[Cite as *In re T.K.*, 2005-Ohio-2321.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 84934

IN RE:	:	
T.K.	:	JOURNAL ENTRY
	:	AND
	:	OPINION
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		MAY 12, 2005
	:	
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court
	:	Juvenile Division Case No. DL03 107722
JUDGMENT	:	AFFIRMED IN PART, REVERSED IN PART AND REMANDED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For Appellee: (State of Ohio)	WILLIAM D. MASON Cuyahoga County Prosecutor MICHAEL S. WARBEL OSCAR E. RODRIQUEZ Justice Center - 9th Floor 1200 Ontario Street Cleveland, Ohio 44113
For Appellant: (T.K.)	JODI M. WALLACE P.O. Box 31126

Independence, Ohio 44131

MARY EILEEN KILBANE, J.:

{¶1} T.K.[1] appeals his conviction on two counts of felonious assault and one count of aggravated riot with firearm and gang specifications. He claims that the court erred in denying his motion for acquittal and in finding that words he allegedly uttered to encourage shots being fired could be used to support the charges and subsequent finding of delinquency. We affirm in part, reverse in part and remand.

{¶2} The record reveals that on the evening of July 30, 2003, Carolyn Pinson and several family members were gathering at her Bayliss Avenue home for a birthday celebration. Sometime during the course of the party, numerous members of a local gang called "Seven All" arrived at the party in search of Ms. Pinson's nephew, K.B., who had an altercation with several members of the gang the night before.

{¶3} Shortly after the gang's arrival, several shots were fired. Ms. Pinson was shot three times: in her wrist, finger, and upper arm. D.W. was shot in the stomach, and a third boy, J.H., was also shot. Sometime during the assault, T.K. was heard to say,

[1]This Court protects the identity of all parties in juvenile court cases.

"Shoot the mother f***er." The group then ran from the home, but several boys, including T.K., were later identified as being present at the house.

{¶4} In a statement to police, Ms. Pinson indicated that a boy named Jerry, a.k.a. "T-top," shot her. Although T.K.'s name is contained nowhere in Ms. Pinson's actual police statement, he was indicted on three counts of a crime which if committed by an adult would be felonious assault, R.C. 2903.11(A)(2), and one count of what would be aggravated riot if committed by an adult, R.C. 2917.02; all with one-year and three-year firearm specifications, R.C. 2941.141, R.C. 2941.145, and a gang specification, R.C. 2941.412.

{¶5} Following a trial in April 2004, T.K. was found guilty on two counts of felonious assault, minus any specifications, for the attacks against Ms. Pinson and her nephew, and one count of aggravated riot with a one-year firearm specification and a gang specification. He was sentenced to one year on both counts of felonious assault, sentences to run concurrent, found guilty of aggravated riot, and sentenced to six months on the firearm specification, and an additional year on the gang specification. He appeals in the assignments of error set forth in the appendix to this opinion.

{¶6} In his second assignment of error, T.K. challenges his convictions as against both the sufficiency and manifest weight of

the evidence. We review a claim of insufficiency to determine "whether, after reviewing the evidence in the 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. Stallings*, 89 Ohio St.3d 280, 289, 2000-Ohio-164, quoting *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781,2789. We review a manifest weight challenge to determine whether some competent, credible evidence supports the judgment. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. We will reverse a judgment on manifest weight grounds only if it appears that the decision reflects an unreasonable view of the evidence and the result is unjust. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶7} T.K. was convicted on two counts of felonious assault in violation of R.C. 2903.11(A)(2), which states that, "No person shall knowingly * * * cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." The court found that T.K.'s words were directed to his brother, A.K., finding that he knew that his brother had brought a gun to the house. The court then found that:

> **"{I}t was the testimony, and it has been the evidence in these cases that of the one person who handed J.S. a firearm, it was this alleged delinquent's brother.**
>
> **"And so I believe that it isn't [sic] reasonable to infer that he know that his brother had a weapon, which is why then he could direct and shout out, Shoot the MF, Shoot that**

bitch.

*** * ***

"So it wasn't general, it was specific. Was it specifically intended for Ms. Pinson? I'm not real clear on that. Was it specifically intended for D.W.? I'm not clear on that.

