

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 12AP-217
Plaintiff-Appellee,	:	(C.P.C. No. 11CR-3163)
v.	:	
	:	(REGULAR CALENDAR)
Ernest L. Blackburn,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 31, 2012

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*,
for appellee.

Siewert & Gjostein Co. LPA, and *Thomas A. Gjostein*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Defendant-appellant, Ernest L. Blackburn, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of aggravated robbery in violation of R.C. 2911.01, a felony of the first degree, one count of felonious assault in violation of R.C. 2903.11, a felony of the second degree, and two counts of robbery in violation of R.C. 2911.02, one a felony of the second degree and one a felony of the third degree. On appeal, defendant assigns a single error:

APPELLANT'S CONVICTION WAS NOT SUPPORTED BY
THE SUFFICIENCY OF THE EVIDENCE AND IN
VIOLATION OF THE DUE PROCESS CLAUSE OF THE
FOURTEENTH AMENDMENT TO THE U.S. CON-

STITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION AND THE CONVICTION WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Because sufficient evidence and the manifest weight of the evidence support defendant's convictions, we affirm.

I. Facts and Procedural History

{¶ 2} By indictment filed June 20, 2011, defendant was charged with one count of aggravated robbery, one count of felonious assault, and one of robbery, each with a repeat violent offender specification; he also was charged with an additional count of robbery. The charges were tried to a jury in November 2011, and the jury returned guilty verdicts on all counts.

{¶ 3} In a sentencing hearing conducted December 15, 2011, the trial court merged the 2 robbery counts and then merged those with the aggravated robbery charge, imposed 10 years for the aggravated robbery charge and 5 years for the felonious assault charge, and ordered they be served consecutively for a total term of incarceration of 15 years. Defendant appeals.

II. Assignment of Error - Sufficiency and Manifest Weight of the Evidence

{¶ 4} Defendant's single assignment of error contends neither sufficient evidence nor the manifest weight of the evidence supports the trial court's judgment finding him guilty of the charged offenses.

A. Sufficiency of the Evidence

{¶ 5} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Conley*, 10th Dist. No. 93AP-387 (Dec. 16, 1993).

{¶ 6} To present sufficient evidence of the offenses with which defendant was charged, plaintiff-appellee, the state of Ohio, was required to prove the following elements:

- Aggravated Robbery under R.C. 2911.01(A)(3) - "No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall * * * [i]nfllict, or attempt to inflict, serious physical harm on another."
- Felonious Assault under R.C. 2903.11(A)(1) - "No person shall knowingly * * * [c]ause serious physical harm to another."
- Robbery under R.C. 2911.02(A)(2) - "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [i]nfllict, attempt to inflict, or threaten to inflict physical harm on another."
- Robbery under R.C. 2911.02(A)(3) - "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [u]se or threaten the immediate use of force against another."

{¶ 7} According to the state's evidence, the victim lived at 494 East Deshler Avenue in Columbus, Ohio. On May 19, 2011, about 7:00 p.m., he was alone in his apartment, one of two that were above Jones Appliances store on Parsons Avenue. The victim rented the apartment from Lyle Jones, owner of the appliance store, whom he had known for about 20 years. Entrance to the apartment was obtained by entering a side door to the building and going up stairs to the individual entrances to the two apartments.

{¶ 8} The victim heard a knock on the door and told the person outside his door to enter. Defendant, whom the victim had known for approximately 20 years, entered the apartment. The victim believed defendant took pain pills and thought defendant appeared to be "high" when he arrived at the apartment. (Tr. 71.) On the victim's coffee table were pills the victim took, primarily as a result of an auto accident in 1996. The medication included OxyCodone, Xanax for anxiety and sleep, and a stomach reflux medication.

According to the victim, he refilled the prescriptions a day or two before defendant came to his apartment.

{¶ 9} On entering the apartment, defendant accused the victim of taking his wallet. Defendant then grabbed a hammer off the coffee table and hit the victim in the head with the hammer at least three or four times. After striking the victim, defendant grabbed the medication off the table as well as approximately \$50 in cash and ran down the steps. The victim was able to get up and exit the door to a hand railing in the stairwell, where he "hollered down, 'Stop him.'" (Tr. 81.)

{¶ 10} Jones was working into the evening on May 19, 2011 when he heard a lot of noise in the upstairs apartment, an unusual circumstance. He kept hearing the noise, and then suddenly "a big thump. It sounded like maybe somebody fell or was running or trying to get away or hitting walls or something." (Tr. 57.) Jones then heard the victim say "'Catch that guy.'" (Tr. 57.) At that point, Jones saw defendant coming down the steps. As soon as Jones saw defendant, Jones grabbed the coat defendant was wearing and, in effect, pulled it off of defendant; "[h]e slipped out of it." (Tr. 57.)

