[Cite as *State v. Tate*, 2004-Ohio-2007.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 82871

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
CURTIS TATE	:	
	:	
Defendant-Appellant	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	APRIL 22, 2004
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from Common Pleas Court Case No. CR-430759
	:	
JUDGMENT	:	AFFIRMED.
	:	
DATE OF JOURNALIZATION	:	

APPEARANCES:

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FRANK D. CELEBREZZE, JR., J.

{¶1} The appellant, Curtis Tate, appeals his conviction for robbery, in violation of R.C. 2911.02(A)(3), following a bench trial in the Court of Common Pleas, Criminal Division. The appellant claims the evidence produced against him was insufficient to support his robbery conviction. For the reasons set forth below, we affirm.

{¶2} On October 30, 2001, Curtis Tate ("Tate") attempted to steal four cans of Spam and four jars of Sanka coffee, a total combined value of $18.30, from The Reserve Square Market in Cleveland. While attempting to leave the store with the merchandise, Tate was apprehended by DeVaughn Garrison, a store employee. Garrison had observed Tate stuff four jars of Sanka coffee into his coat.

{¶3} Garrison asked Tate to accompany him to an office in the store where they both were joined by the store manager, Lou Bancho. Garrison was standing in the doorway and Tate was standing inside the office. Tate complied with Garrison's instructions and removed the stolen merchandise from his coat and pants legs. Bancho left the office to call the police, and Garrison began to fill out criminal trespass forms with Tate.

{¶4} Approximately ten to fifteen minutes later, Bancho returned to the office and informed Tate that the police were on the way. According to Bancho's testimony, Tate became agitated and attempted to exit the office by pushing past Garrison's arm which

was blocking the doorway. While attempting to push past Garrison's arm, Tate's shoulder bumped Garrison in the chest causing Garrison's head to hit the door jam. Garrison testified he quickly subdued Tate and prevented him from leaving. As a result of Garrison's head hitting the door jam, he suffered a headache, but was otherwise uninjured.

{¶5} On December 18, 2002, the Cuyahoga County Grand Jury indicted Tate on one count of robbery, in violation of R.C. 2911.02. On March 12, 2003, Tate waived his right to a jury trial. After the bench trial concluded, Tate was found guilty of the lesser included offense of robbery of the third degree, in violation of R.C. 2911.02(A)(3). Tate was sentenced to one year incarceration.

{¶6} The appellant presents this sole assignment of error for our review:

{¶7} "The evidence adduced at trial is insufficient to uphold a conviction of robbery thereby denying the appellant his right to due process as guaranteed by the fourteenth amendment of the U.S. Constitution, Article I, Section 10 of the Ohio Constitution and *State v. Ballard* (1984), 14 Ohio App.3d 59."

{¶8} In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court re-examined the standard of review to be applied by an appellate court when reviewing a claim of insufficient evidence:

{¶9} "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 defendant's guilt beyond a reasonable doubt. 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)" Id. at paragraph two of the syllabus.

{¶10} More recently, in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, the Ohio Supreme Court stated the following with regard to "sufficiency" as opposed to "manifest weight" of the evidence:

{¶11} "With respect to sufficiency of the evidence, '"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.' Black's Law Dictionary (6 Ed.1990) 1433. See, also, Crim.R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction). In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio

St. 486, 55 Ohio Op. 388, 124 N.E.2d 148. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 [*387] S.Ct. 2211, 2220, 72 L.Ed. 2d 652, 663, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560." Id. at 386-387.

{¶12} Finally, we note that a judgment will not be reversed upon insufficient or conflicting evidence if it is supported by competent credible evidence which goes to all the essential elements of the case. *Cohen v. Lamko* (1984), 10 Ohio St.3d 167, 462 N.E.2d 407.

{¶13} The appellant claims the evidence against him was insufficient to support his conviction for robbery because the elements of the offense did not occur simultaneously. The appellant specifically argues that the required element of force used to flee did not occur immediately after the attempted theft.

