[Cite as *State v. Hutchinson*, 2010-Ohio-5752.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23648
v.	:	T.C. NO. 09CR1038
AARON HUTCHINSON	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 24th day of November, 2010.

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CANNON, J. (by assignment)

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{¶ 1} After trial by jury in the Montgomery County Court of Common Pleas, appellant Aaron Hutchinson was found guilty on one count of aggravated robbery with a firearm specification. He now appeals, challenging the trial court's judgment overruling his

motion to suppress evidence as well as the sufficiency and weight of the evidence submitted in support of his conviction. For the reasons below, we affirm.

{¶ 2} On the night of May 6, 2008, Michael Mayor was walking on Willowood Avenue in Dayton, Ohio. He passed a house where he observed six people congregating on the porch. Although he could hear them talking, the people did not speak to him and he did not speak to the people. Several moments later, however, Mr. Mayor heard footsteps behind him. He turned and observed two men approaching him. Mr. Mayor noticed the first individual, later identified as appellant, was wearing a white tank-top shirt. As appellant drew closer, he shouted: "Hey man, give me everything *** I said give me everything. Your watch, your cell phone, your wallet." When Mr. Mayor replied he had nothing to give, he noticed the second individual, later identified as Larry Baxter, was pointing a firearm at him. Apparently angry with Mr. Mayor's response, appellant ordered Baxter to shoot. As Baxter attempted to pull the trigger, the firearm malfunctioned.

{¶ 3} Mr. Mayor testified he momentarily watched the duo as Baxter tried to fix the weapon. He then backed away from the assailants and fled to safety. During his escape, Mr. Mayor noticed the two individuals also retreated in the opposite direction from which they came. Mr. Mayor immediately called the police.

{¶ 4} Officer Joseph Setty of the Dayton Police Department responded to the call. Baxter was quickly apprehended; during Baxter's arrest, the officer discovered a loaded .25 caliber semi-automatic handgun in a rear pants pocket. Appellant was not identified as a participant in the crime until July 2008.

{¶ 5} On September 2, 2008, Detective Deborah Ritchey conducted an interview

with appellant. During the interview, appellant conceded he was with Baxter during the attempted robbery. However, he claimed he had no foreknowledge that Baxter intended to rob anyone at gunpoint. He stated he was surprised when Baxter pulled the weapon on Mr. Mayor. Appellant further claimed, after Baxter brandished his firearm, Mr. Mayor pulled a knife. At this point, appellant asserted he quickly fled the scene.

{¶ 6} On April 14, 2009, appellant was indicted on one count of aggravated robbery with a deadly weapon and one firearm specification. He subsequently filed a motion to suppress evidence which was overruled. The matter ultimately proceeded to a jury trial after which appellant was convicted on all charges. Appellant was sentenced to a three-year term of imprisonment on the aggravated robbery charge and a three-year term of imprisonment on the specification. The terms were ordered to run consecutively, for an aggregate term of six years.

{¶ 7} Appellant now appeals, asserting three assignments of error for our review. His first assigned error alleges:

{¶ 8} "The trial court erred in overruling appellant's motion to suppress."

{¶ 9} Appellate review of a trial court's ruling on a motion to suppress evidence presents mixed questions of fact and law. *State v. Dickerson*, 179 Ohio App.3d 754, 2008-Ohio-6544, at ¶9. "At a suppression hearing, the trial court assumes the role of trier of fact, and as such, is in the best position to resolve factual questions and evaluate witness credibility." Id., citing *State v. Carter* (1995), 72 Ohio St.3d 545, 552. A reviewing court will therefore not disturb a trial court's factual findings if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting those

