[Cite as *State v. McLaughlin*, 2011-Ohio-1551.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93858

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAHAD C. MCLAUGHLIN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519148

BEFORE: Blackmon, J., Kilbane, A.J., and Rocco, J.

RELEASED AND JOURNALIZED: March 31, 2011

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Jahad McLaughlin ("McLaughlin") appeals his conviction for robbery and assigns the following two errors for our review:

> **"I. The trial court erred in finding him guilty of the lesser included offense of robbery when the facts and the rule of lenity require theft as the appropriate conviction."**
>
> **"II. The trial court erred in sentencing the defendant to a sentence outside the mainstream of local judicial practice."**

{¶ 2} Having reviewed the record and pertinent law, we affirm McLaughlin's conviction. The apposite facts follow.

Facts

{¶ 3} The Cuyahoga County Grand Jury indicted McLaughlin for one count each of aggravated robbery and impersonation of a police officer, both with firearm specifications, having a weapon while under disability, and carrying a concealed weapon. The aggravated robbery count also had a notice of prior conviction and repeat violent offender specification attached. McLaughlin waived his right to a jury trial; the matter proceeded to a bench trial.

Trial

{¶ 4} On the evening of December 14, 2008, McLaughlin and his co-defendant, William Ross, were in Ross's vehicle driving down Hough Avenue. They had planned to get together to smoke marijuana. According to Ross, as the car reached East 80th Street and Hough Avenue, McLaughlin exited the car, telling him, "That look like my girl. Let me go holler at her real quick." As Ross looked at his side view mirror, he saw McLaughlin chasing Kelly Hatten. He had the radio turned up so he could not hear if they were yelling. After about a minute, McLaughlin returned to the car and told Ross, "a punk a** 22 dollars." As they were turning around in a driveway, the police approached with their guns drawn. McLaughlin at that

time flicked something out the window, which was later identified as a police badge.

{¶ 5} Kelly Hatten testified that he was walking down the street with his girlfriend Shonte. He saw a car pass, then stop, and slowly back up. McLaughlin jumped out of the car and pointed a gun at him, stating, "You know what this is, you know what time this is." Hatten was terrified; he and Shonte fled. As he ran, he could hear McLaughlin yelling, "Stop, police. Don't make me shoot you, you mother f*****s." Hatten did not believe that McLaughlin was a police officer and continued running. When McLaughlin caught him, he threw Hatten onto the ground. He then picked him up by his coat and pointed the gun in Hatten's face, ordering him to give him his money. Hatten gave him almost $500; McLaughlin ordered him to get back down on the ground. Hatten refused because he was afraid McLaughlin would shoot him. Ross pulled up in the car. McLaughlin jumped in and they left.

{¶ 6} While Hatten was calling 911, he saw a police cruiser and told the officers what had occurred. The police were able to locate the vehicle because Hatten identified it as it drove down the street. As the officers removed the men from the car, they saw a long barrel gun on the floor of the car. McLaughlin told them it was a BB gun. The officer confirmed it was a BB gun by looking at the barrel of the gun. The officers recovered a black ski

mask and a loaded .25 caliber semiautomatic handgun from beneath the driver's seat. $492 was confiscated from McLaughlin.

{¶ 7} McLaughlin testified over his attorney's objection. He denied that he pointed a gun at Hatten and robbed him. He claimed he confronted Hatten because he was with Shonte, who was underage, and Hatten was a great deal older than her. He stated that it would be impossible for him to chase Hatten because his leg was injured from a prior shooting. He admitted he had prior convictions for voluntary manslaughter, domestic violence, and felonious assault. He claimed the money the officers recovered was his money that he received from his job, his birthday, and from his girlfriend.

{¶ 8} Based on the evidence presented, the trial court found McLaughlin not guilty of carrying a concealed weapon, having a weapon while under disability, and impersonating a police officer. The court found him not guilty of aggravated robbery, but found he was guilty of the lesser included offense of robbery along with the notice of prior conviction and the repeat violent offender specification. The trial court sentenced him to the maximum term of eight years in prison.

Insufficient Evidence to Support Robbery

{¶ 9} In his first assigned error, McLaughlin argues the evidence was insufficient to convict him of robbery because he did not physically harm

Hatten. McLaughlin contends that the evidence supports the lesser included offense of theft.

