**[Cite as *State v. Jones*, 2015-Ohio-1598.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

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| STATE OF OHIO, | : | |
| | | CASE NO. CA2014-05-110 |
| Plaintiff-Appellee, | : | |
| | | O P I N I O N |
| | : | 4/27/2015 |
| - vs - | | |
| | : | |
| MACKENZIE A. JONES, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2013-12-2061

Michael T. Gmoser, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Scott N. Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

**M. POWELL, J.**

**{¶ 1}** Defendant-appellant, MacKenzie A. Jones, appeals from the judgment of the Butler County Common Pleas Court convicting him of two counts of complicity to aggravated robbery, sentencing him to serve four years in prison and ordering him to pay $70 in restitution. For the reasons that follow, we affirm the judgment of the trial court.

**{¶ 2}** Appellant and Jeff Oder are long-time acquaintances, having attended both grade school and high school together. Oder considered appellant a friend and had been to

his home on a number of occasions. On December 15, 2013, appellant contacted Oder and offered to sell him two tickets at a price of $50 per ticket to a Cincinnati Bengals football game. Oder accepted the offer, but later contacted appellant and told him that he wanted to purchase only one ticket. Oder and appellant exchanged text messages during their discussion about the purchase of Bengals tickets in which Oder directed some racially disparaging remarks towards appellant.

**{¶ 3}** On the early afternoon of December 18, 2013, Oder and his friend, Nathan Poling, drove to appellant's home to purchase the Bengals ticket. Upon arrival, Oder saw appellant in the parking lot, and exited his vehicle to speak with him. Poling remained in the car and saw appellant and Oder were arguing with each other. While Oder and appellant were talking, appellant's brother, Ryan Horton, appeared in the parking lot. Oder stated that Horton came from the same direction from which appellant had come. As Horton came out of the apartment building, a third person drove into the parking lot. This third person was later identified as Adrean Dungey. Dungey parked, took an infant who was with him inside the apartment building and then came back out and stood near appellant and Horton.

**{¶ 4}** Horton produced a handgun and pointed it at Oder's head and demanded that Oder empty his pockets. Oder removed his wallet containing $70, his cell phone and his keys. At some point while this was occurring, appellant told Horton that "he [Oder] has $50." Dungey then hit Oder a couple of times, splitting his lip. While Dungey was punching Oder, appellant and Horton were standing there, with Horton still pointing the gun at Oder. Poling heard appellant say to Oder, "this is what you get when you mess with me" and "you're getting [Poling] involved in something he shouldn't be involved in." Appellant made these statements to Oder while Oder was being struck by Dungey. At some point during this incident, either Horton or Dungey took Oder's property.

**{¶ 5}** Horton and Dungey then began "tossing" or "passing" the gun back and forth to

each other. When Dungey got ahold of the gun, he and Horton approached Poling who was still in the car. Dungey grabbed Poling by his shirt, pointed the gun at Poling's head and neck area and demanded that he empty his pockets. Poling pulled out his empty wallet, a cell phone, keys, and a pack of cigarettes. Poling heard Dungey "count down from three," several times, causing Poling to believe he was about to be shot. Dungey took the pack of cigarettes and crushed them. Then, appellant, Horton, and Dungey all walked away together and proceeded in the same direction.

**{¶ 6}** Oder and Poling briefly went to a friend's house so that Oder could wipe the blood off his face and "catch his breath." Oder and Poling then went to the Fairfield Police Department where they reported the robbery to Officer Toby Chenoweth. Officer Chenoweth noticed that both Oder and Poling were very emotional and nervous, their hands were shaking and Oder was bleeding from his mouth. Oder identified appellant as one of the people who had robbed him. Oder told Officer Chenoweth that appellant instructed Horton and Dungey to check Oder's wallet because he had $50.

**{¶ 7}** Later that day, Fairfield police executed a search warrant at appellant's apartment. The police found appellant, Horton, and Dungey present in the apartment. Dungey was searched incident to his arrest. His pockets contained $49 in cash with blood on it and Oder's cell phone, which was missing its SIM and SD cards. A subsequent search of the residence revealed a .32 caliber revolver in Horton's bedroom. The money found on Dungey and the revolver found in Horton's bedroom were submitted for DNA analysis. Horton and Dungey's DNA was found on the revolver, and the blood on the money matched Dungey's.

