[Cite as *State v. Crumbley*, 2010-Ohio-3866.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93202

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

FREDDIE CRUMBLEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520391

BEFORE: Cooney, J., Kilbane, P.J., and McMonagle, J.

RELEASED: August 19, 2010

JOURNALIZED:
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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Freddie Crumbley ("Crumbley"), appeals his convictions. Finding no merit to the appeal, we affirm.

{¶ 2} In January 2009, Crumbley was charged with codefendants, Sylvester Simmons ("Simmons") and Bennie Marshall, in a 54-count indictment. Counts 1 and 7-18 charged Crumbley with aggravated burglary; Counts 2 and 19-30 charged him with aggravated robbery; Counts 3 and 43-54 charged him with kidnapping; and Counts 4 and 31-42 charged him

with robbery. The matter proceeded to a bench trial, where defense counsel requested that Counts 7-54 be dismissed because Crumbley was a juvenile at the time those incidents were alleged to have occurred and there was no evidence in the record of a bindover. The trial court agreed and dismissed Counts 7-54. The court found Crumbley guilty of Counts 1-4 and sentenced him to seven years in prison on each of Counts 1-3 and six years in prison on Count 4, to be served concurrently to Counts 1-3, for an aggregate of seven years.

{¶ 3} The following evidence was adduced at trial.

{¶ 4} In December 2008, Cleveland police investigated a complaint that Simmons and Crumbley were repeatedly robbing Aurby Nelson ("Nelson") of his pension and social security checks. As a result of the investigation, the police planned a sting operation on January 2, 2009, the next date Nelson expected to receive a check. Police officers, Sean Smith ("Smith") and Robert Martin ("Martin"), testified that they arrived at Nelson's home around 8:00 a.m. Before they had the opportunity to set up the camera and recording device, Simmons and Crumbley came to Nelson's back door. Smith and Martin hid near the kitchen and observed Simmons and Crumbley banging and kicking on the door. Simmons and Crumbley told Nelson, "Open the door, you know what's going to happen, open the door, you don't want it to

happen again, we are going to f * * * you up." Crumbley yelled, "Open the door or this is going to cost you more money." Nelson refused to open the door and told them to go away.

{¶ 5} Crumbley and Simmons then moved to Nelson's side door because they were unable to gain entry through the back door. They continued to bang, kick the side door, and verbally threaten Nelson. They knocked the side door off its hinges and kicked through an interior door that was locked with a chain. Once inside, Simmons and Crumbley ran into the kitchen, grabbed Nelson, and pushed him toward the rear door. Smith and Martin immediately responded, announcing that they were police officers and ordering Simmons and Crumbley to the ground.

{¶ 6} Nelson testified that Crumbley would come by his house once a week to ask for money and that Crumbley never acted violently toward him. Although both Crumbley and Simmons were observed by the police on the day of the sting, Nelson testified that Simmons was alone on the day of the incident. He further testified that Simmons broke into his house and pushed him.

{¶ 7} Crumbley testified in his own defense. He denied ever breaking into Nelson's home, touching him, or taking any money from him. He testified that on January 2, 2009, he was driving his girlfriend to work, when

he observed Simmons knocking on Nelson's back door. Simmons looked concerned, so Crumbley pulled into Nelson's garage and asked Simmons what was wrong. Simmons replied that he was checking on Nelson who was not answering his door. Simmons then left, and Crumbley continued to knock on the door. Nelson did not answer, so Crumbley went to the side door. He wiggled the side door and was able to take it off its hinges. He then went inside to talk to Nelson. While they were in the kitchen, Crumbley claimed that the police came from behind him and hit him on the head with a gun. He fell to the floor, where the police kicked him and handcuffed him.

{¶ 8} Crumbley now appeals, raising four assignments of error, in which he argues that each of his convictions are against the manifest weight of the evidence.

Manifest Weight of the Evidence

{¶ 9} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25, the Ohio Supreme Court restated the standard of review for a criminal manifest weight challenge as follows:

> "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 factfinder'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."

