[Cite as *State v. Fausnaugh*, 2012-Ohio-4414.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
		No. 11AP-842
Plaintiff-Appellee,	:	(C.P.C. No. 10CR-07-4352)
		No. 11AP-843
v.	:	(C.P.C. No. 11CR-06-3062)
Aaron E. Fausnaugh,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 27, 2012

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

Brian J. Rigg, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by defendant-appellant, Aaron E. Fausnaugh, from judgments of conviction and sentence entered by the Franklin County Court of Common Pleas, following a jury trial in which appellant was found guilty of robbery and vandalism.

{¶ 2} On July 26, 2010, appellant was indicted in case No. 10CR-07-4352 on one count of vandalism, in violation of R.C. 2909.05, and one count of theft, in violation of R.C. 2913.02. On June 13, 2011, appellant was indicted in case No. 11CR-06-3062 on one count of aggravated robbery, in violation of R.C. 2911.01, two counts of robbery, in violation of R.C. 2911.02, and one count of felonious assault, in violation of R.C. 2903.11. A co-defendant, Joshua Lee Fausnaugh (appellant's brother), was also charged with one count of vandalism and one count of theft. The indictments arose out of an incident on

July 13, 2010, occurring on the property of Great Dane Trailers ("Great Dane"), located in Hilliard, Ohio.

{¶ 3} The state filed a motion for joinder of the cases for trial, and the matter came for trial before a jury beginning August 2, 2011. Great Dane is engaged in the business of selling and servicing tractor-trailers. The company has an aluminum scrap bin and a steel scrap bin on the property; scrap metal is collected in these bins for later sale to another company. On July 12, 2010, Donald Stewart, an employee of Great Dane, heard a loud engine, and then observed a red Ford pickup truck "leaving in a hurry towards our gate." (Tr. 105.) The bed of the truck contained aluminum scrap. Stewart observed three white males, in their early 20s, inside the truck. Dwight Halley, a Great Dane employee, also observed a red pickup truck, containing aluminum scrap in the truck bed, on the company property that day. Halley went to the office, and was told that no one had permission to pick up scrap. An employee at the Great Dane office contacted the Hilliard Police Department, and an officer came to the site and made a report.

{¶ 4} The next day, July 13, 2010, at approximately 3:30 p.m., Halley was at work when he observed the same red pickup truck on the property; the truck was parked near the aluminum scrap bin. Halley went to the office and told personnel to call the police. Halley then went outside and closed the front gate. As he walked toward the gate, Halley observed two individuals standing outside the truck; the two men saw Halley and got back inside the truck, driving over to the gate area where Halley was standing. The men wanted to leave, but Halley told them the police had been contacted and that "they couldn't leave" until the police arrived. (Tr. 126.) The driver, later identified as appellant's brother, Joshua, was wearing a red shirt and was the same individual Halley had observed driving the truck the previous day.

{¶ 5} Thomas Baldwin, a shop foreman at Great Dane, was informed that a red pickup truck was on the property. At trial, Baldwin identified appellant as one of the two individuals in the truck; appellant was in the passenger seat of the vehicle. Baldwin and several other employees approached the vehicle and asked the occupants what they were doing. Baldwin looked in the back of the truck and observed a roof bow and a brake drum. Baldwin told the occupants that the police were being contacted. The vehicle contained a temporary license tag in the window, and when a Great Dane employee

mentioned copying down the number, the occupants "ripped it out of the back window." (Tr. 283.)

{¶ 6} Appellant then jumped out of the truck, walked up to Baldwin and said: "We're getting out of here. You're not calling the police." (Tr. 248.) Baldwin immediately dialed 911. Appellant jumped back in the truck and "started yelling at * * * the driver, telling him to back up," which the driver did. (Tr. 249.) According to Baldwin, the occupants were "debating whether to run the gate down." (Tr. 249.) The driver of the truck then drove to the other side of the company property, momentarily out of Baldwin's sight.

{¶ 7} Baldwin thought he had enough time to run up and lock the gate with a chain. The driver, however, "floored" the engine, and Baldwin realized the vehicle was not going to stop, so he let go of the chain. The truck rammed the gate, and the pole on the gate "popped out," hitting Baldwin on the forearm and hand. (Tr. 251.) Baldwin received injuries, and was later driven to a hospital for treatment. After the truck exited the property, the driver headed south on Lyman Drive and pulled into a nearby McDonald's restaurant, adjacent to a Bob Evans restaurant. Baldwin and another employee ran toward the McDonald's.

{¶ 8} Rachel Imwalle, an employee of Bob Evans restaurant on Lyman Drive, Hilliard, was working on the afternoon of July 13, 2010, when she noticed a red pickup truck speeding around the parking lot. The driver pulled into a parking spot, and two men ran into the restaurant laughing. The men "ran over to the window" and "looked out." (Tr. 223.) Imwalle also looked out the window and observed a police car at a nearby McDonald's restaurant. The two individuals "laughed and then ran out the door." (Tr. 223.) At trial, a videotape, recorded by the restaurant's surveillance system, was played for the jury.