facts as true, a reviewing court then independently considers the trial court's application of the law de novo, giving no deference to the trial court's legal conclusions. *Dickerson*, supra, citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627. Under his first assignment of error, appellant contends his pretrial statement, given to Detective Deborah Ritchey of the Dayton Police Department, was inadmissible due to its involuntary character. Where the admissibility of a confession is challenged at a suppression hearing, the burden is upon the prosecution to prove compliance with *Miranda v. Arizona* (1966), 384 U.S. 436, i.e., that the defendant knowingly, intelligently, and voluntarily waived his or her rights and that the inculpatory statement was voluntary. *State v. Kassow* (1971), 28 Ohio St.2d 141, at paragraph four of the syllabus.[1] Once the state has established these elements, a criminal defendant then has the burden of proving the statement was involuntary. See, e.g., *State v. Alford*, Montgomery App. No. 23332, 2010-Ohio-2493, at ¶10.

{¶ 10} In determining whether a pretrial statement is involuntary, a reviewing court "'should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'" *State v. Mason* (1998), 82 Ohio St.3d 144, 154, quoting *State v. Edwards* (1976), 49 Ohio St.2d 31, paragraph two of the syllabus. Keeping these factors in mind, the

[1]In its response brief, the state argues appellant was not in custody at the time of interrogation and therefore was not entitled to *Miranda* warnings. Regardless of this argument, however, the interviewing detective in this matter Mirandized appellant, after which she obtained a waiver of appellant's rights. Because *Miranda* warnings were administered, any comment on the substance of the state's argument on this issue would be unnecessary and advisory.

determination of whether a minor intelligently and voluntarily waives his or her rights during an interrogation cannot always be decided using the same criteria as that applied to mature adults. See *State v. Kerby*, Clark App. No. 03-CA-55, 2007-Ohio-187, at ¶45, citing *State v. Bell* (1976), 48 Ohio St.2d 270, 277. The criteria will necessarily vary with the age, emotional maturity, and intellectual capacity of the minor. Id.; see, also, *Kerby*, supra. Nevertheless, absent evidence that a minor-suspect's will was overborne and his or her capacity for self-determination was fundamentally impaired due to coercive police tactics, his or her statement to police will generally be considered voluntary. See *State v. Otte* (1996), 74 Ohio St.3d 555, 562, citing *Colorado v. Connelly* (1986), 479 U.S. 157, 167; see, also, *In re Garrett* (July 31, 1996), Hamilton App. No. C-950243, 1996 Ohio App. LEXIS 3233, *6.

{¶ 11} In support of his involuntariness argument, appellant points out he was only 17 years-of-age at the time of the interview; he had completed only ten years of education; his mother was not advised she could be present during the interview; the interview was conducted in a six-foot by eight-foot, windowless room; and the detective did not inquire whether appellant was under the influence of drugs or alcohol at the time he was questioned. Despite the points upon which appellant focuses, we believe the totality of the circumstances supports the trial court's decision.

{¶ 12} At the suppression hearing, Detective Ritchey testified she initially asked appellant to identify himself and spell his name, which he was able to do. She also asked him to recite his social security number and his birth date, and appellant was again able to provide the detective with this information. Appellant then told the detective he had

completed ten years of schooling. After establishing appellant could read, the detective commenced a recitation of his rights. In doing so, Detective Ritchey testified she turned the form toward appellant so he could read along with her. Appellant placed his initials next to each right on the form and stated verbally he understood all of his rights. Appellant then expressed his desire to waive these rights and signed the waiver form indicating he wished to speak with the detective.

{¶ 13} Detective Ritchey testified that, throughout the interview, appellant was very well-spoken and coherent. She remarked he made regular eye contact and, in her estimation, appeared notably intelligent. Finally, the detective testified nothing in appellant's demeanor indicated he was using drugs or alcohol at the time she questioned him.

{¶ 14} Considering the totality of the circumstances, we hold there was no evidence indicating appellant's statement was involuntary. Even though appellant was legally a minor and had only ten years of education, the detective's testimony does not suggest he failed to understand his rights or was forced into making a statement. To the contrary, the record indicates appellant appreciated the nature of the rights he was waiving and did so of his own personal volition.

