[Cite as *State v. Havergne*, 2011-Ohio-935.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95090

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TYRELL HAVERGNE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523541

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

RELEASED AND JOURNALIZED: March 3, 2011

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Tyrell Havergne appeals his convictions and assigns the following errors for our review:

> **"I. The trial court erred in denying Appellant's motion for acquittal on the receiving stolen property charge, a felony of the fifth degree, because the state failed to produce sufficient evidence to sustain the conviction."**
>
> **"II. Appellant's conviction is against the manifest weight of the evidence."**

{¶ 2} Having reviewed the record and pertinent law, we affirm in part, reverse in part, and remand for resentencing.

{¶ 3} On April 23, 2009, a Cuyahoga County Grand Jury indicted Havergne on aggravated robbery and kidnapping, with one and three-year firearm specifications attached. The grand jury also indicted Havergne on one count of receiving stolen property. Havergne pleaded not guilty at his arraignment, several pretrials were conducted, and on April 26, 2010, a jury trial commenced.

Jury Trial

{¶ 4} At trial, the state presented the testimony of four witnesses, including Antoinette Burgess, who testified that she owns a convenience store at West 47th Street in Cleveland, Ohio, and lives with her husband and two children above the store. Burgess testified that on April 6, 2009, at approximately 2:00 p.m., she was about to send a text message when she realized she had forgotten to turn on the store's surveillance camera. Burgess placed her cell phone on the counter and walked towards the camera.

{¶ 5} Burgess testified that two males entered the store before she reached the camera, so she returned behind the counter without turning on the camera. One of the males, who Burgess recognized from being in the store on two prior occasions, asked for a cigarette and Burgess placed a Black and Mild on the counter. The second male produced a gun, pointed it at Burgess's face, and instructed her to leave the cash register open.

{¶ 6} Burgess complied, Havergne reached into the register and removed the money. Burgess testified that Havergne came behind the counter, pushed her out the way, reached into a second register that is used for lottery sales, emptied the contents, and took her cell phone off the counter. Both men then fled the store.

{¶ 7} After the robbery, Burgess called her husband, told him the store had been robbed and that her cell phone had been taken. Burgess later called the police to report the robbery. Burgess testified that a few days after the robbery she identified Havergne from a police photo array.

{¶ 8} Burgess's husband, Harold Fowler, testified that on April 6, 2009, his wife called to tell him the store had been robbed and that her phone had been taken. Fowler immediately called Burgess's cell phone and a male answered. Fowler identified himself as Mike, pretended he was interested in purchasing drugs, and made plans to meet the individual at a McDonald's restaurant to complete the transaction.

{¶ 9} Fowler subsequently contacted the police, told them about the robbery, and about the telephone call to his wife's cell phone, and that he had arranged to meet the person who answered the phone for a fictitious drug transaction. Fowler testified that the police accompanied him to the restaurant. On the way to the restaurant, Fowler called his wife's cell phone, spoke to the same individual, got a description of the vehicle he would

be driving and that he was wearing a red shirt. Fowler also described the car he would be driving and arranged for the individual to enter his vehicle upon arrival. The individual arrived as scheduled, pulled next to Fowler's vehicle, and entered the vehicle, where he was subsequently arrested.

{¶ 10} Detective Thomas Shoulders, a 30-year veteran of the Cleveland Police Department, testified that he traveled to the McDonald's restaurant with Fowler. In preparation for the meeting, Detective Shoulders assigned a surveillance detail to the parking lot and to the inside of the restaurant. Havergne arrived as planned, entered the vehicle, was in possession of Burgess's cell phone, and was subsequently arrested.

{¶ 11} Havergne indicated that he had bought the cell phone for $20 from a tall black male in Tower City. Detective Shoulders prepared a photo array and showed it to Burgess a few days later. Detective Shoulders testified that Burgess identified Havergne as one of the males who participated in the robbery.

{¶ 12} At the end of the state's case-in-chief, Havergne motioned the court to dismiss the armed robbery and kidnapping counts. The trial court denied the motion, and Havergne proceeded to testify in his own defense.

{¶ 13} Havergne testified he bought the cell phone at Tower City from a black male that was wearing an orange jacket. Havergne stated he received a call on the cell phone from someone who identified himself as "Mike" who

wanted to purchase drugs. He decided to meet him to get a feel for what Mike wanted to purchase.

{¶ 14} The jury returned guilty verdicts on all three counts. On May 3, 2010, the trial court sentenced Havergne to concurrent prison terms of six years for aggravated robbery and kidnapping, plus three years for the firearm specifications to be served consecutively to the underlying charges. The trial court also sentenced Havergne to 11 months on the receiving stolen property charge to be served concurrently to the other sentences. Havergne now appeals.