{¶ 9} Hilliard Police Officer Joshua Barnett was on duty on July 13, 2010, when he received a dispatch regarding a possible theft; it was reported that a red Ford truck had exited the property of Great Dane. While Officer Barnett was en route, he received information that the truck might be at a local McDonald's restaurant. Officer Barnett drove to the McDonald's, and observed a red truck in an adjacent parking lot of a Bob Evans restaurant. An employee of Great Dane was in the area, and he told the officer that

the suspects had fled on foot, running toward I-270. Officer Barnett walked toward the direction of I-270, and then observed two white males running toward the freeway. Officer Barnett radioed other officers regarding the location of the suspects.

{¶ 10} On July 13, 2010, Hilliard Police Detective David Cunningham received a dispatch requesting police officers to respond to a reported theft in progress at Great Dane. The report indicated that suspects had rammed a gate with their vehicle while attempting to flee the scene, and that the vehicle was traveling southbound on Lyman Drive. The dispatcher then reported that the suspects were on foot near a Bob Evans restaurant. The suspects were described as two white males, one wearing a red shirt and the other wearing a white shirt. Detective Cunningham responded to the scene, arriving about nine minutes later near the intersection of Cemetery Road and I-270.

{¶ 11} When Detective Cunningham arrived, the radio dispatcher indicated that one of the suspects, later identified as Joshua, had been apprehended but that the other suspect was still at large on the east side of I-270. Detective Cunningham entered the freeway, pulled off on the median, and activated his emergency lights. Approximately 30 minutes later, appellant was observed exiting from a tree-lined area and running westbound across an on-ramp toward I-270. Appellant entered the "northbound lanes of the freeway almost at a full run causing a number of vehicles to swerve and get out of the way." (Tr. 41.) Detective Cunningham observed a semi-truck "swerving to avoid striking him." (Tr. 41.) Appellant continued running, and then climbed over a cable barrier between the north and southbound lanes.

{¶ 12} Hilliard Police Officer Kyle Bright also responded to a dispatch regarding a red pickup truck ramming a gate at Great Dane. While Officer Bright and his partner were en route, they received a dispatch that two individuals were running on the freeway. Officer Bright drove to a nearby Target store and walked toward the tree line. At that point, the officer was informed that one of the suspects had been apprehended. Another officer then radioed that the second suspect was running west across the freeway. Officer Bright observed the suspect and began chasing him. Office Bright yelled at the suspect, "Stop. Police." (Tr. 160.) The suspect did not stop, and crossed one lane of traffic on I-270. The officers stopped traffic and then continued across the freeway. The suspect, identified by Officer Bright as appellant, had jumped over a cable divider and headed

toward the southbound traffic. The suspect walked up to the passenger side of a car, and it appeared that he "was trying to get into the car." (Tr. 162.) The car then drove off and left appellant by himself. Officer Bright drew his weapon and ordered appellant to the ground. Appellant then "went down to his stomach in the center lane of the freeway." (Tr. 164.) Officer Bright and another officer placed appellant under arrest.

{¶ 13} Appellant was transported to the Hilliard Police Department, and was interviewed by Hilliard Police Officer Shawn Johnson. At trial, the jury heard a recording of Officer Johnson's interview with appellant. After the interview, appellant was placed in a holding cell; his brother, Joshua, was in an adjacent cell. Detective Cunningham was standing near the holding area as officers were getting ready to take Joshua to an interview room, when he noticed that appellant was "making a motion in Josh's direction," with his hand moving "back and forth" across his throat. (Tr. 52.) Detective Cunningham then attempted to place a paper over the cell to prevent appellant from communicating to his brother, but appellant said to his brother: "Don't fucking say anything." (Tr. 52.) Officer Johnson testified that, as Joshua was being taken into the interview room, appellant said to his brother: "Don't say shit, yo." (Tr. 211.)

{¶ 14} During an inventory of items, a title was found in appellant's wallet to a 1993 Ford F-150 pickup truck; appellant had purchased the vehicle on July 6, 2010. The state introduced photographs of the bed of the Ford pickup truck depicting pieces of scrap metal and a brake wheel drum. A temporary license tag was lying in the driver's seat.

{¶ 15} Following deliberations, the jury returned verdicts finding appellant guilty of vandalism in case No. 10CR-07-4352, but not guilty of theft. The jury also returned verdicts finding appellant guilty of one count of robbery in case No. 11CR-06-3062, but not guilty of the remaining three counts in that case. The trial court sentenced appellant by entries filed on September 1, 2011.