{¶ 15} Further, there is nothing in the record to indicate appellant was under the influence of drugs or alcohol. Indeed, the detective testified appellant was alert and lucid, exhibiting no signs of impairment.

{¶ 16} Appellant also claims that the interview room's small size and lack of windows somehow affected the voluntariness of his statement. Because there was no

evidence that the detective used the surroundings to, for example, intimidate appellant into issuing a statement, we fail to see how the nature and quality of the interview room bears on the voluntariness analysis.

{¶ 17} Finally, appellant contends the detective's failure to apprise appellant's mother that she could be present during appellant's questioning contributed to the involuntariness of the statement. This court, however, has held the absence of a minor's parent(s) or guardian(s) during questioning does not necessarily affect the validity of the statement. *State v. Dean* (Sept. 29, 1995), Montgomery App. No. CA 14721, 1995 Ohio App. LEXIS 4319, *11-12. Where, as here, there is nothing in the record that would suggest Detective Ritchey threatened, mistreated, or improperly induced appellant to give his statement, the absence of appellant's mother is irrelevant to the voluntariness of his statement. Id.

{¶ 18} The trial court, in its entry of June 11, 2009, indicated that it overruled the motion to suppress "for all the reasons this Court placed into the record on June 11, 2009." There, although it made no specific "factual findings," the trial court made it clear it heard no evidence suggesting the statements made by appellant were involuntary, and no evidence indicating the officer did anything inappropriate in her questioning.

{¶ 19} For the foregoing reasons, we hold the trial court was indisputably correct in finding that appellant's statement was voluntary and therefore constitutionally sound. Appellant's first assignment of error is accordingly overruled.

{¶ 20} As his second and third assignments of error are related, we shall address them together. They provide:

{¶ 21} "[2.] The trial court erred in denying defendant's [Criminal] Rule 29 motion. The state's evidence was not sufficient to justify denial of the motion.

{¶ 22} "[3.] Appellant's conviction was against the manifest weight of the evidence and the trial court's decision should be reversed."

{¶ 23} We shall first set forth the relevant standards of review. "'"Sufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, quoting Black's Law Dictionary (6 Ed.1990) 1433. A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. Id. at 390. On review for sufficiency, courts are not to assess whether the state's evidence is to be believed but whether, if believed, the evidence would support a conviction. Id. The proper question to ask 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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 24} Alternatively, a challenge based upon a manifest weight of the evidence argument attacks the believability of the evidence and asks which of the competing inferences suggested by the evidence is more persuasive. *State v. Wilson* , Montgomery App. No. 22581, 2009-Ohio-525, at ¶12. When evaluating whether a conviction is against the weight of the evidence, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine 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." *Thompkins*, supra, at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 25} Appellant was indicted on one count of aggravated robbery, pursuant to R.C. 2911.01(A)(1), with a firearm specification, pursuant to R.C. 2929.14 and R.C. 2929.145. In essence, appellant's arguments only challenge whether the state met its burdens of production and persuasion regarding the aggravated robbery conviction. With respect to this crime, the state was required to demonstrate appellant attempted to commit a theft offense or fled immediately after the attempt while having a deadly weapon on or about his person or under his control which he displayed, brandished, indicated he possessed, or used.

{¶ 26} At trial, the victim, Michael Mayor, testified that on the night of May 6, 2008, he was walking on Willowood Avenue in Dayton, Ohio, when two individuals approached him from behind. The first individual, appellant, donned a white tank-top shirt and cut-off shorts, and authoritatively demanded, "give me everything." "Your watch, your cell phone, your wallet." Mr. Mayor professed he had nothing to give. At that point, however, he noticed the second individual, Larry Baxter, pointing a handgun at him. According to Mr. Mayor, appellant ordered Baxter to shoot. Baxter tried to pull the trigger, but, according to testimony, the firearm "malfunctioned" and Mr. Mayor was able to escape unharmed. As he fled the scene, Mr. Mayor testified he observed both assailants retreating together in the opposite direction.

