

[Cite as *State v. Gibson*, 2015-Ohio-2390.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101826

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PEACHES GIBSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-584594-A

BEFORE: Boyle, J., Keough, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: June 18, 2015

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Peaches Gibson, appeals her aggravated robbery, robbery, and carrying a concealed weapon convictions. She raises two assignments of error for our review:

1. The jury's guilty verdict of aggravated robbery in violation of R.C. 2911.01(A)(1), robbery in violation of R.C. 2911.02(A)(1) and (2), carrying a concealed weapon in violation of R.C. 2923.12(A)(2), and firearm specifications was based upon insufficient evidence.

2. The jury's guilty verdict of R.C. 2911.01(A)(1), robbery in violation of R.C. 2911.02(A)(1) and (2), carrying a concealed weapon in violation of R.C. 2923.12(A)(2), and firearm specifications was against the manifest weight of the evidence.

{¶2} Finding no merit to Gibson's appeal, we affirm.

Procedural History and Factual Background

{¶3} In April 2014, Gibson was indicted on 11 counts: Count 1, attempted murder in violation of R.C. 2923.02 and 2903.02(A); Count 2, aggravated burglary in violation of R.C. 2911.11(A)(1); Count 3, aggravated burglary in violation of R.C. 2911.11(A)(2); Count 4, burglary in violation of R.C. 2911.12(A)(1); Count 5, aggravated robbery in violation of R.C. 2911.01(A)(1); Count 6, aggravated robbery in violation of R.C. 2911.01(A)(3); Count 7, robbery in violation of R.C. 2911.02(A)(1); Count 8, robbery in violation of R.C. 2911.02(A)(2); Count 9, felonious assault in violation of R.C. 2903.11(A)(1); Count 10, felonious assault in violation of R.C. 2903.11(A)(2); and Count 11, carrying a concealed weapon in violation of R.C. 2923.12(A)(2). All of the counts

except for Counts 8 and 11 carried one- and three-year firearm specifications. Gibson pleaded not guilty to all charges, and the case proceeded to a jury trial, where the following facts were presented.

{¶4} Robert Jones, the victim, testified that he works at Medina Customs, which is a tire shop. Jones stated that he knew Gibson because she had purchased a 2000 Audi from Terrance Hereford, the owner of Medina Customs. Jones said that Gibson had previously been in the shop after buying the car about four to six times, complaining that the car was not working properly.

{¶5} According to Jones, on April 5, 2014, Gibson came to the shop with a man he knew only as “Dink.” Jones knew “Dink” because he had come into the store with Gibson in the past. Jones said that he and his cousin, Tony Bryant, were working that day. Gibson complained that her check-engine light was on. Jones told her that she needed to talk to Hereford, but that he would not be there until the following Tuesday. Jones said that Gibson responded, “Oh, so you all just rob me, huh?” Jones told her that he did not own the shop.

{¶6} Jones testified that about 30 or 40 minutes later, “Dink” came into the shop and started talking to him. They talked for about five minutes, and then Jones “heard buttons on the register going off.” Jones went into the office where the register was, and saw Gibson trying to open the register. Jones asked Gibson what she was doing. Jones said that Gibson hit the register and said, “Man, open this register.” Jones told her to leave. Jones then stated that he saw Gibson’s hand in her pocket. Jones testified,

“That’s when the gun goes off.” Jones did not know he was shot at first; he did not see blood, but he said his “pants were hot.” Jones ran out of the office to the corner of East 103rd Street and St. Clair Avenue.

{¶7} Jones testified that he looked back toward the shop. He saw Gibson run out of the shop, get into her car, and drive south on East 103rd Street. Jones went back into the shop, opened the register, and took the money (\$250) out of it. He then felt blood on his leg, so he went to the fire station across the street. He told a firefighter that Gibson had shot him. Jones testified that Gibson shot him right above his left knee. The paramedics took him to the hospital.

{¶8} Jones identified Gibson in a photo array.

{¶9} Bryant testified that he was working at Medina Customs on April 5, 2014. He said that he fell asleep that day because it was a slow day. He woke up when he heard a gunshot. He jumped up to see what was happening. He ran toward the shot and saw Gibson run past him out of the store. Bryant ran outside because he heard Jones yelling, “she shot me, she shot me.” He saw Jones go to the fire station across the street. Bryant did not see anyone else in the shop, but he did see “Dink” standing on the sidewalk.