{¶ 16} On appeal, appellant sets forth the following two assignments of error for this court's review:

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

{¶ 17} Appellant's assignments of error are interrelated and will be considered together. Under these assignments of error, appellant challenges his convictions as not supported by sufficient evidence and as against the manifest weight of the evidence.

{¶ 18} With respect to his robbery conviction, appellant maintains he was merely a passenger in the red pickup truck, and that there was no testimony he controlled the actions of his brother, Joshua, who was driving the truck that day. Appellant also argues there was no eyewitness testimony indicating that he stole anything from Great Dane. Appellant further contends the evidence fails to show he was complicit in the vandalism, including the force necessary to hit the gate with the vehicle.

{¶ 19} We initially note the applicable standards of review in considering sufficiency and manifest weight challenges. In *State v. Sexton*, 10th Dist. No. 01AP-398, 2002-Ohio-3617, ¶ 30-31, this court discussed the distinction between those two standards as follows:

> To reverse a conviction because of insufficient evidence, we must determine as a matter of law, after viewing the evidence in a light most favorable to the prosecution, that a rational trier of fact could not have found the essential elements of the crime proved beyond a reasonable doubt. * * * Sufficiency is a test of adequacy, a question of law. * * * We will not disturb a jury's verdict unless we find that reasonable minds could not reach the conclusion the jury reached as the trier of fact. * * * We will neither resolve evidentiary conflicts in the defendant's favor nor substitute our assessment of the credibility of the witnesses for the assessment made by the jury. * * * A conviction based upon legally insufficient evidence amounts to a denial of due process, * * * and if we sustain appellant's insufficient evidence claim, the state will be barred from retrying appellant.
>
> A manifest weight argument, by contrast, requires us to engage in a limited weighing of the evidence to determine whether there is enough competent, credible evidence so as to permit reasonable minds to find guilt beyond a reasonable doubt * * * to support the judgment of conviction. * * * Issues of witness credibility and concerning the weight to attach to specific testimony remain primarily within the province of the trier of fact, whose opportunity to make those determinations is superior to that of a reviewing court. * * * Nonetheless, we must review the entire record. With caution and deference to

> the role of the trier of fact, this court weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury, as the trier of facts, clearly lost its way, thereby creating 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 a conviction.

(Citations omitted.)

{¶ 20} The offense of vandalism is defined under R.C. 2909.05(B)(1), and the version in effect at the time of appellant's conviction and sentence stated as follows:

> No person shall knowingly cause physical harm to property that is owned or possessed by another, when either of the following applies:
>
> (a) The property is used by its owner or possessor in the owner's or possessor's profession, business, trade, or occupation, and the value of the property or the amount of physical harm involved is five hundred dollars or more;
>
> (b) Regardless of the value of the property or the amount of damage done, the property or its equivalent is necessary in order for its owner or possessor to engage in the owner's or possessor's profession, business, trade, or occupation.

{¶ 21} Robbery is defined under R.C. 2911.02(A), 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:
>
> (1) Have a deadly weapon on or about the offender's person or under the offender's control;
>
> (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
>
> (3) Use or threaten the immediate use of force against another.

{¶ 22} The jury in this case was instructed that appellant could be found guilty of the offenses as a principal offender or as an aider and abettor. In *State v. McWhorter*, 10th Dist. No. 08AP-263, 2008-Ohio-6225, ¶ 18, this court noted:

> In order to support a conviction for complicity by aiding and abetting under R.C. 2923.03(A)(2), "the evidence must show that 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. Such intent may be inferred from the circumstances surrounding the crime." * * * "'Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.' " * * * Aiding and abetting may be established by overt acts of assistance such as driving a getaway car or serving as a lookout. * * * 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." * * * Furthermore, it has been stated that " '[m]ere approval or acquiescence, without expressed concurrence or the doing of something to contribute to an unlawful act, is not an aiding or abetting of the act.' " * * * Thus, in order to constitute aiding and abetting, the accused must have taken some role in causing the offense.

(Citations omitted.)

{¶ 23} As noted, appellant contends that the evidence was insufficient because it shows he was merely a passenger in the truck driven by his brother. We disagree. In considering the issue of sufficiency, and construing the evidence most strongly in favor of the state, as we are required, the evidence at trial indicates the following. The vehicle driven onto the property of Great Dane was titled in appellant's name. Several of the state's witnesses testified that they observed both appellant and his brother outside the pickup truck beside an aluminum scrap dumpster. The two men got back inside the truck after they observed a Great Dane employee closing the front gate. The bed of the pickup truck contained aluminum pieces and a brake drum from a trailer axle. When the truck occupants were told they could not leave until the police arrived, appellant jumped out of the truck, walked up to Baldwin and said: "We're getting out of here. You're not calling the police." (Tr. 248.) As appellant approached, Baldwin thought appellant was going to

hit him, and he took appellant's comments as "a threat." (Tr. 249.) Baldwin immediately dialed 911.

