[Cite as *State v. Williams*, 2010-Ohio-3510.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93891

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ASJA M. WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519348

BEFORE: Dyke, J., Rocco, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: July 29, 2010

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ANN DYKE, J.:

{¶ 1} Defendant Asja Williams appeals from her conviction for robbery and theft. For the reasons set forth below, we affirm.

{¶ 2} On January 22, 2009, defendant and co-defendant Domonique Mitchell were indicted pursuant to a four-count indictment. Counts 1 and 2 pertained to defendant, and alleged that on or about December 20, 2008, defendant and Mitchell committed robbery in violation of R.C. 2911.02(A)(3), and theft of property valued at more than $500 but less than $5,000, in violation of R.C. 2913.02(A)(1). In relevant part, the robbery charge provided:

{¶ 3} "The above named Defendant(s) * * * did, in attempting or committing a theft offense, as defined in Section R.C. 2913.01 and 2913.02 of the

Revised Code, or in fleeing immediately after the attempt or offense upon Sak's/Peggy Bogacki, *recklessly* use or threaten the immediate use of force against another, Sak's/Peggy Bogacki contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio." (Emphasis added.)

{¶ 4} Defendant pled not guilty and the matter proceeded to trial to the bench on June 5, 2009. For its case, the state presented the testimony of Peggy Bogacki, and James Krakora.

{¶ 5} Peggy Bogacki, the district asset manager for Sak's Fifth Avenue at Beachwood Place, testified that part of her duties include detecting and apprehending shoplifters. After being alerted to activity in the contemporary section of the store, Bogacki selected a store camera from that area and began to monitor three females. According to Bogacki, one of the females, identified as defendant, had a bag, which she opened and the other woman began placing jeans into it. Bogacki chased after the women and caught up with them at the entrance to the store. Bogacki identified herself to the women and told them to come back. As Bogacki neared defendant, one of the other woman, later identified as Mitchell, came up behind Bogacki, and stuck her foot between Bogacki's legs to trip her. Bogacki stumbled but recovered. She continued to chase defendant, but the two women fled outside to a grassy area near the southwest portion of the parking lot. Eight pairs of jeans, valued at $2,000, were recovered from the bag.

{¶ 6} Bogacki stated on cross-examination that the third woman exited the store after the other two. She further acknowledged that she never had any contact with defendant and never caught up to her. Bogacki also acknowledged that, after the jeans were recovered, they were photographed and then returned to the store stock.

{¶ 7} James Krakora, an investigator with the Beachwood Police Department, testified that he responded to a call from Sak's that directed him to the southwest corner of the mall property. Krakora observed two women emerging from a wooded area. They appeared to be out of breath and were not wearing coats. Krakora also established that the jeans had been placed inside a modified shopping bag, designed to block a store's electronic sensors from detecting the removal of merchandise.

{¶ 8} The defense subsequently moved for acquittal of the robbery charge, asserting that defendant never had any contact with Bogacki, and that there was no evidence that the women fled together, or otherwise acted in concert in fleeing the store.

{¶ 9} The trial court denied the motion and defendant testified that she and Mitchell went to Sak's with another friend named Britney. Defendant admitted that she had "full intentions to steal jeans" but she insisted that the group did not discuss or plan to shoplift prior to coming to the mall. Defendant admitted that she carried the modified shopping bag and the other two women placed items into it. The women then exited the store separately. Defendant next observed

a sales associate near the entrance to the store, and heard someone say, “run!” Defendant fled, chased by Bogacki, then realized that she had gone in the wrong direction and had lost her keys. As Bogacki approached, Mitchell grabbed the bag from her and continued to flee.

{¶ 10} Defendant stated that she did not observe Mitchell try to trip Bogacki. She stated that she did not intend to use force on anyone at the store. She asserted that there had been no preconceived plan to steal, and that the women acted individually and “stole what we wanted.” She admitted, however, that she planned to give Mitchell her items from the modified shopping bag, once they returned to the car with the stolen merchandise.