{¶10} Bryant testified that he had seen Gibson approximately three times before this incident. He identified Gibson in a photo array.

{¶11} Cleveland firefighter Milton Curry testified that he was outside washing a fire truck when he heard a “bang.” He assumed that a tire blew at Medina Customs; it

happened periodically. But then he saw Jones “half stepping and half limping” toward the station. Jones said, “she shot me.” As Curry tried to help Jones, he saw “a female run out of the tire shop and head south on 103.” Curry helped Jones to the paramedic at the station. The paramedic transported Jones to the hospital.

{¶12} Police never found a gun, but found a bullet in the office near the cash register at Medina Customs.

{¶13} At the close of the state’s case, Gibson moved for a Crim.R. 29 acquittal. The trial court granted it with respect to Counts 2, 3, and 4, dealing with aggravated burglary and burglary because there was no evidence that Gibson trespassed on the property that was open to the public.

{¶14} Gibson testified on her own behalf. She stated that she had been working at Progressive Insurance as a subrogation assistant, but lost her job because of “the situation.”

{¶15} Gibson testified that she purchased the Audi from Hereford for \$4,000 in February 2014. When she purchased the car, it had a couple of issues that Hereford promised to fix before she even drove it off the lot. When she purchased the car, the check engine light was not on. But Gibson said that she soon began having many issues with the car. She took it to the shop many times, but kept having problems.

{¶16} Gibson knew Jones as a mechanic at Medina Customs. She said that she did not have any issues with Jones. She was upset with Hereford, because he is the one who sold her the car.

{¶17} Gibson testified that on April 5, 2014, she went to Medina Customs after lunch, sometime around 1:00 p.m. She said that she was by herself. Jones told her that Hereford was not there, and to come back “later.” She left and went to Rally’s to get something to eat.

{¶18} Gibson stated that she went back to Medina Customs about an hour later, thinking that Hereford would be there. She was alone this time as well. She saw Jones talking to a man in front of the shop. Gibson said that she sat in the waiting room until Jones was done talking. She heard Jones and the man getting into a “heated” conversation.

{¶19} Gibson said that Jones saw her and said, “I told you Terrance is not here.” According to Gibson, Jones “stormed” into the office, and the man followed him. Gibson followed the man, so they were all three standing in the office. Gibson said the man was “irate.” She heard a loud boom, which sounded like a gun. She ran out after she heard the gunshot because she was scared. She saw Bryant on her way out the door.

{¶20} Gibson testified that she did not have a gun on her that day, nor did she shoot Jones.

{¶21} On cross-examination, Gibson replied “yes,” when asked if she believed that Jones wanted the actual shooter (the unknown male) to go free, and that he just wanted to “pin this on her.”

{¶22} At the close of the trial, the jury found Gibson not guilty of Count 1 (attempted murder), Count 6 (aggravated robbery), and Counts 9 and 10 (felonious

assault), but guilty of Count 5 (aggravated robbery) with the one-year firearm specification, Count 7 (robbery) with the one-year firearm specification, Count 8 (robbery), and Count 11 (carrying a concealed weapon). Prior to sentencing, the trial court found that Counts 7, 8, and 11 merge into Count 5. The trial court sentenced Gibson to a total of seven years in prison on Count 5, and one year for the firearm specifications to be served prior to and consecutive to the seven years on the base charge.

The trial court further notified Gibson that she would be subject to five years of mandatory postrelease control upon her release from prison. It is from this judgment that Gibson appeals.

Sufficiency of the Evidence

{¶23} In her first assignment of error, Gibson argues that the state did not present sufficient evidence to convict her.

{¶24} “[Sufficiency] is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), citing *Black’s Law Dictionary* 1433 (6th Ed.1990). When an appellate court reviews a record upon a sufficiency challenge, “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. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶25} Gibson asserts that the state did not present sufficient evidence of aggravated robbery, robbery, and carrying a concealed weapon, as well as the one-year firearm specification. The state had to present evidence beyond a reasonable doubt on the following relevant statutory elements:

{¶26} Aggravated robbery under R.C. 2911.01(A)(1) provides that

[n]o person, in attempting or committing a theft 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, brandish it, indicate that the offender possesses it, or use it[.]

