[Cite as *State v. Hicks*, 2009-Ohio-6209.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: Sheila G. Farmer, P.J.
	:	Hon: W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon: Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-0046
JONATHAN HICKS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2008-CR-831D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 17, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KIRSTEN L. PSCHOLKA-GARTNER Assistant Richland County Prosecutor 38 South Park Street Mansfield, OH 44902	RANDALL E. FRY 10 West Newlon Place Mansfield, OH 44902

Gwin, P.J.

{¶1} Defendant-appellant Jonathon Hicks appeals from his conviction and sentence in the Richland County Court of Common Pleas on one count of complicity to commit robbery, a felony of the second degree, in violation of R.C. 2911.02(A) (2). Plaintiff-appellee is the State of Ohio.

STATEMENT OF FACTS AND THE CASE

{¶2} On the evening of November 25, 2007, Matthew Kader and his wife, Tabitha, walked from their house at 248 South Main Street in Mansfield, Ohio to the Circle K convenience store on Lexington Avenue, just one street over. At the Circle K, they purchased a 12-pack of beer, some pop, and cigarettes. At around 9:00 p.m., they headed back toward their home, cutting down Small Avenue which dead ends into their back yard.

{¶3} As they were walking past the house at 22 Small Avenue, Appellant, Terrence Ison, and Anthony Williams were standing on the porch of that residence. Upon seeing the 12-pack of beer that Matthew Kader was carrying, they began discussing taking the beer from him. Chad McGuire, who was also staying at the residence while he was on house arrest, overheard this conversation.

{¶4} Appellant and Ison yelled at the Kaders from the porch, demanding that Matthew give them some beer. Matthew responded that he did not know them, and was not going to give them any beer. Appellant and Ison came down off the porch and followed the Kaders down the street.

{¶5} When they were nearly to their back yard, Matthew turned around and saw that the men were five to six steps behind them. He continued walking, hoping that

they could reach their house without incident. However, as soon as Matthew turned his back to the men, Appellant swept his legs out from underneath him, knocking him to the ground. The beer bottles Matthew was carrying also fell to the ground and shattered. When Matthew stood back up, Appellant was standing in front of him with his fists raised. He punched Matthew in the face several times, breaking his glasses. While Matthew was struggling with Appellant, he saw Terrence Ison going after his wife.

{¶6} Tabitha had taken off her coat and was trying to help her husband when Ison hit her and knocked her down. At that point, Anthony Williams ran up and joined the altercation. Appellant grabbed Matthew from behind and pinned his arms. Williams put his hands around Matthew's throat and backed him up against the garage located at in the Kader's backyard. He had his fist cocked back to hit Matthew when Tabitha jumped on his back and started to choke him. Williams knocked Tabitha off his back, and Matthew yelled at her to run into the house and call the police.

{¶7} When Tabitha went to call the police, the three men took off running. One of the men grabbed Tabitha's coat, which contained her wallet, ID, and some cash, from where it was laying on the ground. They fled back to the house at 22 Small Avenue. Once there, they told those present that they had just been in a fight with a white couple and had taken a coat with some money in it. They gave the coat to Ison's girlfriend, Jessee Richmond, who disposed of it by taking it a block away to a house on Ford Avenue, breaking out a basement window, and stuffing it inside. The police later located the coat in the basement of 17 Ford Avenue and returned it to Tabitha Kader; however, her pocketbook was not found.

{¶8} When the police arrived at the Kader's house about ten to fifteen minutes after Tabitha made the 911 call, Matthew and Tabitha gave them a description of the men who accosted them. They indicated that the man that first knocked Matthew to the ground was a black male, about 5'8" or 5'9" tall, and skinny. The second man who hit Tabitha was a lighter skinned black male with facial hair. He was slightly taller than the first man, approximately 5'10" or 5'11" tall, and heavier-set. They described the third man who came after the fight started as the biggest of the three. He was a heavy-set black male wearing a camouflage jacket. Matthew and Tabitha advised the officers that the men had come off the porch at 22 Small Avenue, and had fled back towards that residence.

{¶9} When the officers knocked on the door of 22 Small Avenue, they were met by the Appellant's stepfather, Larry Davis. When Mr. Davis opened the door, officers saw Anthony Williams sitting on the living room couch. Mr. Williams, matched the physical description of a heavy-set black male, and was wearing an army style camouflage jacket like the one described by the victims. He was brought out onto the porch, and was taken into custody. Mr. Williams was later transported to the Kader's house where he was identified by the victims.

{¶10} After Mr. Williams was located, Mr. Davis refused to allow the police to enter the residence to search for the other two suspects. He stalled the police for forty-five minutes, telling them that he had been there all night and there was no one else in the home. He did not allow the police to enter the home until Chad McGuire's probation officer arrived. At that point, Probation Officer Dan Myers gave the police authorization

to enter the home on the basis that Mr. McGuire was on house arrest and the residence was subject to search.

