[Cite as *State v. McAlpin*, 2009-Ohio-3285.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91650

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAVAUGH MCALPIN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510580

BEFORE: Boyle, J., Stewart, P.J., and Sweeney, J.

RELEASED: July 2, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Scott D. Claussen
Law Office of Scott Claussen
8813 Memphis Villas Boulevard
Brooklyn, Ohio 44144

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Erica Barnhill
Assistant County Prosecutor
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant Javaugh McAlpin ("McAlpin") appeals his convictions for aggravated robbery and robbery. Finding no merit to the appeal, we affirm.

Procedural History and Facts

{¶ 2} In May 2008, the grand jury indicted McAlpin for aggravated robbery and robbery, in violation of R.C. 2911.01(A)(1) and 2911.02(A)(2). He entered a plea of not guilty to the charges, and the case proceeded to a jury trial. The following evidence was presented at trial.

{¶ 3} The victim, Shanel Jordan, testified that on the night in question she went to her friend Sugar's house to get her hair done. Jordan's hair was chemically damaged in the process so she tried to find someone else to repair the damage. While waiting at Sugar's house for a call from a salon, other people arrived, including McAlpin and his brother, Joseph McAlpin[1] (also his codefendant). Jordan testified that this was the first time that she had met the McAlpin brothers. Later, Jordan found a salon to fix her hair. She left her two children at Sugar's house with her friend Stacey Jones, and went to the salon at 12:00 a.m. She said she was at the salon for about three hours.

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[1]In *State v. Joseph McAlpine*, 8th Dist. No. 91678, 2009-Ohio-2878, Javaugh's brother, Joseph, was referred to as Joseph McAlpine. For purposes of this opinion, Joseph will be referred to as Joseph McAlpin.

{¶ 4} Jordan got back to Sugar's house around 3:00 a.m. to pick up her children. When she pulled up to Sugar's house in her car, she noticed two men standing a couple of houses down. Jordan dropped her keys as she got out of her car. As she stood up from picking up her keys, she said that a man put his arm around her, placed a knife to her neck, and threatened to kill her. She said that the man was wearing a "do-rag" and had a T-shirt over his mouth. Jordan identified this man in court as the codefendant, Joseph McAlpin; she said that she recognized his voice from meeting him earlier that day at Sugar's house.

{¶ 5} Jordan further testified that a second man, who was also wearing a "do-rag" and had a T-shirt over his mouth, was standing "right behind" Joseph McAlpin. She said the second man did not speak. Jordan identified the second man in court as the defendant, Javaugh McAlpin. Jordan stated that Joseph McAlpin took her purse and ran away with Javaugh McAlpin. But Jordan testified that it was Javaugh McAlpin who carried her purse as they ran away.

{¶ 6} Jordan testified that she had $2,000 cash in her purse because she had received her tax refund, as well as her credit cards, the title to her car, her and her children's Social Security cards and birth certificates, and her driver's license. After the McAlpins ran away, Jordan said she got her children and filed a police report. Jordan also indicated that she thought Jones set her up to be robbed because she was the only person in the house who knew that Jordan had her tax-refund money.

{¶ 7} The following day, Jordan went to the Bureau of Motor Vehicles to replace her stolen driver's license and to get a new title for her car. At the BMV, she learned that her power of attorney rights had been assigned to someone else. The power-of-attorney form contained her signature and her Social Security number. Upon further investigation, Jordan discovered that the power of attorney was given to Joseph McAlpin. She further learned that Joseph McAlpin used the power of attorney to get a license plate transferred into his name for a 1994 Chrysler LeBaron. Jordan testified that she did not authorize the grant of power of attorney, she did not sign the form, and she did not own a 1994 Chrysler LeBaron. In addition, Jordan testified that she was not at the BMV on January 24, 2008, the date printed on the power-of-attorney form.

{¶ 8} The next day, Jordan said that Detective Laurie Terrace contacted her to come to the police station to make a statement. Jordan said that Det. Terrace showed her two photo arrays (one containing Javaugh McAlpin and one containing Joseph McAlpin). At first, Jordan failed to identify either Javaugh or Joseph McAlpin. But then Jordan said that Det. Terrace placed a strip of paper over the heads of all of the men to simulate what they would look like wearing a "do-rag." Jordan said that she was then able to identify Javaugh and Joseph McAlpin in the photo arrays.[2]

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[2]McAlpin moved to suppress the photo array before the trial commenced, but the trial court denied it.