{¶ 11} The trial court subsequently convicted defendant of robbery and theft, and stated:

{¶ 12} “The easy one obviously is the count involving the theft, which Ms. Williams actually admitted to on the stand. * * *

{¶ 13} “Count number one is a bit more problematic because from Ms. Williams’ standpoint she didn’t intend on doing this stuff, yet the testimony came in: She came up from Akron with her friend. She brought this device to conceal, that was in the presence of her friend. * * * And her testimony was unbelievable in the fact that they never discussed that. * * *

{¶ 14} “I think they went up there collectively to enter into an enterprise to steal. And unfortunately for Ms. Williams, when you’re involved in that kind of enterprise with other people the act of one imputes to the other ones. So you

might not have been the one doing the tripping or you might not have tried to trip the security guard, but the necessary element of violence or threat of violence has been made by one of your cohorts. So I'm finding you guilty as to count number one."

{¶ 15} The trial court subsequently convicted defendant of both charges and sentenced her to a total of one year of community control sanctions. Defendant now appeals and assigns two errors for our review.

{¶ 16} For her first assignment of error, defendant contends that the trial court essentially applied the accomplice statute as a strict liability statute, and improperly imputed "any acts of the co-defendant to the Defendant[.]" Defendant argues that the trial court assumed that the accomplice statute did not include a mens rea and improperly interpreted the statute as a strict liability offense, thus creating structural error.

{¶ 17} As an initial matter, we note that the complicity statute, R.C. 2923.03(A)(2) reads, in pertinent part, as follows:

{¶ 18} "(A) No person, *acting with the kind of culpability required for the commission of an offense,* shall do any of the following:

{¶ 19} "(1) Solicit or procure another to commit the offense;

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

{¶ 21} Thus, the mens rea of the complicity statute reflects the mens rea of the principal. See *State v. Moore,* Mahoning App. No. 07 MA 136, 2009-Ohio-1177. *In re L.W.,* Summit App. No. 24632, 2009-Ohio-5543 ("[T]he

state was required to prove that L.W. shared the criminal intent of the principal [and r]obbery requires a culpable mental state of 'recklessness' under R.C. 2901.21(B).)."

{¶ 22} In this matter, the principal offense is robbery, the mens rea for which was analyzed in *State v. Colon,* 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-Ohio-1624 (*"Colon I"*). In *Colon I*, the court determined that the catchall culpable mental state of recklessness applies to the robbery statute because the statute neither specifies a particular mental state, nor plainly indicates that a strict liability standard applies. Id. The court further held that an indictment for robbery in violation of R.C. 2911.02(A)(2) omitted an essential element of the crime where it failed to allege a mens rea, i.e., that the defendant recklessly inflicted, attempted to inflict, or threatened to inflict physical harm. Id. In light of this omission, the court determined that the indictment failed to charge an offense, thereby resulting in structural error.

{¶ 23} In the instant matter, however, the indictment clearly set forth a mens rea with regard to the principal offense of robbery as it stated:

{¶ 24} "[T]he above named Defendant(s) * * * did, in attempting or committing a theft offense, as defined in Section R.C. 2913.01 and 2913.02 of the Revised Code, or in fleeing immediately after the attempt or offense upon Sak's/Peggy Bogacki, *recklessly* use or threaten the immediate use of force against another, Sak's/Peggy Bogacki contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

(Emphasis added.)

{¶ 25} Accordingly, the indictment was not defective. Further, as to whether the trial court mistakenly evaluated the mens rea element herein, and imposed strict liability for this offense, we note that in a bench trial the trial court is presumed to know the applicable law and apply it accordingly. *E. Cleveland v. Odetellah* (1993), 91 Ohio App.3d 787, 794; 633 N.E.2d 1159, *State v. Waters,* Cuyahoga App. No. 87431, 2006-Ohio-4895. Further, the law recognizes that intent can be determined from the surrounding facts and circumstances, and persons are presumed to have intended the natural, reasonable, and probable consequences of their voluntary acts. *State v. Garner* (1995), 74 Ohio St.3d 49, 656 N.E.2d 623, citing *State v. Carter* (1995), 72 Ohio St.3d 545, 651 N.E.2d 965, *State v. Johnson* (1978), 56 Ohio St.2d 35, 381 N.E.2d 637, and *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286.