**{¶ 8}** Appellant was indicted for two counts of complicity to aggravated robbery, a first-degree felony, in violation of R.C. 2923.03(A)(2) and 2911.01(A)(1). At trial, the state presented the testimony of a number of witnesses, including Oder, Poling and Officer

Chenoweth, who testified to the facts related above.

**{¶ 9}** Appellant testified in his own defense. Appellant acknowledged that he and Horton live at the apartment searched by police and that he had attempted to sell Bengals tickets to Oder. Appellant testified that when Oder made racist remarks to him, that ended their deal. According to appellant, Oder told him, "I'll be down at your house to fight you in 20 minutes after I wash my car." Appellant testified that when Oder arrived at his apartment, Oder took off his jacket and set down his cell phone and keys. Appellant testified that Oder had a knife and that when appellant asked him why he had brought the knife, Oder told him, "to make sure it's a fair fight." Appellant testified that he punched Oder two times and that when Oder discovered that his lip was bleeding, the fight ended and Oder and Poling left. Appellant testified that 15 minutes after the fight occurred, he went back outside and found Oder's cell phone lying on the ground and that he picked up the cell phone and took it inside his apartment. When he was asked how Oder's cell phone wound up in Dungey's pocket, appellant testified that Dungey's son may have picked it up from appellant's table to play with it. Appellant denied that anyone else was with him when the fight between him and Oder occurred, though appellant acknowledged that Horton was inside their apartment when the fight took place and that Dungey arrived "six minutes" after the fight happened.

**{¶ 10}** The state called Detective Rebecca Ervin on rebuttal. Detective Ervin testified that when she interviewed appellant about the robbery, appellant never told her that Oder had a knife or that Oder had left his cell phone on the ground at appellant's apartment complex.

**{¶ 11}** The jury found appellant guilty as charged. The trial court sentenced him to serve four years in prison on each count, concurrently, and ordered him to pay $70 in restitution to Oder.

**{¶ 12}** Appellant now appeals and assigns the following as error:

**{¶ 13}** Assignment of Error No. 1:

**{¶ 14}** THE EVIDENCE WAS INSUFFICIENT TO SUPPORT CONVICTIONS FOR COMPLICITY TO AGGRAVATED ROBBERY IN COUNTS ONE AND TWO.

**{¶ 15}** Assignment of Error No. 2:

**{¶ 16}** THE GUILTY VERDICTS FOR COMPLICITY TO AGGRAVATED ROBBERY WERE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

**{¶ 17}** Assignment of Error No. 3:

**{¶ 18}** THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN ORDERING PAYMENT OF RESTITUTION AT SENTENCING.

**{¶ 19}** In his first assignment of error, appellant argues that even if the incident occurred as Oder and Poling say it did, the state still failed to present sufficient evidence to prove beyond a reasonable doubt that he aided or abetted Horton and Dungey in the commission of the aggravated robberies.

**{¶ 20}** In reviewing the sufficiency of the evidence underlying a criminal conviction, "[t]he relevant inquiry is 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. Stringer*, 12th Dist. Butler No. CA2012-04-095, 2013-Ohio-988, ¶ 27, citing *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded on other grounds.

**{¶ 21}** Additionally:

> [a] conviction can be based on circumstantial evidence alone. Circumstantial evidence is proof of certain facts and circumstances in a given case, from which the jury may infer other, connected facts, which usually and reasonably follow according to the common experience of mankind. Circumstantial evidence and direct evidence inherently possess the same probative value. *Id.* In some cases, certain facts can only be established by circumstantial evidence, and a conviction based thereon is no less sound than one based on direct evidence. In

> fact, circumstantial evidence may be more certain, satisfying, and persuasive than direct evidence.

(Citations omitted.) *Stringer* at ¶ 31.

**{¶ 22}** Appellant was charged with two counts of complicity to aggravated robbery in violation of R.C. 2923.03(A)(2) and 2911.01(A)(1). R.C. 2923.03 defines "complicity," and division (A)(2) of that section provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." R.C. 2911.01(A)(1), which defines the offense of aggravated robbery, states that "[n]o person, in attempting or committing a theft offense, * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it."