{¶11} When the police and the probation officer searched the remainder of the house, they found an upstairs attic with the door locked. Mr. Davis told the police that the attic had not been used in years, and he did not have a key. Since it was an old door, the probation officer was able to get it open with a pocketknife. Once the attic door was pried open, the officers found the Appellant and Terrence Ison lying on the floor, hiding. The Appellant matched the description of the shorter black male who had first knocked Matthew to the ground. Terrence Ison also matched the description of the larger, light-skinned black male who had punched Tabitha. They were also taken into custody and were transported to the Kader's house where they were identified by the victims.

{¶12} Larry Davis testified on appellant's behalf. He testified that he had just returned home when Anthony Williams advised him there was a fight down the street. The two went down the street to break it up; however, it had ended by the time they got there so they turned around and walked home. Mr. Davis claimed that Mr. Williams did not have anything to do with the robbery, and that he did not see the Appellant or Terrence Ison run down the street and back into the house. On cross-examination, Mr. Davis did admit that he heard Terrence Ison telling his wife that he had been involved in the fight. Anthony Williams also took the stand, telling a similar story to Mr. Davis.

{¶13} Appellant's thirteen-year-old brother, Bertram Hicks, testified. Mr. Hicks insinuated that victim, Matthew Kader and threatened him and several other

neighborhood kids prior to November 25, 2007; however, he had no relevant testimony to offer as to the robbery.

{¶14} The State called Sergeant Jonathon Ahles to rebut Larry Davis' testimony. Sergeant Ahles testified that during the 45 minutes he spoke with Mr. Davis while waiting for the probation officer to arrive, Mr. Davis never told him that Anthony Williams was not involved in the robbery.

{¶15} At the conclusion of the trial, the jury found the Appellant and Terrence Ison guilty of aiding and abetting robbery. The jury was unable to reach a verdict as to Anthony Williams.

{¶16} The trial court sentenced the Appellant to four years in prison, consecutive to the one year sentence that was imposed for his fleeing and eluding conviction in case number 2008-CR-555D. The sentence included a mandatory term of five years of post release control.

{¶17} It is from this conviction and sentence that appellant appeals, raising the following two assignments of error:

{¶18} "I. THE JURY'S VERDICT IN FINDING THE DEFENDANT-APPELLANT GUILTY OF ROBBERY, WAS CONTRARY TO THE MANIFEST WEIGHT OF EVIDENCE, THUS THE CONVICTION WAS IN VIOLATION OF ARTICLE I, 10 [SIC.] OF THE OHIO CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶19} "II. THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT-APPELLANT'S MOTION FOR A CRIMINAL RULE 29 ACQUITTAL."

I. & II.

{¶20} Appellant's two assignments of error raise sufficiency and manifest weight of the evidence claims. Since all the claims center upon the issue of proof of whether appellant aided and abetted a robbery, they will be treated jointly.

{¶21} In his first assignment of error appellant maintains that his conviction is against the manifest weight of the evidence. In his second assignment of error appellant alleges that the trial court erred in not granting his Crim. R. 29 motion for acquittal at the conclusion of the State's case.

{¶22} In determining whether a trial court erred in overruling an appellant's motion for judgment of acquittal, the reviewing court focuses on the sufficiency of the evidence. See, *e.g., State v. Carter* (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 974; *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503. The standard to be employed by a trial court in determining a Crim.R. 29 motion is set out in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus:

{¶23} "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶24} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541*,* superseded by constitutional amendment on other grounds as stated by *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668. "While the test for sufficiency requires a

determination of whether the State has met its burden of production at trial, a manifest weight challenges questions whether the State has met its burden of persuasion." *State v. Thompkins,* supra at 78 Ohio St.3d 390.

{¶25} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St. 3d 259, superseded by State constitutional amendment on other grounds as stated in *State v. Smith* (1997), 80 Ohio St. 3d 89.

{¶26} Specifically, an appellate court's function, when reviewing the sufficiency of the evidence to support a criminal conviction, is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks,* supra. This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The 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. Thompkins*, 78 Ohio St. 3d at 386.

{¶27} The Ohio Supreme Court recently addressed the standard of review for a criminal manifest weight challenge, as follows:

{¶28} “The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins***,** the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678

N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive--the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When 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 fact finder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶29} "Both *C.E. Morris Co.,* 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, and *Thompkins* instruct that the fact-finder should be afforded great deference. However, the standard in *C.E. Morris Co.* tends to merge the concepts of weight and sufficiency. See *State v. Maple* (Apr. 2, 2002), 4th Dist. No. 01CA2605, 2002 WL 507530, fn. 1; *State v. Morrison* (Sept. 20, 2001), 10th Dist. No. 01AP-66, 2001 WL 1098086. Thus, a judgment supported by "some competent, credible evidence going to all the essential elements of the case" must be affirmed. *C.E. Morris Co.* Conversely, under *Thompkins**,*** even though there may be sufficient evidence to support a conviction, a reviewing court can still re-weigh the evidence and reverse a lower court's holdings. *State v. Thompkins,* 78 Ohio St.3d 380, 678 N.E. 2d 541. Thus, the civil-manifest-weight-of-the-evidence standard affords the lower court more deference then does the criminal standard. See *Barkley v. Barkley* (1997), 119 Ohio App. 3d 155, 159, 694

N.E.2d 989." *State v. Wilson,* 713 Ohio St. 3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26; 865 N.E.2d 1264, 1269-1270.

