appellant had cut himself when breaking out the windows. In addition, Hood stated he found live bullets inside his vehicle that had not been there prior to the incident with appellant. The police collected and photographed this evidence. Later, Hood found the spring and the base to the gun clip from a .40 caliber handgun, presumably the one used by appellant to threaten Hood. Hood turned those items over to the police.

{¶ 9} In addition, Hood testified he suffered some injuries as a result of tussling around on the ground with appellant. He testified he "got scuffed up a little bit." (Tr. 44.) He went to the hospital a couple of days after the incident.

{¶ 10} Hewlett testified he was working with appellant the day appellant was fired. Appellant demanded that he be paid on the spot. When Hood told appellant he would have to wait, appellant told Hood he was taking the lawn mower until he was paid. A tussle over the lawn mower ensued. Appellant took the lawn mower and headed toward his vehicle with it, but Hood grabbed the lawn mower. The two men both tugged on it and each fell to the ground trying to get it away from one another. Eventually, Hood told appellant to take the lawn mower as payment. Appellant then grabbed the weed whacker and went to swing it at Hood. Hewlett heard Hood advise appellant he had one chance to swing it at him (Hood). Appellant ran toward his wife's vehicle, grabbed his gun, and ran up the driveway. Appellant then cocked the gun and pointed it toward Hood. Hood took

off running, as did Hewlett, but Hewlett was still able to observe appellant breaking out the windows of Hood's truck.

{¶ 11} Several police officers testified at trial. Some officers responded to the scene on Karl Road. They secured the scene and spoke to Hood and Hewlett. Other officers responded to 2967 East 8th Avenue, Columbus, Ohio, to search for the green Range Rover used to flee the scene at Karl Road. The officers located the vehicle and observed a gun holster inside the vehicle. Eventually appellant emerged from the residence at that address and was arrested.

{¶ 12} Detective John Herman testified he first responded to the scene on Karl Road. He observed Hood's white Lincoln Navigator in the driveway. He found .40 caliber live bullets inside the vehicle, as well as blood throughout the vehicle. He later responded to the scene on East 8th Avenue. Sonequa gave officers permission to search her vehicle. Officers processed blood evidence from inside the green Range Rover. They also recovered a Browning .40 caliber handgun from the front passenger floorboard area of the vehicle, but the spring and the bottom piece of the magazine clip were missing. The spring and bottom plate recovered from the Lincoln Navigator approximately one day after the incident were later determined to be compatible with the .40 caliber handgun recovered from the Range Rover. Detective Herman concluded that the handgun was used to smash out the windows of the Lincoln Navigator, which caused the bottom of the clip to break, which in turn caused the bullets to fall out of the magazine and inadvertently come to rest inside the Lincoln Navigator.

{¶ 13} Detective Herman interviewed appellant following his arrest. Detective Herman testified appellant admitted to participating in the altercation. Appellant's interview was recorded and played for the jury. Appellant admitted that Hood fired him as a result of a broken lawn mower. Appellant demanded immediate payment, but Hood said he would not be paid until payday. Appellant acknowledged he tried to take one lawn mower as payment. Hood tried to prevent him from taking the lawn mower and a struggle ensued. Appellant conceded Hood was either pushed to the ground or fell down as a result of the struggle.

{¶ 14} According to appellant, when Hood finally agreed to allow him to take the lawn mower as payment, appellant determined he needed to take the weed whacker too,

since the lawn mower alone would not cover everything he was owed for mowing lawns. Appellant admitted during the interview that a similar struggle occurred involving a weed whacker. In addition, appellant admitted to breaking out the windows of Hood's Lincoln Navigator. However, appellant denied using a firearm. Instead, appellant claimed he used a rock to break out the windows and cut his hand while doing so. Detective Herman testified he observed during the interview that appellant's hand was bandaged.