**{¶ 23}** In *State v. Salyer*, 12th Dist. Warren No. CA2006-03-039, 2007-Ohio-1659, ¶ 25-27, this court stated:

> "To support a conviction for complicity by aiding and abetting pursuant to 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." *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, syllabus.
>
> Evidence of aiding and abetting may be shown by either direct or circumstantial evidence, and participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed. *State v. Lett*, 160 Ohio App.3d 46, 52, 2005-Ohio-1308. Aiding and abetting may also be established by overt acts of assistance such as driving a getaway car or serving as a lookout. *Id.*
>
> 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. Widner* (1982), 69 Ohio St.2d 267, 269. "[T]here must be some level of active participation by way of providing assistance or encouragement."

> *State v. Nievas* (1997), 121 Ohio App.3d 451, 456. "'Mere 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.'" *Id.*, citing *State v. Sims* (1983), 10 Ohio App.3d 56, 59.

**{¶ 24}** Appellant argues the testimony of Oder and Poling was that appellant "stayed off to the side" during the incident in question and that "[o]ther than the claimed statement about money and comments to Oder that 'this is why you don't mess with me,' and '[y]ou're getting [Poling] into something that he shouldn't be involved in,'" appellant "had no overt involvement with the incident." Appellant contends that the evidence shows that he never had the gun, never threatened or assaulted anyone, never took anything from Oder and Poling, and was never found to be in actual possession of any items taken from Oder. Appellant points out that his mere presence during this incident cannot establish his complicity. He contends that his alleged statement about Oder having $50 does not demonstrate that he was assisting or even encouraging Horton in the commission of a robbery that already had commenced and that the statement shows, "[a]t best," his "mere approval or acquiescence" in the robberies. We find this argument unpersuasive.

**{¶ 25}** We find the state presented sufficient evidence to establish, beyond a reasonable doubt, that appellant aided or abetted Horton and Dungey in the commission of the aggravated robberies of Oder and Poling. First, the evidence showed that appellant was attempting to sell two Bengals tickets for his supervisor at work. He offered them to Oder who initially agreed to buy both tickets but then decided he only wanted one of them. Appellant and Oder arranged to meet at appellant's residence sometime on December 18, 2013 to finalize the purchase. On that day, Oder showed up at appellant's residence sometime around 1:50 p.m. to buy the Bengals ticket. However, appellant sent his work supervisor a text sometime between 11:00 a.m. and 1:00 p.m. that same day, informing her that the sale was not going to happen. Also, the close proximity between the time that Oder

and Poling arrived to buy the Bengals ticket and the time Horton and Dungey arrived on the scene, with Horton bringing a gun with him, further indicates that there was some planning involved. During the robbery, appellant advised Horton and Dungey to check Oder's wallet for $50, as appellant knew that Oder would have that amount on him to buy the ticket. In addition, while Oder was being beaten by Dungey, appellant told Oder "this what you get when you mess with me," thereby indicating, once again, that there was some planning involved. After the incident, appellant, Horton and Dungey all departed together and proceeded in the same direction.

**{¶ 26}** Oder and Horton told Fairfield police the identity of the persons who were involved in the robbery, that these persons had used a gun in robbing them, and that these persons took Oder's cell phone. When the police executed the search warrant on appellant's apartment, appellant, Horton and Dungey were all found in the apartment together. Oder's cell phone was found on Dungey, and a revolver was found in Horton's bedroom. Furthermore, appellant's version of events was simply not believable. Appellant's claims that Oder had a knife at the time of their altercation and that Oder accidentally left his cell phone on the ground after their fight is undermined by appellant's failure to mention these facts to Detective Ervin when she interviewed him shortly after the incident.

**{¶ 27}** In light of the foregoing, appellant's first assignment of error is overruled.

**{¶ 28}** In his second assignment of error, appellant argues that even if the evidence was minimally sufficient to support his convictions on two counts of complicity to aggravated robbery, the jury's decision to convict him of those offenses was contrary to the manifest weight of the evidence.

**{¶ 29}** In determining whether a conviction is against the manifest weight of the evidence, an appellate court, "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in

resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Stringer*, 2013-Ohio-988, ¶ 28, citing *State v. Cummings*, 12th Dist. No. CA2006-09-224, 2007-Ohio-4970, ¶ 12. While an appellate court's consideration of a manifest-weight claim "includes the responsibility to consider the credibility of witnesses and weight given to the evidence, 'these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence.'" *Stringer* at ¶ 29, quoting *State v. Walker*, 12th Dist. No. CA2006-04-085, 2007-Ohio-911, ¶ 26.