{¶ 10} Moreover, an appellate court may not merely substitute its view for that of the jury, but must find that "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." *Thompkins* at 387. Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720.

{¶ 11} In the first assignment of error, Crumbley challenges his aggravated burglary conviction under R.C. 2911.11(A)(1), which provides in pertinent part: "[n]o person, by force * * * shall trespass in an occupied structure * * *, when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense, if * * * [t]he offender inflicts, or attempts or threatens to inflict physical harm

on another [.]" Crumbley argues that there was no evidence that he possessed a weapon or that there was any attempt to inflict physical harm on Nelson once he entered the house.

{¶ 12} In the third assignment of error, Crumbley challenges his kidnapping conviction under R.C. 2905.01(A)(2), which provides in pertinent part that: "[n]o person, by force, threat, or deception, * * * by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, * * * [t]o facilitate the commission of any felony [.]" He argues that there was no evidence that Nelson's liberty was restrained.

{¶ 13} In the fourth assignment of error, Crumbley challenges his robbery conviction under R.C. 2911.02(A)(2), which provides that: "[n]o person, in attempting or committing a theft offense * * *, shall * * * [i]nflict, attempt to inflict, or threaten to inflict physical harm on another [.]" Crumbley claims that there was no evidence that a theft offense actually occurred.

{¶ 14} We note that in a bench trial, the trial court, as the trier of fact, is free to accept or reject all or any part of the testimony of the witnesses and assess the credibility of those witnesses. *State v. Strickland*, 183 Ohio App.3d 602, 2009-Ohio-3906, 918 N.E.3d 170, ¶34, citing *State v. Anderson*,

Cuyahoga App. No. 90460, 2008-Ohio-4240. Here, Martin and Smith testified that they observed Simmons and Crumbley banging and kicking Nelson's back door and threatening Nelson. Simmons and Crumbley ordered Nelson to open the door and threatened him, stating, "You know what's going to happen, open the door, you don't want it to happen again, we are going to f * * * you up." Nelson refused to allow the men to enter and told them to go away. Crumbley further yelled, "open the door or this is going to cost you more money." Crumbley and Simmons then moved to Nelson's side door, where they continued to bang on and kick the door and verbally threaten Nelson. They forced their way into Nelson's home, intending to take money from Nelson. Once inside, Simmons and Crumbley ran into the kitchen and restrained Nelson's liberty by grabbing his chest and pushing him back toward the rear door, which was the door they were not able to open.[1] Their

[1]The element of "restrain the liberty of the other person" has been defined by this court as limiting "'one's freedom of movement in any fashion for any period of time.'" *State v. Wright*, Cuyahoga App. No. 92344, 2009-Ohio-5229, ¶23, quoting *State v. Wingfield* (Mar. 7, 1996), Cuyahoga App. No. 69229. "'[Furthermore,] [a]n offense under R.C. 2905.01 does not depend on the manner in which an individual is restrained. * * * Rather, it depends on whether the restraint "is such as to place the victim in the offender's power and beyond immediate help, even though temporarily." * * * The restraint "need not be actual confinement, but may be merely * * * compelling the victim to stay where he is."'" *State v. Mosley*, 178 Ohio App.3d 631, 2008-Ohio-5483, 899 N.E.2d 1021, ¶20, quoting *State v. Wilson* (Nov. 2, 2000), Franklin App. No. 99AP-1259, quoting 1974 Committee Comment to R.C. 2905.01.

attempt to take Nelson's money and further restrain him ceased when Smith and Martin intervened.

{¶ 15} Although Nelson and Crumbley testified that Crumbley was never violent with Nelson, the trial court weighed all the evidence and reasonable inferences and found the officers' testimony to be more credible. Thus, we find that the trial court did not lose its way, and Crumbley's aggravated burglary, kidnapping, and robbery convictions are not against the manifest weight of the evidence.

