

[Cite as *State v. Collier*, 2010-Ohio-2392.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 2009-CA-38
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-735A
v.	:	
	:	
JONATHAN C. COLLIER	:	(Criminal Appeal
	:	from
	:	Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 28th day of May, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Jonathan Collier appeals from his conviction and sentence for Robbery, in violation of R.C. 2911.02(A)(3). Collier contends that his conviction is not supported by the evidence, and is against the manifest weight of the evidence. We conclude, from our review of the evidence in the record, that Collier's

conviction is supported by the evidence and is not against the manifest weight of the evidence.

{¶ 2} Collier further contends that it was plain error for the trial court to give an instruction to the jury concerning complicity. We conclude that there is evidence in the record from which a reasonable finder of fact could find that Collier's wife, who was with him, aided and abetted him in the commission of Theft, a lesser-included offense concerning which the jury was instructed, so that it was not error to give the instruction.

{¶ 3} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 4} Collier and his wife, Jennifer, went shopping at a Wal-Mart store one afternoon. Collier testified. His wife did not.

{¶ 5} The two picked out various items in the food section of the store, for which they paid. Collier admitted at trial that he stole some DVD games and concealed them on his person. His testimony concerning his wife's involvement in his larcenous activities is a little confusing, but we conclude that a reasonable interpretation of his testimony is that she knew, generally, that he would, from time to time, steal items from stores. He had done it before, and he testified that he would tell her, as they were going home, that he had done so. He testified that he did not let her know that he was stealing items while they were in a store, because she would look suspicious, and give him away.

{¶ 6} Two Wal-Mart "asset protection associates," Max St. Luce and James Reeves, testified for the State. Both testified that Jennifer Collier appeared to them

to be acting as a lookout, and as a “blocker,” for her husband. Both St. Luce and Reeves saw Collier stealing merchandise.

{¶ 7} After Collier and his wife had paid for the food items, they made their way out of the store. St. Luce blocked Collier. Jennifer Collier had walked a bit farther out of the store, but both were in the area between the inner and outer doors. Reeves was present to back up St. Luce, as needed.

{¶ 8} St. Luce identified himself, and showed Collier his badge. Collier testified that he did not immediately take in what St. Luce was saying, but after a bit realized that St. Luce was a store employee who was trying to stop him from leaving the store with stolen merchandise.

{¶ 9} Collier testified that he tried to talk his way out of the situation, hoping to get away. He testified that he never intended to harm anyone.

{¶ 10} Wal-Mart has a video surveillance system. Videos showing the altercation that ultimately involved Collier, St. Luce, Reeves, and Jennifer Collier, were admitted in evidence at trial. They show the altercation from three angles, including one from overhead. They do not include audio.

{¶ 11} Piecing together the testimony of all three witnesses and the videos, it appears that St. Luce and Collier got very close to each other, without quite touching, while Collier was trying to get around St. Luce. Reeves was a few steps to one side. Jennifer Collier had proceeded a few steps toward the outer door, but was watching from that position.

{¶ 12} At some point, St. Luce concluded that he was not going to be able to persuade Collier to come with him to a little office right inside the inner door, where they

could discuss the situation. St. Luce put his hand on Collier. A brief struggle ensued, with Reeves joining in. No blows appear to be involved, but in short order, all three men wound up on the ground.

{¶ 13} At this point, with all three men on the ground, Reeves testified that Jennifer Collier began kicking him, or at least kicking at him. The videos are consistent with this testimony. They show Jennifer Collier having come back toward the store, and are at least consistent with Reeves' testimony that she was kicking him, or kicking at him. Both Reeves and St. Luce testified that they were never harmed during the altercation.

{¶ 14} Collier testified that he shouted at his wife to stop kicking, and St. Luce corroborated this. Collier testified that he told everybody to just stop, that he would cooperate peaceably. Collier and St. Luce then went into the office (which also had a video surveillance camera). Reeves followed, but then went out to get Jennifer Collier to come into the office, also.

{¶ 15} Reeves tried to get Jennifer Collier to come with him. When he put his hands on her, she told him, truthfully, that she was pregnant. Reeves allowed her to leave, and went back into the office with St. Luce and Collier.

{¶ 16} Collier cooperated with St. Luce and Reeves, removing the stolen merchandise from his person, and admitting that he had stolen the items.