**{¶ 30}** Appellant argues the manifest weight of the evidence presented in this case shows that Oder went to appellant's residence on the day in question, not to purchase Bengals tickets, but to engage in a fight with appellant. Appellant contends that Oder sent him a text message the day before indicating that Oder was no longer interested in the tickets because it was forecast to rain on game day. Appellant argues that his text to his supervisor sometime between 11:00 a.m. to 1:00 p.m. on the day of the incident proves this. Appellant contends that Oder made racial slurs to him during their conversations regarding the Bengals tickets, that this was not refuted by Oder, and that Oder told him that he was coming to appellant's residence to fight him after Oder washed his car. Appellant contends that while he "admitted finding Oder's [cell] phone after the altercation, he denied any theft of money." He also reiterates the argument he made in his first assignment of error, i.e., that even if Oder's and Poling's testimony was to be believed, the manifest weight of the evidence shows that he was not complicit in those robberies. However, we find these arguments unpersuasive.

**{¶ 31}** A jury is entitled to believe or disbelieve all, part, or none of a witness' testimony. *State v. Shouse*, 12th Dist. Brown, No. CA2013-11-014, 2014-Ohio-4620, ¶ 46.

Therefore, the jury in this case was entitled to believe the testimony of Oder and Poling and disbelieve appellant's version of events. Specifically, the jury was entitled to reject appellant's testimony that Oder brought a knife with him when he went to appellant's apartment, ostensibly, to fight him; that there was only a brief altercation between him and Oder at appellant's apartment and that Horton and Dungey were not there at any point during the altercation; and that Oder accidentally left his cell phone in the parking lot of appellant's apartment complex. The jury's decision to reject appellant's version of events was supported by the fact that while appellant testified that Oder brought a knife with him when he came to appellant's residence and that appellant "found" Oder's cell phone lying on the ground shortly after their altercation, appellant failed to mention these facts to Detective Ervin when she interviewed him shortly after the incident occurred. A review of the evidence shows that this is not an instance where the jury lost its way in considering the evidence before it.

**{¶ 32}** Therefore, appellant's second assignment of error is overruled.

**{¶ 33}** In his third assignment of error, appellant argues the trial court erred in ordering him to pay Oder restitution of $70, because the record does not support this amount. Appellant acknowledges that Oder testified that $70 was taken from him by Dungey during the incident in question, but contends that if the $49 seized by police from Dungey was part of the $70 that was stolen from Oder, then "one would assume that this amount will be returned to Oder, making the actual loss and the correct restitution amount only $21.00."

**{¶ 34}** R.C. 2929.18, which governs "financial sections," provides that a court imposing sentence upon an offender for a felony may sentence the offender to any financial sanction authorized under this section. These sanctions include, but are not limited to, "[r]estitution by the offender to the victim of the offender's crime * * *, in an amount based on the victim's economic loss." R.C. 2929.18(A)(1).

**{¶ 35}** R.C. 2929.18(A)(1) further states:

> If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender.

**{¶ 36}** Here, Oder testified at appellant's trial that $70 was stolen from him during the incident in question. This evidence provided the trial court with competent, credible evidence that allowed it to determine, with a reasonable degree of certainty, the appropriate amount of the restitution order to impose on appellant, *State v. Borders*, 12th Dist. Clermont No. CA2004-12-101, 2005-Ohio-4339, ¶ 35-37. In addition, the amount of restitution that the trial court ordered appellant to pay Oder "'bears a reasonable relationship to the loss suffered'" by Oder. *Id*., quoting *State v. Marbury*, 104 Ohio App.3d 179, 181 (8th Dist.1995). Furthermore, appellant did not dispute the amount of restitution that the trial court ordered him to pay, and therefore the trial court was not required under R.C. 2929.18(A)(1) to hold a hearing on restitution. Also, appellant's contention that "one would assume" that Oder will receive the $49 that the police seized from Dungey is speculation.

**{¶ 37}** Appellant also argues the trial court erred by failing to consider his present and future ability to pay the ordered restitution. R.C. 2929.19(B)(5) states that "[b]efore imposing a financial sanction under section 2929.18 of the Revised Code * * *, the court shall consider the offender's present and future ability to pay the amount of the sanction[.]" However, appellant is obviously able to work based on the testimony at trial that he was employed at a fast-food restaurant at the time of his offenses. Accordingly we find the trial court did not err in ordering appellant to pay $70 in restitution to Oder. Appellant's third assignment of error is

overruled.

**{¶ 38}** Judgment affirmed.

PIPER, P.J., and HENDRICKSON, J., concur.