{¶27} Robbery under the relevant subsections provides:

(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[.]

{¶28} Carrying a concealed weapon under R.C. 2923.12(A)(2) provides that “[n]o person shall knowingly carry or have, concealed on the person's person or concealed ready at hand * * * [a] handgun other than a dangerous ordnance[.]”

{¶29} The one-year firearm specification under R.C. 2941.141 provides that “the offender had a firearm on or about the offender's person or under the offender's control while committing the offense.”

{¶30} In this case, Jones testified that when he was talking to “Dink” in the front of the shop, he heard someone pushing the buttons on the cash register in the office.

When he went back to see who it was, he saw Gibson trying to get into the cash register. Jones asked Gibson what she was doing. Gibson hit the register and said, “Man, open this register.” At that point, Jones saw Gibson with her hand in her pocket and then heard a gun shot. Jones was shot in his left leg, right above the knee.

{¶31} Gibson asserts that the state “relied almost entirely on the testimony of a convicted felon.” But the believability of Jones’s testimony goes to manifest weight, not sufficiency of the evidence. Jones’s testimony alone, if believed, established each element of aggravated robbery, robbery, and carrying a concealed weapon.

{¶32} Gibson contends that “the fact that [she] had a gun and used it was based on one inference upon another.” We disagree. Inferring that Gibson had a gun and used it from Jones’s testimony that Gibson’s hand was in her pocket, he heard a gun shot, and he was shot, were permissible inferences from the testimony.

{¶33} Circumstantial evidence is “evidence based on inference and not on personal knowledge or observation.” *State v. Cornett*, 3d Dist. Seneca No. 13-09-13, 2009-Ohio-3531, ¶ 12, quoting *Black’s Law Dictionary* 595 (8th Ed.2004). Circumstantial evidence has been defined as “the proof of certain facts and circumstances in a given case, from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind.” *State v. Duganitz*, 76 Ohio App.3d 363, 367, 601 N.E.2d 642 (8th Dist.1991), citing *Black’s Law Dictionary* 221 (5th Ed.1979). Jones’s testimony did not require the factfinder to make an impermissible “inference upon an inference.” Gibson’s arguments are not well

taken.

{¶34} Accordingly, Gibson’s first assignment of error is overruled.

Manifest Weight of the Evidence

{¶35} In her second assignment of error, Gibson contends that her convictions were against the manifest weight of the evidence.

{¶36} Unlike sufficiency of the evidence, a challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence. *Id.*, citing *State v. Robinson*, 162 Ohio St. 486, 487, 124 N.E.2d 148 (1955).

{¶37} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as a “thirteenth juror.” *Id.* In doing so, it must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine “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.” *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the “exceptional case in which the evidence weighs heavily against the conviction.” *Id.*

{¶38} Gibson argues that because Jones was a convicted felon and she had no previous criminal history, that the jury lost its way in convicting her. We disagree. The jury was free to believe Jones over Gibson. Indeed, a trier of fact is free to believe all, part, or none of any witness's testimony. Moreover, "[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury rejected the defendant's version of the facts and believed the testimony presented by the state." *State v. Hall*, 4th Dist. Ross No. 13CA3391, 2014-Ohio-2959, ¶ 28.

{¶39} Further, it was not just Jones's testimony. Bryant and a firefighter across the street from Medina Customs corroborated Jones's testimony that after he was shot, he ran out of the shop first, and then Gibson ran out of the shop after he did. Bryant said that he woke up after hearing the gunshot and saw Gibson running out of the shop. Bryant also said that he ran outside because he heard Jones yelling, "she shot me, she shot me." And the firefighter across the street also saw a woman running out of the shop as Jones was limping across the street to the fire station. The firefighter testified that Jones also told him, "she shot me."

{¶40} After reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we do not agree with Gibson that "in resolving conflicts in the evidence, the jury clearly lost its way and created a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541.

{¶41} Gibson's second assignment of error is overruled.

{¶42} Judgment affirmed.

It is ordered that appellee recover from appellant the 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.

MARY J. BOYLE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN T. GALLAGHER, J., CONCUR