{¶ 17} Collier was charged with Robbery, in violation of R.C. 2911.02(A)(2). The trial court instructed the jury on the elements of that offense, and on the elements of the lesser-included offenses of Robbery, in violation of R.C. 2911.02(A)(3), and Theft. The trial court instructed the jury on the concept of complicity. Collier objected

to this charge as given, contending that the jury should be told that complicity in this case applied only to the Robbery offenses. The trial court overruled that objection, and instructed the jury generally concerning the concept of complicity.

{¶ 18} The jury found Collier not guilty of Robbery, in violation of R.C. 2911.02(A)(2), but guilty of Robbery, in violation of R.C. 2911.02(A)(3). A judgment of conviction was entered on this offense, and Collier was sentenced accordingly. From his conviction and sentence, Collier appeals.

II

{¶ 19} Collier's First and Second assignments of error are as follows:

{¶ 20} "THE VERDICT AGAINST MR. COLLIER WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE.

{¶ 21} "THE VERDICT AGAINST MR. COLLIER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 22} R.C. 2911.02(A) provides, in pertinent part, as follows:

{¶ 23} "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 24} "(1) * * * * ;

{¶ 25} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;

{¶ 26} "(3) Use or threaten the immediate use of force against another."

{¶ 27} Robbery in violation of R.C. 2911.02(A)(2) is a felony of the second degree. Robbery in violation of R.C. 2911.02(A)(3) is a felony of the third degree.

{¶ 28} It is not surprising that the jury found Collier not guilty of Robbery as a violation of R.C. 2911.02(A)(2). Both St. Luce and Reeves testified that they were not harmed during the altercation; there is no evidence that any threat was uttered or implied; Collier denied intending to harm anyone; and the evidence that Collier intended to inflict harm upon either St. Luce or Reeves is thin.

{¶ 29} The evidence is stronger that Collier used force against St. Luce in an attempt to escape from St. Luce's grasp. On this point, St. Luce testified as follows:

{¶ 30} "Mr. Collier tried going around me to get away, which he then put his hands on me, then I put my hands back on him. At this point we're in a physical contact where I have to basically restrain him to get my merchandise back and at the point also to where I'm calling for police assistance.

{¶ 31} " * * * *

{¶ 32} "Q. So when [Collier] physically contacted you, what was that physical contact?

{¶ 33} "A. Basically he was trying to get around me and I was there in front of him already, and this is where I grabbed him because I also assumed that he was ready to run.

{¶ 34} "Q. What was the physical contact?

{¶ 35} "A. Basically like a little push, a little shove.

{¶ 36} "Q. At which point then you responded with –

{¶ 37} "A. To grasp him, grab him, block him.

{¶ 38} "Q. And it was – you're describing it as a block.

{¶ 39} "A. Block.

{¶ 40} “Q. Push him?

{¶ 41} “A. No [sic] push him, just basically grab him at that point.

{¶ 42} “Q. And once you grabbed him, how did the Defendant react?

{¶ 43} “A. He kept trying to get out the door, try to escape, to run towards the door. And he also got kind of violent with me where he didn’t want to comply.”

{¶ 44} The testimony of Reeves and the videos, while inconclusive on this point, are at least consistent with Collier’s having tried to force his way past St. Luce, while in physical contact with St. Luce. Collier denied that he used force in an attempt to escape from St. Luce’s grasp, maintaining that he was merely trying to hold onto the door in an attempt to avoid St. Luce and Reeves, both heavy men, landing on him on the ground. But the jury could reasonably conclude, based on all the evidence, that Collier was attempting to escape from St. Luce’s grasp up until the time that Collier, St. Luce and Reeves were all on the ground, at which point, as they all agree, Collier gave up and decided to cooperate.

{¶ 45} We conclude that the evidence in this record, when viewed in a light favorable to the State, permits a reasonable finder of fact to conclude that St. Luce was using reasonable force to detain Collier, which St. Luce was privileged to do, under R.C. 2935.041(A) and (C), and that Collier used force in an effort to escape from that detention. We conclude that this is not the rare case where the finder of fact has lost its way and a manifest miscarriage of justice has occurred.

{¶ 46} Collier’s First and Second assignments of error are overruled.