{¶ 10} In analyzing the sufficiency issue, the reviewing court must view the evidence "in the light most favorable to the prosecution" and ask whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560; *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565; *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Carter*, 72 Ohio St.3d 545, 1995-Ohio-104, 651 N.E.2d 965.

{¶ 11} Pursuant to R.C. 2911.02, the elements of robbery are:

> **"(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:**
>
> **"(1) Have a deadly weapon on or about the offender's person or under the offender's control;**
>
> **"(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another."**

{¶ 12} McLaughlin argues that because there was no evidence he inflicted physical harm, he should have been convicted of theft, which does not require physical harm, instead of robbery. However, the robbery statute does not require the state to demonstrate actual physical harm because it also

states that the threat of physical harm is sufficient. "The test for the force or threat of force element in a robbery prosecution is objective. The element is satisfied if the accused's conduct 'in reason and common experience is likely to induce a person to part with property against his will and temporarily suspend his power to exercise his will by virtue of the influence of the terror impressed.'" *State v. Hamilton*, Cuyahoga App. No. 90179, 2008-Ohio-5476, quoting *State v. Foster*, Cuyahoga App. No. 90109, 2008-Ohio-2933.

{¶ 13} Although Hatten was not physically injured, the evidence showed that McLaughlin tackled Hatten and threatened physical harm by pointing the BB gun in his face. Hatten testified that he was "terrified" because he thought it was a real gun and that McLaughlin was going to shoot him. As the trial court stated on the record:

> **"[H]e violently threw him down to the ground and/or threatened the immediate use of force by pulling the BB gun out. Now, the BB gun isn't capable of inflicting death, but it was used to indicate a threat, and at that time no one, with the possible exception of the defendant, could have known that it was in fact a BB gun. So, two of the elements of robbery fit."** Tr. 141.

{¶ 14} Therefore, because McLaughlin tackled Hatten and threatened harm in order to rob him of his money, the evidence was sufficient to support the robbery conviction.

{¶ 15} McLaughlin also argues that the "rule of lenity" required the trial court to find him guilty of theft instead of robbery. The "rule of lenity," is a

principle of statutory construction codified under R.C. 2901.04(A). It provides, in relevant part that: " * * * sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." Application of the rule of lenity requires a court to strictly construe a criminal statute to apply only to conduct that is clearly proscribed. *State v. Elmore*, 122 Ohio St.3d 472, 481, 2009-Ohio-3478, 912 N.E.2d 582, citing *United States v. Lanier* (1998), 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432.

{¶ 16} The rule does not apply to the instant case because the evidence clearly showed that McLaughlin engaged in robbery because he tackled Hatten and threatened physical harm by pointing his BB gun at him. A conviction of theft would not be appropriate due to the evidence of force and threat of force used. Accordingly, McLaughlin's first assigned error is overruled.

Proportionality of Sentence

{¶ 17} In his second assigned error, McLaughlin argues his sentence is disproportionate to sentences imposed on other defendants convicted of robbery.

{¶ 18} This court has concluded that in order to support a contention that his or her sentence is disproportionate to sentences imposed upon other offenders, a defendant must raise this issue before the trial court and present

some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal. *State v. Edwards*, Cuyahoga App. No. 89181, 2008-Ohio-2068; *State v. Nettles*, Cuyahoga App. No. 85637, 2005-Ohio-4990; *State v. Woods*, Cuyahoga App. No. 82789, 2004-Ohio-2700; *State v. Mercado*, Cuyahoga App. No. 84559, 2005-Ohio-3429; *State v. Breeden*, Cuyahoga App. No. 84663, 2005-Ohio-510; *State v. Austin*, Cuyahoga App. No. 84142, 2004-Ohio-5736. McLaughlin did not raise in the trial court that his sentence was disproportionate to sentences given to other offenders with similar records, who have committed the same offense. Nor did he present evidence as to what a "proportionate sentence" might be. Therefore, he has not preserved the issue for appeal. Accordingly, McLaughlin's second assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, A.J., and
KENNETH A. ROCCO, J., CONCUR