{¶ 9} During cross-examination, Jordan testified that she has vision problems; specifically, she said that she cannot see clearly over long distances and that she has difficulty distinguishing similar dark colors from one another. She also testified that she wears glasses, but that she was not wearing them when the incident occurred. In addition, she admitted that she did not write in her statement that Joseph McAlpin had threatened her. She further stated that she did not know the name of the salon where she went to get her hair repaired, and after the robbery occurred, she did not go to the police station until two hours after the robbery. Finally, she agreed that the first time she went to the police station, she referred to her assailants as Jason and Joseph Nathan rather than Javaugh and Joseph McAlpin.

{¶ 10} Det. Terrace testified that she spoke to Jordan about the robbery. Det. Terrace explained that the initial photo array that she showed Jordan did not contain pictures of Javaugh or Joseph McAlpin and that Jordan did not identify anyone from that photo array. After the report was made regarding the power of attorney form at the BMV, however, Det. Terrace went to Jospeh McAlpin's home and saw a Chrysler LeBaron in the driveway. When Det. Terrace returned to Joseph McAlpin's residence about a week later, the car was gone, and she arrested Javaugh and Joseph McAlpin. Det. Terrace testified that she arrested Javaugh McAlpin because the police report mentioned a person named "Jay," and she believed that he also went by that name. After the arrest, Det. Terrace showed Jordan a second photo

array, and this time it contained pictures of Javaugh and Joseph McAlpin from their recent booking photos. Jordan identified Javaugh and Joseph McAlpin as the people who robbed her. Det. Terrace did not recall using strips of paper to cover the men's heads to mimic what they would look like if they had worn a "do-rag."

{¶ 11} The jury found Javaugh McAlpin guilty of aggravated robbery and robbery as charged. The trial court sentenced him to three years for aggravated robbery and two years for robbery and ordered the sentences to be served concurrently. The trial court also informed him that he would be subject to five years of postrelease control upon his release from prison.

{¶ 12} It is from this judgment that Javaugh McAlpin appeals, raising two assignments of error for our review:

{¶ 13} "[1.] The evidence was insufficient to support a conviction on the aggravated robbery and robbery charges.

{¶ 14} "[2.] The jury simply lost its way in finding the appellant guilty."

<u>Crim.R. 29</u>

{¶ 15} In his first assignment of error, McAlpin argues that the trial court erred when it did not grant his Crim.R. 29 motion for acquittal. We disagree.

{¶ 16} Under Crim.R. 29(A), a trial court "shall not order an entry 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 proven beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. The test an

appellate court must apply in reviewing a challenge based on a denial of a motion of acquittal is the same as a challenge based on the sufficiency of the evidence to support a conviction. See *State v. Bell* (May 26, 1994), 8th Dist. No. 65356.

{¶ 17} An appellate court's function in reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted to 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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "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. Thompkins* (1997), 78 Ohio St.3d 380, 386. 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. *Jenks* at 273.

{¶ 18} McAlpin was convicted of aggravated robbery, under R.C. 2911.01(A)(1), which provides, in pertinent part, that "[n]o person, in attempting or committing a theft offense *** or in fleeing immediately after the attempt or offense, shall *** [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon or brandish it, indicating that the offender possesses it, or use it."

{¶ 19} McAlpin was also convicted of robbery, under R.C. 2911.01(A)(2), which provides, in pertinent part, that "[n]o person, in attempting or committing a theft

offense or in fleeing immediately after the attempt or offense, shall *** [i]nflict, attempt to inflict, or threaten to inflict physical harm on another."

{¶ 20} McAlpin maintains that the state did not present sufficient evidence to prove beyond a reasonable doubt that (1) he participated in the incident, or (2) that he did anything wrong. Specifically, McAlpin argues that the state failed to present sufficient evidence of his identity or that he aided or abetted Joseph McAlpin in committing the crimes. He further argues that Jordan's identification of him is not credible because (1) she did not have an adequate opportunity to observe the second assailant because of lighting conditions; (2) his face was primarily covered; and (3) she has vision problems that cause similar colors to mesh together. In addition, McAlpin argues that when Jordan first looked at the photo array, which contained a picture of him, she did not recognize him. Also, Jordan testified that the second assailant did not have any weapons, and she did not hear him say anything.