"What I do believe that I am reasonably clear on is that those words had meaning for T.K. because he knew that his brother brought a gun to the scene." (May 10, 2004 Tr. at 14-15).

{¶8} While T.K.'s brother was also identified as present on the night of the shooting, there was no testimony that shots fired by A.K.'s gun were responsible for the harm caused to either Ms. Pinson or to D.W. Each trial witness stated that they were unsure as to who T.K. was directing to shoot. If the judge transferred the intent of the words so as to direct T.K.'s brother to shoot, presumably there must be some indication in the record that these words directed the shots fired by A.K. Instead, the testimony at trial was that A.K. pulled his own weapon from his waistband, handed it to J.S. and that J.S. fired. The judge failed to find that T.K.'s words were directed to J.S. in an attempt to cause harm, a finding that was not made.

{¶9} Although the dissent cites to *State v. Jones* (Nov. 7, 2002) Cuyahoga App. No. 80737, 2002-Ohio-6045, for the proposition that an intent to harm one person is transferred to the second person and the individual attempting harm is held criminally liable as if he intended to harm and did harm the same person. Jones,

however, admitted firing a weapon in the direction of a specified target, he only disputed that the weapon he fired was capable of firing the type of ammunition as identified by the police.

{¶10} Further, as it relates to the assertion that T.K. is also guilty of felonious assault under a theory of aiding an abetting, this emphasis is misplaced. We recognize that under *State v. Sims* (1983), 10 Ohio App.3d 56, "[a] person cannot be convicted of aiding and abetting a principal offender in the commission of an offense in the absence of evidence that the person assisted, incited or encouraged the principal to commit the offense." However, even this definition identifies a "principal" offender. In the instant case, the evidence is so riddled with conflicting testimony that a principal cannot be squarely identified. As reflected above, even the trial court could not determine either the intended target or who the statement was meant to encourage. Instead, the court assigned meaning to the words because presumably T.K.'s brother carried a gun. Such rationale is misplaced.

{¶11} For these reasons, the evidence presented was insufficient to support T.K.'s convictions on charges of felonious assault. T.K.'s conviction of aggravated riot, however, was properly supported in the record.

{¶12} R.C. 2917.02, states in pertinent part:

> **"(A) No person shall participate with four or more others in a course of disorderly conduct in violation of section**

2917.11 of the Revised Code:(1) With purpose to commit or facilitate the commission of a felony;(2) With purpose to commit or facilitate the commission of any offense of violence;(3) When the offender or any participant to the knowledge of the offender has on or about the offender's or participant's person or under the offender's or participant's control, uses, or intends to use a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code."

{¶13} At trial, Detective Simms testified that T.K. had been identified by the police as a member of the Seven All gang. (Tr. at 244). Ms. Pinson testified that the night that the Seven All gang arrived at her house, there were approximately thirty kids present and she could identify T.K. as being there. She further testified that he was acting as an instigator and that she saw his lips move as he said, "Shoot the mother f***er." (Tr. at 60, 63, 94, 109). D.W.'s testimony also supported T.K.'s presence at the scene, and although he does not know who T.K. was encouraging to shoot, he claimed that the words were said both before and after the shooting. (Tr. at 152-153, 188, 212).

{¶14} In addition, T.K. was also found guilty of the one-year firearm specification under the principal charge of Aggravated Riot, however, an unarmed accomplice may be convicted and sentenced pursuant to a firearm specification. *State v. Hickman* (Dec. 13, 2004), Stark App. No. 2003-CA-00408, 2004-Ohio-6760.

{¶15} Based on our resolution on his second assignment of error, we find T.K.'s first assignment of error moot.

{¶16} We affirm the conviction on charges of Aggravated Riot with both firearm and gang specifications, and reverse the convictions on two counts of felonious assault.

Case remanded for proceedings consistent with this opinion.

APPENDIX A:
ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN ADJUDICATING MR. KENNAN DELINQUENT ON THE CHARGES OF FELONIOUS ASSAULT AND AGGRAVATED RIOTING BECAUSE HIS ALLEGED LANGUAGE DID NOT AMOUNT TO FIGHTING WORDS AND HIS LANGUAGE WAS PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES' CONSTITUTION.