{¶ 15} The parties entered into stipulations regarding several laboratory reports. The parties stipulated that the DNA types obtained from the blood found on the driver's side door of Hood's vehicle and from the gun recovered from the Range Rover matched appellant's DNA. It was also stipulated that the .40 caliber handgun was test-fired and found to be operable. Finally, the parties stipulated that the magazine follower, spring, and plate recovered from the victim's Lincoln Navigator were compatible with the magazine frame recovered from the Range Rover.

{¶ 16} Following the stipulations, the State rested its case. Appellant did not present any witnesses or evidence.

{¶ 17} On May 4, 2011, the jury returned a verdict finding appellant not guilty of the aggravated robbery offense, but guilty of robbery with a one-year firearm specification.[1] A sentencing hearing was held on May 25, 2011. The trial court sentenced appellant to three years of incarceration on the robbery offense, along with a mandatory one-year sentence for the firearm specification, which was ordered to run consecutively to the robbery, for a total sentence of four years. The trial court filed a judgment entry of conviction on May 27, 2011. This appeal now follows in which appellant presents two assignments of error for our review:

> [I.] THE VERDICT IS AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE.
>
> [II.] THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT.

[1] It appears the State dismissed the felonious assault offense prior to the commencement of trial, as this charge was never presented to the jury. The trial court entered a nolle prosequi for the felonious assault charge, pursuant to its May 27, 2011 judgment entry of conviction.

{¶ 18} Because appellant's two assignments of error are intertwined, we shall address both of them together. Collectively, appellant contends his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence because: (1) there is evidence to demonstrate appellant abandoned his efforts to take the lawn mower, thereby removing the theft element; (2) Hood ultimately gave the lawn mower to appellant as payment, so no attempted theft occurred; (3) the gun specification should have been dismissed pursuant to Crim.R. 29 because the firearm was only used as a criminal tool in furtherance of a criminal damaging offense; and (4) the jury should have received an instruction on criminal damaging as an alternative offense, rather than just instructions on aggravated robbery and robbery.

{¶ 19} 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). 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*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 78; and *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶ 20} 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); *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶ 21} 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, ¶ 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*, 162 Ohio St. 486 (1955) (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).

{¶ 22} "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*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 23} 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*, 10th Dist. No. 96APA04-511 (Feb. 6, 1997).

{¶ 24} The jury convicted appellant of one count of robbery as a felony of the second degree pursuant to R.C. 2911.02(A)(1) and/or (2). The jury further found appellant guilty on the one-year firearm specification pursuant to R.C. 2941.141. In order to prove the offense of robbery as charged in the indictment, the prosecution was required to prove that appellant, in attempting or committing a theft offense, or in fleeing immediately after the attempt or the offense, either: (1) had a deadly weapon on or about his person or under his control; or (2) recklessly inflicted, attempted to inflict or

threatened to inflict physical harm on Hood. Additionally, in order to prove the one-year firearm specification, the prosecution was required to prove that appellant had a firearm on or about his person or under his control while committing the robbery offense.

{¶ 25} Appellant argues the theft or attempted theft element is lacking in this case because he abandoned any attempt to take the lawn mower and/or weed whacker prior to retrieving the handgun, and because Hood ultimately agreed to let him take the lawn mower as payment. We disagree.

{¶ 26} First, any concession by Hood to allow appellant to take the lawn mower as payment occurred following a long and protracted altercation, during which Hood was attempting to diffuse an escalating situation. As such, Hood's agreement to allow appellant to take the lawn mower shows signs of coercion. Even if we ignored the element of coercion and presumed Hood legitimately granted appellant permission to take the lawn mower as payment, Hood did not at any point give appellant permission to take the weed whacker. Appellant's efforts to take the weed whacker were ongoing, regardless of whether or not Hood agreed to allow appellant to take the lawn mower.