{¶14} The appellant was convicted of R.C. 2911.02(A)(3), which states:

{¶15} "(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:

{¶16} "***

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

{¶18} In the instant matter, it is undisputed that the appellant attempted to steal four cans of Spam and four jars of Sanka coffee. This fact constituted the element of attempted theft. It is also undisputed that the appellant did not use force or a threat of force in attempting to steal the merchandise from the store; therefore, we will focus on the appellant's use of force in attempting to flee *immediately* after the attempted theft in order to constitute the essential elements of robbery. (Emphasis added.)

{¶19} In order to sustain a conviction for robbery, the appellant must use or threaten the immediate use of force in attempting to flee after an attempted theft offense. These elements must occur immediately after one another in order to complete the crime of robbery.

{¶20} The court in *State of Ohio v. McDonald* (Dec. 6, 2001), Cuyahoga App. No. 78939, defined the term "immediately" as it relates to the offense of robbery:

{¶21} "'Immediately' is typically defined as follows: (1) without lapse of time; without delay; instantly; at once; (2) without intervening medium or agent; concerning or affecting directly; (3) with no object or space intervening. *** However, immediately is not a word capable of a hard and fast definition to every applicable situation. Whether the action is immediate depends upon the circumstances of the case. *State v. Thornton* (May

12, 1977), Frankin App. No. 77AP-53. At the same time, immediately does not mean that all elements of a crime must occur concurrently or simultaneously in order for a crime to have been completed. *State v. Meisenhelder* (Oct. 12, 2000), Cuyahoga App. No. 76964. Rather, it is sufficient to establish that the separate acts forming the elements of a crime constitute a single continuous transaction. *Meisenhelder, supra*. At a trial for robbery, whether the use of force occurs 'immediately' after a theft offense is a question for the trier of fact. *State v. Costa* (Dec. 31, 1998), Greene App. No. 98-CA-32; *State v. Wright*, (Feb. 3, 1997), Clermont App. No. CA96-02-022." Id. at 9-10.

{¶22} In the instant matter, after being stopped by Garrison, the appellant voluntarily accompanied Garrison to an office in the store and, upon Garrison's request, returned the merchandise he had attempted to steal. Ten to fifteen minutes later, when the appellant was informed that the police had been called, he became agitated and attempted to physically push past Garrison in order to leave the office where he was being detained.

{¶23} The State argues that the "continuous transaction rule," found in *State of Ohio v. Hughes*, Cuyahoga App. No. 81768, 2003-Ohio-2307, applies to the instant case and that the force used by the appellant against Garrison in an attempt to escape the office is part of the same transaction as the attempted theft; therefore, the requirement of "using force to flee immediately after" is

fulfilled, and the appellant's conviction for robbery should be upheld. We agree.

{¶24} In *Hughes*, the defendant was observed taking infant clothing off hangers, putting them into bags and leaving the store. In the parking lot, the defendant was confronted by a store employee who had observed the defendant stealing the clothes. The defendant immediately started to run away with the merchandise, was grabbed by the store employee, and a fight ensued between them. All the while, the stolen merchandise was with the defendant, who was using force to immediately flee from a store employee while attempting to complete the crime of theft.

{¶25} The court in *Hughes* held, "The element of force or harm differentiates robbery from theft. Where a defendant struggles with a security guard while resisting apprehension after a shoplifting incident, this court has applied the 'single continuous transaction' rule and held that such conduct, as part of a single continuous act committed by the defendant, constitutes sufficient evidence to establish the force of harm element of the crime of robbery in this context. Accordingly, this court has always rejected these defendants' sufficiency claims." Id. at ¶23. In the instant matter, the appellant struggled with the store personnel in order to avoid being apprehended and arrested by the police. The finder of fact, which in this case was the trial judge, determined that the use of force in order to escape the office happened immediately following the attempted theft;

therefore, given the application of the continuous transaction rule, we find any rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found the essential elements of robbery proven beyond a reasonable doubt. We therefore affirm the decision of the trial court.

Judgment affirmed.

SEAN C. GALLAGHER, J., CONCURS.(SEE SEPARATE CONCURRING OPINION).

DIANE KARPINSKI, J., DISSENTS.(SEE SEPARATE DISSENTING OPINION).

SEAN C. GALLAGHER, J., CONCURRING.

{¶26} I concur with the majority that the facts in this case were sufficient to sustain a conviction for robbery under R.C. 2911.02. I write separately to address issues concerning what constitutes "immediate" under the statute.