{¶ 16} Accordingly, the first, third, and fourth assignments of error are overruled.

{¶ 17} In the second assignment of error, Crumbley challenges his aggravated robbery conviction under R.C. 2911.01(A)(3), which provides that: "[n]o person, in attempting or committing a theft offense * * *, shall * * * [i]nflict, or attempt to inflict, serious physical harm on another." Serious physical harm is defined as any of the following:

> "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> "(b) Any physical harm that carries a substantial risk of death;
>
> "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

> "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." R.C. 2901.01(A)(5).

{¶ 18} Crumbley argues that the act of grabbing Nelson by his shirt does not amount to an attempt to inflict serious physical harm. The State claims that Crumbley's actions and threats made it clear that he intended to inflict serious harm on Nelson. In support of its argument, the State relies on *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132.

{¶ 19} In *Eley*, the defendant appealed his aggravated robbery conviction, claiming that he should not have been convicted because the victim did not sustain serious physical injuries. The defendant, in stealing the bag of money, grabbed the victim's shirt and ripped off his buttons. The victim was then tackled on the sidewalk and received an injury to both his head and hip. The *Eley* court upheld the conviction, finding that "the jury could reasonably conclude, beyond a reasonable doubt, that the assailant attempted to inflict whatever harm was necessary to incapacitate [the victim]." Id. at 172. Furthermore, "a jury could reasonably find that the attacker would not have stopped short of serious physical harm had the victim failed to let go of the money bag." Id.

{¶ 20} The instant case is distinguishable. Here, while banging on and kicking Nelson's door, Crumbley and Simmons threatened "open the door, you know what's going to happen, open the door, you don't want it to happen again, we are going to f * * * you up" and "open the door or this is going to cost you more money." Other than pushing and grabbing Nelson by his shirt, there is no evidence that Crumbley used a weapon or attempted to cause serious physical harm. Thus, the trial court lost its way in finding Crumbley guilty of aggravated robbery. However, because there is not unanimity on this issue, the aggravated robbery conviction is affirmed. Reversing the trial court judgment on manifest weight of the evidence requires the unanimous concurrence of all three appellate judges. *Thompkins* at paragraph four of the syllabus, citing Section 3(B)(3), Article IV of the Ohio Constitution (noting that the power of the court of appeals is limited in order to preserve the jury's role with respect to issues surrounding the credibility of witnesses).

Judgment is 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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COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS IN PART; DISSENTS IN PART (WITH SEPARATE OPINION);

CHRISTINE T. McMONAGLE, J., CONCURS WITH SEPARATE OPINION OF JUDGE KILBANE.

MARY EILEEN KILBANE, P.J., CONCURRING IN PART; DISSENTING IN PART:

{¶ 21} I respectfully dissent from the conclusion in the second assignment of error that the State failed to prove that Crumbley attempted to inflict serious physical harm upon Nelson.

{¶ 22} After Nelson, who is 67 years old and in very frail health, refused to let Crumbley and his codefendant, Sylvester Simmons, into his home, they banged and kicked on the back door, stating: "Open the door or we are going to f * * * you up. Open the door, you know what's going to happen if you don't open the door." (Tr. 308.) Simmons and Crumbley then broke down Nelson's side door by kicking the door's hinges off the wall and kicking

through an interior door that was locked by a chain link and held up by a ladder. (Tr. 313.)

{¶ 23} Once inside Nelson's home, Simmons and Crumbley grabbed Nelson by the shirt and pushed and shoved him toward the back door of the house. After Detectives Martin and Smith made their presence known, a struggle ensued and Simmons fled as the detectives arrested Crumbley. Only the fortunate and serendipitous intervention of the Cleveland police that early morning ended the incident without further harm. A reasonable trier of fact could conclude that Crumbley's actions constituted an attempt to cause serious physical harm.

{¶ 24} Accordingly, I would overrule Crumbley's second assignment of error and affirm his conviction for aggravated robbery.

{¶ 25} I concur with the lead opinion in all other respects.