{¶ 27} Second, the fact that appellant ultimately left the scene without taking the lawn mower and the weed whacker with him does not equate to abandonment of the crime. "Abandonment" requires that the actor abandon his effort to commit the offense or otherwise prevent its commission, under circumstances which manifest a complete and voluntary renunciation of his criminal purpose. R.C. 2923.02(D). *See also State v. Bowyer*, 8th Dist. No. 88014, 2007-Ohio-719, ¶ 15, citing *State v. Cooper*, 52 Ohio St.2d 163, 178 (1977) (vacated on other grounds) (when an offender forms the intent to perform an act and takes a substantial step toward the act, he cannot argue he has abandoned the act).

{¶ 28} During his interview with Detective Herman, appellant clearly acknowledged he tried to take the lawn mower and the weed whacker as payment for the lawns he had mowed. He did not express an intent to abandon his initial plan to take these items. Additionally, it is significant to note that appellant injured himself when he cut his hand while breaking out the windows of Hood's vehicle. A reasonable jury could have easily concluded appellant's failure to complete the theft offenses by actually

absconding with the property was the result of an involuntary cessation caused by his hand injury.

{¶ 29} Third, a reasonable fact finder could have determined appellant had not abandoned his attempted thefts and that the attempted thefts were ongoing at the time he retrieved the handgun from Sonequa's vehicle. In fact, the retrieval of the gun could be found to have assisted appellant in the facilitation of the robbery, in that it helped him to flee the scene. Significantly, Hood testified that when appellant pointed the gun at him, he ran in fear. Hewlett testified he ran as well. Had appellant not cut himself breaking the windows on Hood's truck after that, he certainly would have been capable of fleeing with the lawn mower and the weed whacker.

{¶ 30} This also supports the robbery element charged under R.C. 2911.02(A)(1), which requires the prosecution to prove that appellant had a deadly weapon on or about his person or under his control. Under the statute, the elements of robbery can be met if the offender has a deadly weapon on or about his person or under his control while he is attempting or committing a theft offense *or while he is fleeing immediately after the attempt or the offense*. In the instant case, there is sufficient evidence to demonstrate that appellant had a deadly weapon[2] on or about his person or under his control while he was fleeing immediately after the attempt. Furthermore, a conviction under these circumstances is not against the manifest weight of the evidence.

{¶ 31} As indicated above, the offense of robbery includes the flight which occurs immediately after the theft or attempted theft, so if the offender had a deadly weapon on or about his person or under his control while fleeing immediately after the theft or attempted theft, he was engaged in robbery during his flight from the scene. *See State v. Campbell*, 90 Ohio St.3d 320, 331-32 (2000) (the jury could infer the defendant used the gun he had just stolen to commit the carjacking, meaning he used it to facilitate flight immediately after the theft, which meant he used it to facilitate the aggravated robbery).

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[2] Pursuant to R.C. 2923.11(A), "deadly weapon" is defined as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." Furthermore, pursuant to R.C. 2923.11(B)(1), a "firearm" is defined as "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable." In the instant case, the parties stipulated that the firearm at issue was operable.

See also State v. Turner, 4th Dist. No. 94 CA 2265 (Jan. 24, 1996) (aggravated robbery includes both the theft and the fleeing immediately after the theft if the offender has a deadly weapon during immediate flight[3]). Consequently, we believe the evidence presented in the instant case demonstrates appellant had a deadly weapon on or about his person while he was fleeing the scene on Karl Road immediately after attempting to steal the lawn mower and/or weed whacker. Therefore, his conviction for robbery, although not likely characterized as a traditional, run-of-the-mill robbery, such as a holdup at a convenience store or a purse-snatching at gun point, is nevertheless supported by sufficient evidence and is not against the manifest weight of the evidence.

{¶ 32} Next, we address the issue of the gun specification. Appellant contends there is insufficient evidence to support his conviction on the gun specification and that said conviction is against the manifest weight of the evidence. Again, we disagree.