{¶30} However, an appellate court may not merely substitute its view for that of the jury, but must find that "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St. 3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App. 3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶31} In *State v. Thompkins* supra, the Ohio Supreme Court held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." Id. at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." Id. at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498.

{¶32} Of relevance to these assignments of error, appellant was convicted of aiding and abetting a robbery. R.C. 2911.02(A) (2) provides, "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another…. (3) Use or threaten the immediate use of force against another."

{¶33} R.C. 2923.03 provides: "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶34} "* * *

{¶35} "(2) Aid or abet another in committing the offense."

{¶36} R.C. 2923.03(F) states, "A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

{¶37} Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself." *State v. Huff* (2001), 145 Ohio App.3d 555, 563, 763 N.E.2d 695. (Footnote omitted.) Thus, "[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria." *State v. McDaniel* (May 1, 1998), Montgomery App. No. 16221, (citing *State v. Elliott* (1995), 104 Ohio App.3d 812, 663 N.E.2d 412).

{¶38} It is true that a person's mere association with a principal offender is not enough to sustain a conviction based on aiding and abetting. *State v. Sims* (1983), 10 Ohio App.3d 56, 58, 460 N.E.2d 672, 674-675. Generally, a criminal defendant has aided or abetted an offense if he has supported, assisted, encouraged, cooperated with, advised, or incited another person to commit the offense. See *State v. Johnson* (2001), 93 Ohio St.3d 240, 754 N.E.2d 796, syllabus; *State v. Hickman*, Stark App. No. 2003-CA-00408, 2004-Ohio-6760 at ¶45. "'Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.'" *State v. Mendoza* (2000), 137 Ohio App.3d 336, 342, 738 N.E.2d 822, quoting *State v.*

Stepp (1997), 117 Ohio App.3d 561, 568-569, 690 N.E.2d 1342; *State v. Myers*, Richland App. No. 03-CA61, 2004-Ohio-3052 at 116.

{¶39} As set forth in the Statement of Facts, supra, the jury heard testimony that the Appellant and his co-defendants followed the Kaders down the street with the intention of committing a theft offense, and that the object of the theft merely changed due to events that took place during the ensuing altercation. From this evidence, it is clear that the Appellant and his two co-defendants followed the Kaders down the street and assaulted them with the intent to steal something.

{¶40} Viewing this evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant, at the very least, supported, assisted, encouraged, cooperated with, advised, or incited another person to commit the offenses with which he was convicted. Viewing this evidence linking appellant to the assault of the victims and the theft of the coat and its contents in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant was well aware of, and participated in following the victims, confronting them, assaulting the victims and stealing the coat and its contents.

{¶41} We hold, therefore, that the state met its burden of production regarding each element of the crime of aiding and abetting robbery.

{¶42} Although appellant cross-examined the witnesses and presented his own witnesses to argue that he did not participate in assault or the theft of the coat, the weight to be given to the evidence and the credibility of the witnesses are issues for the

trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881.

{¶43} Reviewing courts should accord deference to the trial court's decision because the trial court has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections that cannot be conveyed to us through the written record, *Miller v. Miller* (1988), 37 Ohio St. 3d 71. "A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.' *United States v. Barnard,* 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)". *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶44} In *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81, 461 N.E.2d 1273, the Ohio Supreme Court explained: "[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." See, also *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶45} The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the

inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* Franklin App. No. 02AP-604, 2003- Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke,* Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the convictions. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt. The jury did not create a manifest injustice by concluding that appellant was guilty of the crimes charged in the indictment. We further conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant was guilty of the crime of aiding and abetting robbery.

{¶46} We conclude the trier of fact, in resolving the conflicts in the evidence, did not create a manifest injustice to require a new trial.

{¶47} Appellant's first and second assignments of error are overruled.

{¶48} The judgment of the Richland County Court of Common Pleas is affirmed.

By Gwin, J.,

Farmer, P.J., and

Edwards, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JULIE A. EDWARDS

WSG:clw 1022

[Cite as *State v. Hicks*, 2009-Ohio-6209.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JONATHAN HICKS	:	
Defendant-Appellant	:	CASE NO. 2009-CA-0046

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Richland County Court of Common Pleas is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JULIE A. EDWARDS