II. THE TRIAL COURT ERRED WHEN IT OVERRULED MR. KENNAN'S CRIMINAL RULE 29 MOTION FOR ACQUITTAL AND ULTIMATELY FOUND MR. KENNAN TO BE A DELINQUENT CHILD BECAUSE THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO SUPPORT A CRIMINAL CONVICTION RESULTING IN THE JUDGMENT BEING AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

MARY EILEEN KILBANE
JUDGE

ANTHONY O. CALABRESE JR., J., CONCURS

SEAN C. GALLAGHER, P.J., DISSENTS (SEE DISSENTING OPINION ATTACHED)

SEAN C. GALLAGHER, J., DISSENTING:

{¶17} I respectfully dissent from the majority finding in this case. I would affirm the conviction and overrule both assignments of error.

{¶18} The majority notes that Ms. Pinson's written statement does not reference T.K.'s purported comments calling on his brother to "shoot the mother f***." Testimony elicited through direct and cross-examination invariably reveals more about the facts and circumstances of an event than a written statement prepared prior to trial. Here, Ms. Pinson's written statement, typed by a police officer and signed by her, was limited to one page. The written statement never referenced T.K.'s role in these events.

{¶19} Although the trial court may have expressed some confusion over who was the specific target of the gunfire, this is not fatal to the court's ultimate finding of delinquency. The court did find that T.K. acted specifically to harm someone and that a member of the gang had a weapon on the scene. The doctrine of transferred intent indicates that where an individual is attempting to harm one person and as a result accidentally harms another, the intent to harm the first person is transferred to the second person and the individual attempting harm is held criminally liable as if he both intended to harm and did harm the same person. See *State v. Jones,* Cuyahoga App. No. 80737, 2002-Ohio-6045, citing *State v. Mullins* (1992), 76 Ohio App.3d 633. Although the transferred intent doctrine would not be applicable to Pinson's wounds if she was T.K.'s target, it is applicable for T.K. in relation to the shooting of Pinson's nephew.

{¶20} Further, under the principle of aiding and abetting, the court's finding is proper. The Supreme Court of Ohio has applied the common legal meaning to the term "aid and abet." "Ohio's complicity statute, R.C. 2923.03, does not provide a definition of the terms 'aid or abet.' As a result, this court is now called upon to provide a definition. Black's Law Dictionary defines 'aid and abet' as 'to assist or facilitate the commission of

a crime, or to promote its accomplishment.' Black's Law Dictionary (7 Ed.Rev. 1999) 69." *State v. Johnson,* 93 Ohio St.3d 240, 2001-Ohio-1336.

{¶21} Many courts have relied on the view that an "aider and abettor" is "one who assists or encourages another to commit a crime, and participates in the commission thereof by some act, deed, word, or gesture." *State v. Sims* (1983), 10 Ohio App.3d 56, paragraph two of the syllabus; R.C. 2923.03(A)(2). Further, "[a] person cannot be convicted of aiding and abetting a principal offender in the commission of an offense in the absence of evidence that the person assisted, incited or encouraged the principal to commit the offense." Id. at paragraph three of the syllabus. "[T]he 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. "This rule is to protect innocent bystanders who have no connection to the crime other than simply being present at the time of its commission." *Johnson*, 93 Ohio St.3d at 243.

{¶22} Here T.K. is much more than a mere bystander at the scene. Even the majority acknowledges he was, at a minimum, an active participant in an aggravated riot. Although this record is admittedly confusing and complicated by conflicting testimony, there is evidence in the record that T.K. actively encouraged someone in his gang to shoot at one member of those associated with Ms. Pinson on the porch. The finder of fact can believe some, none, or all of the testimony of a particular witness. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. Moore,* Cuyahoga App. No. 84655, 2005-Ohio-888, citing *State v. DeHass (1967),* 10 Ohio St.2d 230.

{¶23} Finally, the question of whether T.K. can be convicted and sentenced on the firearm specifications as an aider and abettor must be answered in the affirmative. An unarmed accomplice may be convicted and sentenced pursuant to a firearm specification. *State v. Hickman,* Stark App. No. 2003-CA-00408, 2004-Ohio-6760. See, also, *State v. Hanning,* 89 Ohio St.3d 86, 92, 2000-Ohio-436.

{¶24} For these reasons, I would overrule both assignments of error and affirm the decision of the trial court.