{¶ 11} Jones saw defendant run to a white Mustang automobile, "throw something" into his car that "looked like a hammer," and enter the vehicle. (Tr. 58.) Jones told one of his delivery trucks to pull in front of defendant to block him so they could "try[] to get ahold of him." (Tr. 57.) The truck positioned itself, and Jones "got almost behind [defendant]," but defendant "backed up real fast in the middle of Parsons, which stopped traffic, and took off going north." (Tr. 58.) Both Jones and the victim identified defendant in court as the perpetrator; the victim also identified defendant in a photo array.

{¶ 12} The state's evidence, if believed, is sufficient to support each of the four charges against defendant. More specifically, the state's evidence regarding aggravated robbery demonstrated that defendant, in committing a theft of the victim's medications and money, inflicted serious physical harm on the victim by hitting him in the head with a hammer at least three or four times. The injuries were sufficient to cause the victim to go to Grant Hospital where he required treatment, staples to close the wounds, and a period of recovery. Immediately after striking the victim, defendant took the victim's pills and money without the victim's consent.

{¶ 13} Because the evidence meets the elements of the aggravated robbery as indicted, it likewise supports the felonious assault and robbery charges. Felonious assault required the state to prove defendant knowingly inflicted serious physical harm on the victim. The state proved serious physical harm as one of the elements of the aggravated robbery charge, and the evidence suggests nothing short of defendant's knowingly striking the victim with the hammer. The second-degree felony robbery charge required that the state show defendant inflicted physical harm in committing a theft offense, which the state necessarily demonstrated in proving theft and serious physical harm for the aggravated robbery charge. *See* R.C. 2901.01(A)(3) (defining physical harm to be "any injury * * * regardless of its gravity or duration"). As to the third-degree felony robbery charge, the state needed only to prove defendant acted recklessly in using force against the victim to commit a theft offense. In demonstrating defendant knowingly struck the victim, the state necessarily met its burden of recklessness under the third-degree felony robbery count. *See* R.C. 2902.22.

{¶ 14} Accordingly, defendant's contentions with respect to sufficiency of the evidence are unpersuasive.

B. Manifest Weight of the Evidence

{¶ 15} When presented with a manifest weight argument, we weigh the evidence in a manner to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley; Thompkins* at 387 (noting that "[w]hen 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"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 16} Defendant argues that his convictions are against the manifest weight of the evidence because the victim was not credible. Defendant suggests the victim accused defendant of the charged offenses because defendant walked into the victim's apartment

and accused the victim of having stolen defendant's wallet. Moreover, defendant intimates the victim himself is drug-addicted. To support his contention, defendant notes that the victim, although ordinarily refilling his prescriptions at a local drug store, went to Georgia with his girlfriend a day or two before the incident at issue and there refilled his prescriptions. As a result, the victim had approximately 300 OxyCodone pills on his coffee table when defendant arrived. Defendant, in effect, suggests the victim was so addicted to painkillers he was unable to procure adequate refills in Ohio and was forced to travel to Georgia to obtain the desired refills. Defendant contends that, when the accusation about the wallet is combined with what defendant characterizes as the victim's drug addiction, the jury lost its way in finding the victim a credible witness.

{¶ 17} Even if the victim were a drug addict, his status does not suggest that he could not be the victim of a crime or that defendant could not steal from him. Although the victim admitted lack of memory in some specifics that could have led the jury to believe a drug addiction was impairing his memory in some aspects of his testimony, it did not require the jury to disbelieve his testimony altogether. Indeed, based on the evidence, the jury could have attributed the victim's foggiess to the injury the victim sustained, as one of the officers reporting to the scene testified the victim appeared to be "out of it" from the injury. (Tr. 44.) Moreover, the evidence regarding drugs cut against defendant as well, since some evidence indicated defendant himself was "high" and was taking similar medication, a factor that may have motivated him to rob the victim. (Tr. 71.)

{¶ 18} Most damaging to defendant's manifest weight argument, however, is Jones' testimony. According to Jones, defendant ran down the steps and, when Jones attempted to stop him, defendant continued to run, even leaving his coat behind. Jones saw him throw what appeared to be a hammer into the car and speed off in an unusual manner and direction because one of Jones' delivery trucks blocked defendant's usual exit. In light of Jones' testimony, corroborating various aspects of the victim's testimony, the jury did not lose its way in finding defendant committed the indicted offenses. Defendant's single assignment of error is overruled.

III. Disposition

{¶ 19} Having overruled defendant's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and TYACK, J., concur.