{¶ 47} Collier's Third Assignment of Error is as follows:

{¶ 48} "THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT INSTRUCTED THE JURY ON ACCOMPLICE INSTRUCTIONS ."

{¶ 49} Collier concedes that this assignment of error is governed by the plain-error standard of review, because he did not object to the giving of instructions on the concept of complicity – he merely objected to the form in which those instructions were given. Specifically, Collier asked the trial court to specify that in this case, the jury should consider robbery as the common purpose for the alleged complicity between Collier and his wife. The trial court declined to specify a particular common purpose.

{¶ 50} Plain error requires a conclusion that there is a substantial likelihood that the result would have been different, but for the error. We conclude that it is unlikely that this jury would have returned a different verdict had the complicity instruction not been given. From the questions submitted by the jury, it appears that the jury was focused upon Collier's conduct, not the conduct of his wife, in its analysis of the force element of Robbery under R.C. 2911.02(A)(3).¹ During deliberations, the jury asked:

{¶ 51} "Is a defensive action considered force?"

{¶ 52} "Can it be considered to be self defense to use force to avoid detention by a security person?"

{¶ 53} Without objection by either party, the trial court answered these two questions together, as follows:

¹The jury may have considered the role of Collier's wife in its analysis of the physical harm element of R.C. 2911.02(A)(2), but Collier was acquitted of that offense.

{¶ 54} “The next two questions are being considered together. Is a Defense – is a defensive action considered force? And can it be considered self-defense to use force to avoid detention by a security person?

{¶ 55} “As to ‘Is a defensive action considered force,’ I suppose you could have defensive actions which are – depending on the circumstances, which are not force; but force can be involved in defensive actions. I can only refer you to the definition of force in your instructions.

{¶ 56} “Can it be considered to be self-defense to use force to avoid detention by a security person? That’s not a yes-or-no type of question. We’ve discussed this to some length. When I say ‘we,’ the Counsel for the parties and myself.

{¶ 57} “Under the Ohio Revised Code, a merchant or an agent of a merchant such as a security person, is permitted to use reasonable force to detain a suspect whom the agent has probable cause to believe is trying to take property of the merchant. That force can be used. Reasonable force can be used to detain a person for a reasonable period of time to try to get the property back or – and to have a law enforcement officer come to make an arrest.

{¶ 58} “Force cannot be used to avoid detention by a security person using a reasonable degree of force or amount of force pursuant to his right under that law.

{¶ 59} “JUROR NUMBER SIX: Could you say that again?

{¶ 60} “THE COURT: If a security officer or agent of a merchant is acting under, within the law of the State of Ohio to use a reasonable amount of force to detain a suspect whom he has reasonable cause to believe is trying to steal from the merchant,

then you cannot – then the suspect cannot use force to avoid that detention.

{¶ 61} “You can only give rise to a defense regarding force if – an amount of force over and above a reasonable degree of force was being imposed upon you. So that would be up to the trier of fact to decide.

{¶ 62} “So what seems like a simple question doesn’t always get a simple answer. So thank you for your patience and waiting while we were trying to give you the best answer that could be given to you under the facts of this case.

{¶ 63} “State wish to put anything on record regarding the questions and responses?

{¶ 64} “MS. SMITH: No, Your Honor.

{¶ 65} “THE COURT: Defense?

{¶ 66} “MR. MERRELL: No, Your Honor.

{¶ 67} “THE COURT: Thank you, ladies and gentlemen. You can return back to the jury room to continue your deliberations.”

{¶ 68} Furthermore, Collier’s trial counsel all but conceded, during closing argument, that there is evidence in the record from which the jury could find that Jennifer Collier was complicit in Theft:

{¶ 69} “It appears she was involved in the theft offense, a little bit of conjecture but, granted, these people are sort of trained to look is somebody blocking an aisleway or not.”

{¶ 70} This evidence, alone, would justify the instruction. Even though Collier admitted to the jury that he was guilty of Theft, the State was still entitled to present all of its proof as to that offense, including the evidence of complicity of his wife in Theft.

{¶ 71} We conclude, then, that the giving of an instruction on complicity was not error, and even if it were, it did not rise to the level of plain error.

{¶ 72} Collier's Third Assignment of Error is overruled.

IV

{¶ 73} All of Collier's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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FROELICH and WILLAMOWSKI, JJ, concur.

(Hon. John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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