{¶ 24} Appellant jumped back in the truck and "started yelling at * * * the driver, telling him to back up." (Tr. 249.) According to Baldwin, the occupants were "debating whether to run the gate down." (Tr. 249.) After the truck rammed the gate, appellant and his brother stopped at a restaurant and took off on foot toward a tree line, with appellant eventually running across lanes of an interstate before pursuing officers were able to take him into custody. Later, at the police department, appellant motioned to his brother and told him not to say anything. Upon review of the record, the jury could have reasonably concluded that appellant was at the scene to assist his brother in removing items from the scrap bin onto the truck, and that appellant's role was more than just an innocent bystander.

{¶ 25} Appellant further contends there is no evidence that he controlled the actions of his brother, or that he was complicit in the vandalism. As recited above, however, the state presented evidence that appellant was the individual who got out of the truck and confronted Baldwin. Appellant ordered his brother to back up the truck, and his brother complied, evincing appellant's control over him. Baldwin also testified that the occupants of the truck were "debating whether to run the gate down." (Tr. 249.) The evidence further shows that, following the events at Great Dane, appellant and his brother both continued in their efforts to flee, including appellant's attempts to cross an interstate highway on foot. Under Ohio law, the criminal intent of an aider and abettor "can be inferred from the presence, companionship, and conduct of the defendant before and after the offense is committed." *In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, ¶ 13. Here, there was evidence presented by which the jury could have concluded that appellant directed the actions of his younger brother, and that he was complicit in the act of vandalism.

{¶ 26} Appellant also argues that no Great Dane employee witnessed him steal anything. Under Ohio law, however, circumstantial evidence can have the same probative value as direct evidence, and "[a] conviction can be sustained based on circumstantial evidence alone." *State v. Franklin*, 62 Ohio St.3d 118, 124 (1991), citing *State v. Nicely*, 39 Ohio St.3d 147, 154-55, (1988). Further, a robbery conviction can be supported by

evidence of committing or attempting to commit a theft. The evidence in this case indicated that Great Dane employees observed appellant and his brother outside of the truck as it was parked near the aluminum scrap bin; the back of the truck contained a brake drum and aluminum scrap. After appellant and his brother observed a Great Dane employee near the gate, they immediately got inside the truck and drove over to the employee, telling him they wanted to leave. As argued by the state, the trier of fact could have reasonably concluded that appellant and his brother only stopped their efforts because they realized Great Dane employees had observed them, and that an employee was closing the gate.

{¶ 27} In the present case, the jury returned a verdict finding appellant guilty of robbery under R.C. 2911.02(A)(3), which provides that no person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall use or threaten the immediate use of force against another. Under Ohio law, "the threat of physical harm need not be explicit"; rather, an implied threat of physical harm is sufficient to support a robbery conviction. *State v. Harris,* 10th Dist. No. 07AP-137, 2008-Ohio-27, ¶ 14. As noted above, the state presented testimony by Baldwin that he felt threatened by appellant's conduct. According to Baldwin, the actions of appellant "scared me. * * * [H]e was walking right up to me like he's going to hit me." (Tr. 248.) Baldwin testified that another Great Dane employee, Ronnie Walters, "stepped in front of him and told him that wouldn't be a wise idea." (Tr. 268.)

{¶ 28} In considering the sufficiency of the evidence, and construing such evidence most strongly in favor of the state, we conclude there was sufficient evidence upon which the jury could have found appellant guilty of robbery under R.C. 2911.02(A)(3). Further, the evidence was also sufficient to support appellant's conviction for vandalism.

{¶ 29} With respect to appellant's manifest weight challenge, while appellant did not present any witnesses, defense counsel's strategy at trial was to portray appellant as merely a passenger in the vehicle, with no intent to steal scrap metal or to encourage his brother to ram the gate. The defense also portrayed appellant's flight from the scene as simply an attempt to get away from Great Dane employees, and not an effort to elude the police. In contrast, the state's theory of the case was that appellant and his brother acted in concert, and that appellant was an active participant in all of the activity on that date.

The jury, as trier of fact, was free to believe or disbelieve the testimony of the state's witnesses and, based upon the testimony presented, could have reasonably concluded that the evidence was consistent with a finding that appellant actively participated in the criminal acts.

{¶ 30} Upon review of the record, we conclude that the trier of fact, in resolving conflicts in the evidence, did not lose its way and create a manifest miscarriage of justice so as to require a new trial. Accordingly, we find that appellant's convictions for robbery and vandalism are not against the manifest weight of the evidence.

{¶ 31} Based upon the foregoing, appellant's first and second assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas are hereby affirmed.

Judgments affirmed.

FRENCH and DORRIAN, JJ., concur.

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