{¶27} The majority correctly differentiates the offense of robbery from theft by the elements of force or harm. *State v. Hughes*, Cuyahoga App. No. 81768, 2003-Ohio-2307. In similar cases where a defendant has struggled with a security guard while resisting apprehension after a shoplifting incident, this court has consistently applied the "single continuous transaction" rule; e.g., *Hughes*, supra (defendant struck store employees attempting to apprehend him after he left the store without paying for several items); *State v. Dunning* (Mar. 23, 2000), Cuyahoga App. No. 75869 (defendant used force against security guard several blocks from store where theft occurred). We have determined such

conduct, as part of a single continuous transaction committed by the defendant, constitutes sufficient evidence to establish the force or harm element of robbery in this context. Id.

{¶28} Tate's view that the force used to flee did not occur "immediately" after the attempted theft is a misinterpretation of the robbery statute.

{¶29} Placing a legal time clock on the events associated with a theft that is coupled with the use of force invites inconsistent results. If ten to fifteen minutes is too long, is eight to nine minutes sufficient and, if so, why? There is no easy way to legally compartmentalize events in a criminal act. The majority correctly notes that the elements of robbery (theft or attempted theft and flight immediately after the attempt or offense with force or threat of force) must occur "immediately" after one another in order to sustain a conviction. Whether a chain of events occurs in an immediate sequence or an intervening act occurs to break the chain of events is a question of fact for the jury to determine. *State v. McDonald* (Dec. 6, 2001), Cuyahoga App. No. 78939. Attempts to distinguish incidents where a defendant is still in possession of the stolen merchandise at the time the force or threat of force is used from incidents, such as in this case, where goods are recovered or abandoned are likewise a question of fact for jury determination. The plain language of the statute draws no distinction between force used to attempt to commit the offense and force used to flee after the attempt or the commission of the offense. In a similar case, *State v. Frunza*, Cuyahoga App. No. 82053, 2003-Ohio-4809, this court found assaultive conduct while being detained after a theft was discovered and the items were recovered was sufficient to sustain a conviction for robbery.

{¶30} In the present case, it was reasonable for the trier of fact to conclude that Tate initially cooperated under the belief he would be free to go after first consulting with

store officials. Upon learning that the police were called and charges would result, Tate then used force to flee. Since no intervening act or event was deemed to have occurred between the theft or attempted theft, the trial court, acting as the trier of fact, was justified in determining whether the force used was immediate.

{¶31} Further, a knowledgeable criminal could use Tate's logic to simply delay escape following a shoplifting to avoid a felony robbery charge and later, after "ten or fifteen minutes," use the force necessary to flee the scene. The most that party would likely be charged with is misdemeanor theft and misdemeanor assault, far better than a felony of the second degree.

{¶32} The dissent writes a thoughtful analysis covering the terms "immediate" and "detention," which is certainly helpful to the overall discussion. Nevertheless, I believe Judge Anne L. Kilbane's analysis from *McDonald* provides the required balance between questions of fact and questions of law. As the dissent notes from *Thornton*, "Whether the action is immediate depends upon the circumstances of the case." I would apply this same logic to questions arising out of whether someone is "detained" or "in detention."

{¶33} The General Assembly has not seen fit to create a low-level felony "aggravated shoplifting" statute to encompass theft offenses involving force perceived by some to be less drastic than traditional armed or violent robbery scenarios. In light of this fact, I would affirm the decision of the trial court.

KARPINSKI, J., DISSENTING.

{¶34} I respectfully dissent.

{¶35} I agree with the separate concurrence that clock time will not necessarily resolve the question of what is immediate. But clock time is not the deciding factor here. As the Tenth Appellate District said, "Whether the action is immediate depends upon the circumstances of the case." *State v. Thornton*, 1977 Ohio App. Lexis 8779, at *3-4. The opinion in *Thornton*, unanimously adopted by a panel consisting of Judges McCormack, Holmes, and Whiteside, provided an analysis which, I believe, applies to the facts here.