Sufficiency of Evidence

{¶ 15} In the first assigned error, Havergne argues the trial court erred in denying his motion for acquittal on the felony receiving stolen property charge, because there was no evidence presented to support an enhancement of the penalty from a misdemeanor to a felony.

{¶ 16} Crim.R. 29(A), which governs motions for acquittal, states:

> **"The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."**

{¶ 17} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus as follows:

> **"Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment 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 proved beyond a reasonable doubt."**

{¶ 18} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted 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. (*Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"**

{¶ 19} In the instant case, the jury found Havergne guilty of receiving stolen property in violation of R.C. 2913.51(A), which provides that "[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense."

{¶ 20} In a prosecution for receiving stolen property, the trier of fact may find the defendant guilty by inference when the defendant's possession of recently stolen property is not satisfactorily explained under all the circumstances developed from the evidence. See, e.g., *State v. Kirby*, 10th

Dist. No. 06AP-297, 2006-Ohio-5952, ¶14. Where the value of the property is $500 or more but less than $5,000, receiving stolen property is elevated from a misdemeanor of the first degree to a felony of the fifth degree. R.C. 2913.51(C).

{¶ 21} The state concedes, and we agree, that there was no evidence presented as to the value of the cell phone, which is the subject of the instant charge. Thus, Havergne could only have been properly convicted of a misdemeanor of the first degree and sentenced to a maximum term of six months incarceration, instead of the 11 months the trial court imposed. As such, the trial court should have granted the motion for acquittal as to the felony receiving stolen property charge. Accordingly, we sustain the first assigned error and remand for resentencing.

Manifest Weight of Evidence

{¶ 22} In the second assigned error, Havergne argues his convictions are against the manifest weight of the evidence.

{¶ 23} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed 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*, 78 Ohio St.3d 380, 1997-Ohio-52, 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."**

{¶ 24} In the instant case, in addition to receiving stolen property, the jury found Havergne guilty of aggravated robbery and kidnapping. Aggravated robbery, in violation of R.C. 2911.01, provides as follows:

> **"(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, 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 and either display the weapon, brandish it, indicate that the offender possesses it, or use it; * * *"**

{¶ 25} Kidnapping, in violation of R.C. 2905.01, provides as follows:

> **"(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the**

> **liberty of the other person, for any of the following purposes:**
>
> **"(2) To facilitate the commission of any felony or flight thereafter;* * *"**

{¶ 26} At trial, Burgess testified that she recognized Havergne because he had been in the store on two separate occasions prior to the day of the robbery. Burgess also had no difficulty identifying Havergne from a photo array a few days later. In addition, immediately after the robbery, Burgess called her husband, told him about the robbery, and indicated that the robber took her cell phone.

{¶ 27} Further, Burgess's husband, Fowler, immediately called his wife's cell phone, spoke with a male, and as a ruse, feigned interest in purchasing drugs. Fowler talked with this same individual to solidify their meeting, get a description of the vehicle, and what the individual would be wearing. Finally, when they met, Havergne was apprehended by the police with Burgess's cell phone in his possession.

{¶ 28} Despite Havergne's testimony that he purchased the cell phone from an unknown male wearing an orange jacket at Tower City, the jury could have concluded, based on the immediacy of Burgess's call to her husband, and Fowler's call to his wife's cell phone, that it was impossible for the robbers to have reached Tower City and sold the cell phone in such a short period of time.

{¶ 29} The determination of weight and credibility of the evidence is for the trier of fact. *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimonies are credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503.

{¶ 30} Further, the trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, at ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, at ¶17. Therefore, Havergne's convictions are not against the manifest weight of the evidence. Accordingly, we overrule the second assigned error.

Allied Offenses

{¶ 31} Sua sponte, we note that Havergne was convicted and sentenced for allied offenses of similar import. R.C. 2941.25(A) provides that, "[w]here the same conduct by defendant can be construed to constitute two or more

allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant can be convicted of only one." It is well-established that a two-step analysis is required to determine if two offenses are allied offenses of similar import. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶14. "'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import, and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.'" Id. at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶ 32} When committed with a single animus, aggravated robbery and kidnapping are allied offenses of similar import and, therefore, merge at sentencing. *State v. Flagg*, Cuyahoga App. Nos. 93248 and 93249, 2010-Ohio-4247, citing *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154. In the present case, it is indisputable that the restraint of Burgess was purely incidental to the aggravated robbery.

{¶ 33} As such, Havergne committed these offenses with a single animus, and the offenses should have merged for sentencing. This matter must be remanded to the trial court for a new sentencing hearing where the state shall choose which charge it wishes to proceed under.

{¶ 34} Judgment affirmed in part, reversed in part, and remanded for resentencing.

It is ordered that appellee and appellant share the 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.

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
JAMES J. SWEENEY, J., CONCUR