{¶ 27} Appellant's sufficiency argument asserts that the trial court erred in failing to grant his motion for acquittal because (1) there was no evidence appellant ever touched the

firearm used by Baxter, and (2) there was no evidence that he knew Baxter intended to rob Mr. Mayor.

{¶ 28} With respect to appellant's first point, it is legally irrelevant that appellant did not display, brandish, indicate he possessed, or use the firearm. In Ohio, it is well-established that an accomplice "shall be prosecuted and punished as if he were a principal offender." R.C. 2923.03(F); see, also, *State v. Bies* (1996), 74 Ohio St.3d 320, 325. Moreover, " [a]n individual indicted for and convicted of *** aggravated robbery, and *** a firearm specification, is subject to a mandatory three-year term of actual incarceration *** regardless of whether he was the principal offender or an unarmed accomplice." *State v. Chapman* (1986), 21 Ohio St.3d 41, at syllabus. The evidence demonstrated appellant was an accomplice in an aggravated robbery with a firearm. As such, appellant can be held criminally culpable for the indicted offenses.

{¶ 29} Appellant's second argument is equally unpersuasive. Mr. Mayor's testimony demonstrated that appellant was the individual who initially accosted him and demanded his belongings. Whether he knew Baxter intended to rob Mr. Mayor is inconsequential. The evidence demonstrated that appellant attempted to commit a theft offense and that his cohort contemporaneously brandished a deadly weapon. Accordingly, we hold the state presented sufficient evidence to prove, beyond a reasonable doubt, appellant committed the charged crimes.

{¶ 30} Appellant next asserts the evidence militates against the jury's verdict merely because Mr. Mayor's testimony was not credible. We again disagree.

{¶ 31} Initially, appellant fails to provide any support for his conclusory statement

pertaining to the credibility of Mr. Mayor's testimony, e.g., inconsistencies in the testimony or a personal interest which might motivate him to inculpate appellant. Appellant merely asserts his conviction is against the weight of the evidence for roughly the same reasons he believes the evidence was insufficient, viz., he had no knowledge that Baxter intended to rob Mr. Mayor; he did not touch Mr. Mayor or the firearm; and the only evidence of appellant's involvement was Mr. Mayor's testimony. These points do not indicate the jury lost its way in convicting appellant of the charged crimes.

{¶ 32} In conjunction with the evidence discussed above, appellant, during his interview with Detective Ritchey, conceded he was shooting dice with Baxter on the evening in question. After losing $25, he and Baxter went on a walk during which they approached Mr. Mayor. Appellant stated that Baxter suddenly drew his firearm, pointed it at Mr. Mayor, and demanded that Mr. Mayor give him all his money. Appellant stated that Mr. Mayor then brandished a knife, at which point appellant fled. He professed he had no knowledge that Baxter intended to rob anyone. He also admitted he was wearing a white, "wife-beater" tank top when the incident occurred.

{¶ 33} Although appellant's version of the incident conflicted with Mr. Mayor's testimony, appellant nevertheless acknowledged he was with Baxter during the attempted theft wearing clothing that matched Mr. Mayor's description. A jury is free to believe all, part, or none of a witness' testimony. See, e.g., *State v. Handcock*, Clark App. No. 2008 CA 85, 2009-Ohio-4327, at ¶21. Although the jury heard appellant's construction of events by way of Detective Ritchey's testimony, it ultimately found Mr. Mayor's account of the incident more credible. Because the evidence, viewed as a whole, supports the jury's

determination, we do not believe the verdict resulted in a manifest miscarriage of justice.

{¶ 34} Appellant's second and third assignments of error are both overruled.

{¶ 35} For the reasons discussed in this opinion, appellant's three assignments of error lack merit. The judgment of conviction entered by the Montgomery County Court of Common Pleas is therefore affirmed.

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BROGAN, J. and GRADY, J., concur.

(Hon. Timothy P. Cannon, Eleventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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