{¶36} In *Thornton*, the appellate court cited to the following facts: "appellant was observed committing a theft offense in a mercantile establishment *** and at about 5:40 p.m. was detained by a security officer employed by the establishment. The security officer showed appellant his badge and required appellant to accompany him to the security office. *** At about 6:40 p.m. appellant produced a paint scraper and attempted to escape from the security office. At that time appellant had been under control of the security personnel for about one hour in stabilized detention. Appellant then threatened the use of force to obtain his freedom."

{¶37} The court first observed, "The detention of appellant was in accordance with R.C. 2935.041 which permits a merchant or his employee to detain a person in order to recover the item without search or undue restraint or to cause an arrest to be made by a police officer when there is probable cause for believing that items offered for sale by the establishment have been unlawfully taken." After "considering the facts" in that case, the appellate court concluded: "it is apparent that appellant did not flee immediately after attempting or committing the theft offense in order to prevent his apprehension for the crime as contemplated by R.C. 2911.02, but instead attempted to escape from detention after his detention had been stabilized for some time." Reversing the trial court, the

appellate court concluded that "an essential element of the crime of robbery was not established." Further, the court clarified that the proper charge *** was the charge of "escape," a felony of a lesser degree than robbery. Today, if the escape were applied to a charge of theft, which is a misdemeanor, the escape would be classified as a felony of the fifth degree. R.C. 2921.34(C)(2)(c)(i).

{¶38} I am aware that the detention in *Thornton* was an hour, whereas here, according to the manager, it could have taken 15 minutes. However, it is what happened during this time that establishes detention, not clock time. In the case at bar, when defendant was stopped,[1] he voluntarily accompanied the clerk to a small office, where he surrendered the stolen goods. The manager left to get his camera. In the interim, the clerk called to determine the price of the goods and tallied up the total. The clerk then filled out a criminal trespassing form. In an attempt to stall the defendant, the clerk said, he took his time writing and asked the defendant to repeat certain information four or five times. During this period, defendant was calm and never physically threatened anyone or used force. These circumstances indicate a "stabilized detention."

{¶39} It was not until he learned the police had been called that he attempted to escape. And in this attempt, he tried to "scoot" past a big clerk, weighing between 240 and 260 pounds, who actively played football as a defensive end. The clerk, who had been

[1]The clerk said he was at the door waiting for defendant and actually stopped defendant at the lottery line. The manager agreed the lottery machine was inside the store but stated defendant was stopped in the mall.

standing on one leg while he was writing up the report on his knee, lost his balance and hit his head.[2] Then the door closed, locking them in the room, and a tussle followed.[3]

{¶40} Because the facts in *Thornton* are quite similar to the facts in the case at bar, I believe we should adopt the analysis the court applied to those facts. Here also, the defendant had surrendered the stolen goods and submitted to authority. In other words, it was detention as defined in R.C. 2911.02 that he attempted to escape from. There was no single continuous transaction. His attempt to scoot past the store employee occurred after his detention, which, to use the language of Judge McCormack in *Thornton*, had "stabilized."

{¶41} The facts here and in *Thornton* are different from those in *State v. Frunza*, ante, in which there was no voluntary surrendering of goods and no submission to authority. I disagree with the separate concurrence because it does not appreciate the difference between being stopped and being detained and the significance of a stabilizing detention. In *Frunza*, trying to push a stroller toward the doorway, a defendant twice pushed the stroller's safety bar into the leg of an assistant manager. Unable to exit with the stroller, which contained stolen merchandise, defendant picked up the child and pushed the employee from the front while defendant's companion pulled the employee's hair from behind. Without any voluntary surrender of stolen goods or submission to authority, she and the stroller were taken to the manager's office, where the store

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[2]The clerk's injury amounted to only a headache, which he described as "nothing."

[3]The nature of this "tussle" is not clear from the record. The clerk said defendant tried to push past him. Then the clerk "got tired, and grabbed him, and turned him completely into the room." In that tussle, the clerk said he received some scratches.

recovered the merchandise from the stroller and, upon being advised the police were coming, defendant became angry and struck the store manager. The opinion reports these events as one continuous action. There was no lapse of time while a clerk filled out a form and called to determine the price of the goods. In other words, there was no stabilizing period of time that might amount to an intervening event.