{¶ 21} R.C. 2923.03(F) provides, in pertinent part, that "[w]hoever *** is guilty of complicity in the commission of an offense *** shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in the terms of this section, or in the terms of the principal offense." Further, R.C. 2923.03(A)(2) states that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: *** (2) Aid or abet another in committing the offense."

{¶ 22} In *State v. Smith*, 8th Dist. No. 88437, 2007-Ohio-2921, this court explained complicity as follows:

{¶ 23} "In *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-336, syllabus, the Supreme Court held as follows: '[t]o support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime." *Smith* at _15.

{¶ 24} It is also well settled that aiding and abetting may be shown by both direct and circumstantial evidence, and participation may be inferred from presence, companionship, and conduct before and after the offense is committed. *State v. Cartellone* (1981), 3 Ohio App.3d 145, 150, citing *State v. Pruett* (1971), 28 Ohio App.2d 29, 34. The Supreme Court of Ohio has held that an unarmed accomplice in an aggravated robbery may be charged under R.C. 2911.01(A) and punished as if he were a principal offender. *State v. Chapman* (1986), 21 Ohio St.3d 41, 42. In such a case, "the court can impute the elements of the principal offense, committed by the principal, to the aider and abettor." *State v. Letts* (June 22, 2001), 2d Dist. No. 15681.

{¶ 25} After a review of the record, we find that the state presented sufficient evidence to convict McAlpin of aggravated robbery and robbery. With regard to his

identification, Jordan testified that she spent several hours in McAlpin's company before the robbery occurred. In addition, she identified him in the photo array after Det. Terrace placed a strip of paper over his head to simulate what he would look like with a "do-rag." Although she did admit to having vision problems, she also testified that she has no problem seeing things up close. She further testified that McAlpin was close to her during the robbery, as he was "right behind" Joseph McAlpin, who had a knife to her throat. Thus, any rational trier of fact could have found beyond a reasonable doubt that McAlpin was the other person present during the robbery.

{¶ 26} Also, with respect to whether McAlpin did anything wrong in the instant case, any rational trier of fact could have found beyond a reasonable doubt that he aided and abetted Joseph McAlpin in the commission of the robbery. McAlpin covered his face just like his brother did, he accepted the purse that his brother gave him, and he fled the scene of the crime with his brother while carrying the stolen purse. Although McAlpin did not have a weapon, Joseph McAlpin did. As an accomplice, McAlpin can be treated just as if he was the principal offender, regardless of whether he had a weapon, pursuant to R.C. 2923.03(F).

{¶ 27} After viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of aggravated robbery and robbery were proven beyond a reasonable doubt.

{¶ 28} Accordingly, McAlpin's first assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 29} In his second assignment of error, McAlpin argues that his conviction was against the manifest weight of the evidence. We disagree.

{¶ 30} In *Thompkins*, supra, the Ohio Supreme Court stated:

{¶ 31} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. *** Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in trial, to support one side of the issue rather than the other. *** Weight is not a question of mathematics, but depends on its *effect in inducing belief*.' (Emphasis added.) ***

{¶ 32} "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 factfinder's resolution of the conflicting testimony. *** 'The court, reviewing the record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." (Internal citations omitted.) *Thompkins* at 387.

{¶ 33} In this assignment of error, McAlpin argues that "[t]he jury simply lost its way in finding him guilty" because "[t]he evidence simply does not reach a burden of beyond a reasonable doubt considering all of the flaws in the testimony and the identification." McAlpin also argues that Jordan's identification of him is merely an assumption because McAlpin was with his brother prior to the robbery.

{¶ 34} After reviewing all the evidence, we find McAlpin's arguments to be without merit. The only "flaw" – if it was a flaw at all – was that Jordan did not get McAlpin's name correct the first time she spoke to the police. But Jordan had just met the McAlpin brothers earlier that night, so it was reasonable that she may not have remembered his name exactly. Further, Jordan testified that she spent a couple of hours with the McAlpins before she left to get her hair repaired. And Jordan identified McAlpin in a photo array as the second man who robbed her.

{¶ 35} Based on this evidence, along with the evidence stated above with respect to sufficiency, we find that the jury did not clearly lose its way or create a manifest miscarriage of justice such that McAlpin's conviction should be reversed.

{¶ 36} Accordingly, McAlpin's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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.

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MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
JAMES J. SWEENEY, J., CONCUR