{¶ 26} In this matter, the trial court determined that defendant and Mitchell drove to the mall together from Akron. Defendant brought into the store a shopping bag that had been altered to prevent store security equipment from detecting the removal of merchandise. In this regard, the court further found defendant's claim that she and Mitchell had no discussions about shoplifting prior to reaching the mall to be "unbelievable." The court then determined that "they went up there collectively to enter into an enterprise to steal" and rejected defendant's repeated assertions that there was no scheme or aiding or abetting with regard to the attempt to trip the security guard while fleeing. We therefore

reject defendant's claim that the trial court erroneously convicted defendant on the basis of strict liability.

{¶ 27} The first assignment of error is without merit.

{¶ 28} In her second assignment of error, defendant asserts that her robbery conviction is based upon insufficient evidence and is against the manifest weight of the evidence.

{¶ 29} 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. 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 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 30} In this matter, defendant was convicted of robbery in violation of R.C. 2911.02(A)(3), which provides:

{¶ 31} "No person, in attempting or committing a theft offense * * * shall do any of the following: * * *

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

{¶ 33} The state's theory was that defendant was guilty of this offense as an accomplice under R.C. 2923.03, which provides:

{¶ 34} "(A) No person, acting with the kind of culpability required for the

commission of an offense, shall do any of the following:

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

{¶ 36} Pursuant to R.C. 2923.03(F), a charge of complicity may be stated in terms of the complicity statute or in terms of the principal offense. Accord *State v. Herring,* 94 Ohio St.3d 246, 251, 2002-Ohio-796, 762 N.E.2d 940.

{¶ 37} In this matter, the state's evidence demonstrated that defendant and Mitchell drove to the mall together from Akron. Defendant brought into the store a shopping bag that had been altered to prevent store security equipment from detecting the removal of merchandise. Defendant held this bag open while Mitchell placed items into it. They exited the store and as Bogacki approached defendant, Mitchell attempted to trip Bogacki, causing her to stumble. Both women then fled to the same grassy area outside the mall where they were later apprehended. Viewing this evidence in a light most favorable to the prosecution, we find that a rational trier of fact could have concluded beyond a reasonable doubt that defendant aided and abetted Mitchell in robbery.

{¶ 38} There is sufficient evidence to support the conviction.

{¶ 39} As to the weight of the evidence supporting the conviction, we note that "[w]eight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 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 factfinder's resolution of the conflicting testimony. Id. at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶ 40} In evaluating a challenge to the verdict based on the manifest weight of the evidence, this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*.

{¶ 41} In this case, defendant admitted that she came to the store to steal jeans. She brought the modified shopping bag into the store to keep security from detecting the theft, and she, Mitchell and another friend placed items into the bag. Although defendant insisted that they did not discuss the thefts prior to arriving at the mall, she admitted that she planned to give Mitchell her items from the modified shopping bag after they had returned to the car. Each woman then exited the store and as Bogacki approached, defendant heard someone yell, "run!" As Bogacki got closer, Mitchell stuck out her foot to trip Bogacki, causing her to stumble. The evidence therefore indicates that defendant acted in concert with Mitchell to commit a theft offense at the store and the use of force to flee was a natural, reasonable, and probable consequence of this voluntary act. The trial court did not lose its way and commit a manifest miscarriage of justice in convicting her of the offense of robbery.

{¶ 42} The second assignment of error is overruled.

Affirmed.

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.

ANN DYKE, JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;
KENNETH A. ROCCO, P.J., CONCURS. (SEE ATTACHED CONCURRING OPINION).

KENNETH A. ROCCO, P.J., CONCURRING WITH SEPARATE OPINION:

{¶ 43} Although I must concur with the majority opinion, I write separately to convey my dismay about the exercise of prosecutorial discretion displayed in this case. It was not enough to indict appellant for theft, an

offense to which she obviously accepted responsibility, but the state chose additionally to add a charge of robbery. Clearly, R.C. 2923.03 permitted the state to do so; nevertheless, the statute did not require it.

{¶ 44} One of the duties of the prosecutor is to use his or her discretion to distinguish the culpability of the actors involved in a criminal incident; a crime should not be viewed as "one size fits all." Otherwise, as in a case like this, justice is not really served.

{¶ 45} The prosecutor easily could have taken the facts presented herein into consideration before taking the case to trial; in view of appellant's role in the incident, a robbery conviction was unnecessary to achieve a just result. I have seen too many of such cases to be entirely comfortable in concurring in affirming the convictions when an accomplice with lesser culpability is convicted of offenses as if the accomplice were the principal offender.