{¶ 33} Based upon our analysis as set forth above, we have determined the evidence, if believed, sufficiently demonstrates that appellant had a deadly weapon on or about his person or under his control while committing the robbery offense. That is all that is necessary to meet the requirements for proving the elements of the one-year firearm specification under a sufficiency standard. Furthermore, although appellant's trial counsel (and now appellate counsel) argued that the handgun was used merely to break out the windows of Hood's truck and, therefore, it was only used in furtherance of a criminal damaging offense, we find this argument unpersuasive. According to the testimony of Hood and Hewlett, as well as the circumstantial evidence regarding the recovery of the handgun, the live bullets, and the pieces of the magazine clip found in Hood's vehicle, a reasonable jury could find the handgun was in appellant's possession while he was fleeing as part of the robbery offense. Furthermore, as stated above, there is evidence to demonstrate the handgun was used in furtherance of the robbery, i.e., to facilitate his flight immediately thereafter. Therefore, we reject appellant's argument.

{¶ 34} In addition to finding appellant's conviction for robbery is supported on the basis that he possessed a deadly weapon or had such a weapon under his control while attempting or committing a theft offense or while fleeing immediately thereafter, we further find appellant's robbery conviction is supported on alternative grounds.

[3] This principle is equally applicable to robbery as charged pursuant to R.C. 2911.02(A)(1).

Specifically, we find the evidence is sufficient to demonstrate that appellant recklessly inflicted, attempted to inflict or threatened to inflict physical harm on Hood while attempting or committing a theft offense or while fleeing immediately thereafter, and that such a finding is not against the manifest weight of the evidence.

{¶ 35} "Physical harm" is defined as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3). Here, there was testimony that appellant and Hood struggled over the lawn mower for an extended period of time and at one point, they were on the ground tussling over the lawn mower. There was also testimony that the two men ended up on the ground fighting over the weed whacker as well. Hood testified he suffered some injuries as a result of tussling on the ground with appellant, stating he "got scuffed up a little bit." (Tr. 44.) Hood also testified he went to the hospital a couple of days after the incident with appellant. This is enough to establish "physical harm" as defined by the statute and by this court. *See Columbus v. Bonner*, 10th Dist. No. 81AP-161 (July 21, 1981) (the slightest physical harm is sufficient to constitute physical harm; the temporary discomfort associated with the pull on a camera strap located around the victim's neck was sufficient to constitute physical harm); and *State v. Neff*, 10th Dist. No. 92AP-655 (Sept. 30, 1992) (the act of deliberately grabbing the victim's arm, jerking him around, and causing him pain was sufficient to establish physical harm).

{¶ 36} Finally, with respect to appellant's claim that the jury should have received an instruction on criminal damaging as an alternative to aggravated robbery and robbery, we reject this assertion as well.[4]

{¶ 37} Appellant has pointed to nothing within the record to indicate that his trial counsel requested an instruction on criminal damaging, and we have not found anything in the record suggesting that a request was made. As such, any purported error would be subject to plain error review. We do not find plain error here. We are unaware of any authority that would demonstrate that criminal damaging is a lesser-included offense of aggravated robbery or robbery. The fact that appellant was not indicted on a

[4] We struggle to understand how this particular complaint, as presented, fits within appellant's sufficiency and manifest weight challenges. Nevertheless, we shall attempt to address it in the interests of thoroughness.

misdemeanor criminal damaging offense, which may or may not be applicable, but which is not a lesser-included offense of aggravated robbery or robbery, or that the jury was not instructed on the same, does not suggest error. Nor does it suggest that the evidence was insufficient to support the robbery conviction or that said conviction is against the manifest weight of the evidence.

{¶ 38} Based upon the foregoing analysis, we find all of the essential elements of the crime have been demonstrated and the evidence is legally sufficient to support appellant's conviction for robbery with a one-year firearm specification as a matter of law. Furthermore, 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 conviction for robbery with the one-year firearm specification must be reversed.

{¶ 39} Accordingly, we overrule appellant's first and second assignments of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J., and BRYANT, J., concur.