{¶42} The majority relies upon the case of *State v. Hughes*, ante, in which a fight ensued after an employee in the parking lot grabbed the defendant as he was running away with the merchandise. In *Hughes*, the flight immediately followed the theft. There was no detention, much less a period of stabilized detention as occurred in both *Thornton* and *McDonald,* as well as the case at bar. In *Hughes,* on the other hand, defendant was in flight with the goods when he was first apprehended and used force. When a defendant flees with the stolen goods, it is clearer that the flight is one continuous action with the theft. That is the situation in *State v. Costa*, 1998 Ohio App. Lexis 6380 at *7, but not here.

{¶43} Even if the stolen goods are yielded, moreover, to arrive at a period of stabilized detention there must be some submission to authority. That did not occur in *State v. Wright*, 1989 Ohio App. Lexis 738, in which defendant, when confronted, handed the manager a bottle of wine, but, when the manager took a hold of his bicycle and asked defendant to step back inside the store, defendant engaged in a struggle and struck the clerk several times. Nor was there any period of submission to authority in *State v. Dixon*, 1990 Ohio App. Lexis 2663.[4]

[4]In closing argument, the state cited the cases of *Costa*, *Wright*, and *Dixon* in support of its charge of robbery.

{¶44} In *State v. McDonald*, ante, this court was presented with a set of facts also almost identical to those in the case at bar. However, the issue in that case was whether the court should have given an instruction on a lesser included crime. This court declined at that time to choose between the crimes of robbery and theft, but it found that there should have been an instruction on the lesser included offense of theft because the evidence could "have indicated there was a break in the sequence of events comprising the elements of robbery that disengaged the theft from" an assault of a police officer. Thus this court reversed and remanded the case. That option is not available here. The issue is only sufficiency of the evidence. Moreover, I find more compelling the Tenth District's conclusion that the proper charge was the crime of escape from detention. The court did not consider that issue in *McDonald*, nor do we know whether the trial court considered it here.

{¶45} As in the case of *Thornton*, "[t]he point in dispute is whether the threatened force took place 'in fleeing immediately after committing the theft offense.'" Answering that question, the eminent jurists in *Thornton* explained that the attempted flight followed a detention, not the theft. In the analysis of the circumstances that demonstrate detention, the *Thornton* court did not defer to the lower court, as the concurring opinion seems to here. The *Thornton* court found an essential element of robbery was not established by the evidence.

{¶46} The concurring opinion emphasizes the role of the trial court in determining whether there was a detention. But a reviewing court does not defer to the trial bench on matters of sufficiency. Under the sufficiency standard, a reviewing court views the evidence in a light most favorable to the prosecution, but does not defer to the trial court's

judgment. The issue here is not one of conflicting evidence, but of the analysis of that evidence. The concurring opinion says it is following the analysis in *McDonald* rather than in *Thornton*. These cases, however, are not in conflict. In *McDonald*, this court advised that the facts indicated the theft might be viewed as "disengaged" from the assault. Deciding to remand the case on another issue, the *McDonald* court declined to rule on the disengagement, but clearly advised the trial court of that option. We cannot decline to rule here. The pivotal issue is the nature of the defendant's detention.

{¶47} Neither the lead opinion nor the concurring opinion explains why the circumstances here do not demonstrate a detention constituting an intervening break. More importantly, we do not know whether the trial court ever considered the issue of detention in this case. If only for that reason, this court should resolve this question.

{¶48} Finally, the concurring opinion notes the legislature has failed to define a low level felony that would "encompass theft offenses involving force *** less drastic than traditional armed or violent robbery scenarios." This comment, cited as a basis for affirming the lower court, confuses the issue. It is not a matter of how much force is used. Rather, the question is whether there is a connection between the theft and the force. That the legislature has not described a lesser crime based on the degree of force used does not help in understanding what constitutes a detention sufficient to create a break in the sequence of events. I would agree, however, that the legislature should be encouraged to consider such a classification, especially for the mildly desperate acts of a person who uses only the force of his shoulder to push past someone blocking a door.

{¶49} It is not necessary, however, to determine the degree of force here, because the defendant was not properly charged. The circumstances of this case demonstrate a

stabilized detention occurred and, therefore, the proper charge was escape from detention. Therefore, a necessary element in robbery has not been established.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR.
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court

pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).