

[Cite as *State v. Kendall*, 2018-Ohio-380.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104919

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KRISTLE A. KENDALL

DEFENDANT-APPELLANT

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

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-603225-A

BEFORE: Boyle, J., E.A. Gallagher, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: February 1, 2018

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Kristle A. Kendall, appeals her conviction for aggravated robbery. She raises four assignments of error for our review.

1. The state failed to present sufficient evidence to sustain a conviction against appellant.
2. Appellant's conviction is against the manifest weight of the evidence.
3. The trial court erred by ordering appellant to pay costs when it did not properly comply with the statute.
4. The court costs imposed at the sentencing hearing infringes upon appellant's rights under the Eighth and Fourteenth amendments to the United States Constitution, R.C. 2929.18, R.C. [2929.19](B)(5), R.C. 2947.14, and related sections of the Ohio Constitution.

{¶2} Finding merit to her third assignment of error, we affirm in part, reverse in part, and remand.

I. Procedural History and Facts

{¶3} In February 2016, Kendall was indicted on one count of aggravated robbery, a first-degree felony, in violation of R.C. 2911.01(A)(1), which carried a one- and three-year firearm specification. Plaintiff-appellee, state of Ohio, proceeded under Ohio's complicity statute, R.C. 2923.03(A)(2), alleging that Kendall aided and abetted another in the commission of the aggravated robbery. Kendall pleaded not guilty to the charge, and the matter proceeded to a jury trial where the following evidence was presented.

{¶4} In the afternoon of August 30, 2015, around 4:00 or 5:00 p.m., Anna Ghallab hosted a birthday party for her daughter. Ghallab's mother, grandmother,

brother Michael Collins, Jr., and Kendall attended the party. Collins and Kendall had been staying with Ghallab for a couple of days before the party because Kendall's boyfriend had physically abused her. Ghallab believed that her brother and Kendall were high on drugs on the day of the party.

{¶5} According to Ghallab and Kendall, Collins became very upset at the party. At some point, Collins left the party and went to his father's house, which was nearby. Collins broke into his father's house and stole a 9mm handgun, as well as ammunition for the gun. Collins went back to his niece's party and got Kendall.

{¶6} Collins and Kendall left for a short time, and then briefly returned. Collins was driving a Jeep that Kendall had borrowed from a friend approximately two weeks earlier. Kendall came in Ghallab's house, but Collins remained in the Jeep. Kendall said they were going to go to Edgewater Park to talk. Ghallab testified that Kendall appeared to be "antsy" and told Ghallab that she just wanted to grab a "couple bags" of her things.

{¶7} While Ghallab was talking to Kendall, Ghallab received a text message from her brother's friend, telling her that her brother was "wasted" and that he had broken into their father's house and had stolen a gun. Ghallab told Kendall about the text, but Kendall acted like she did not know anything about it. Ghallab said that she did not speak to Kendall again until 11:10 p.m., when Kendall called her to tell her that her brother had killed himself.

{¶18} A Lakewood police officer spoke to Collins around 9:00 p.m. that night. Collins admitted to taking his father's gun and told the officer that he was suicidal.

{¶19} Ghallab testified that after her brother and Kendall left, she called Kendall to try and get Kendall to take Collins to the Parma Police Department or to a hospital to obtain help for her brother. According to Ghallab, Kendall did not really respond to her requests.

{¶10} A little after 9:00 p.m. that same night, Collins drove the Jeep to a Shell gas station in Strongsville. Kendall was in the front passenger side of the Jeep. Collins pulled the Jeep near the front of the gas station, put the car in park, got out of the vehicle, and went inside the gas station. While inside, Collins proceeded to rob the gas station clerk at gunpoint and took \$165 in cash and eight packs of Newport cigarettes from the clerk. The gas station clerk said that Collins appeared to be a little "strung out" and "edgy." Collins went back outside, yelled at two people in a vehicle with the gun still in his hand, and then got into the passenger side of the jeep. At that point, Kendall drove the Jeep out of the gas station parking lot.

{¶11} Detectives assigned to the case obtained surveillance footage from the gas station. Detective Steven Dzursisin testified that the footage showed that less than one minute elapsed from the time Collins got out of the Jeep at the gas station until the time he returned to the passenger side of the Jeep. The gas station surveillance footage was played for the jury. Detective Dzursisin explained that the surveillance videos showed the following:

(1) at 9:09:29 p.m., the Jeep pulled into the gas station with Michael driving and its brake lights were on;

(2) at 9:11:49 p.m., Michael exited the Jeep to go into the gas station and the Jeep's brake lights were off;

(3) at 9:12:04 p.m., the Jeep's brake lights came on again, but no one, other than Michael, had entered or exited the Jeep;

(4) at 9:12:31 p.m., Michael walked out of the gas station, but turned towards another car with two passengers in it;

(5) by 9:12:44 p.m., Michael entered the passenger side of the Jeep and the brake lights remained on; and

(6) by 9:12:47 p.m., the Jeep left the gas station with Kendall driving.

{¶12} One witness at the Shell station, Pavlo Karpin, testified that he was pumping gas into his truck when he heard a male, who was standing near the door of the gas station store, yelling at two people in their vehicle; he could not see the male, however, because the Jeep was blocking his view of him. Karpin said that when he heard the male yelling was when he first noticed the Jeep. Karpin testified that he saw a woman inside the Jeep at that time. He further stated that he saw a "hassle" inside the Jeep, explaining that it looked like the woman in the Jeep was "moving from seat to seat." When he saw the "movement" in the Jeep, there was no one else in the vehicle with the woman.

{¶13} Karpin testified that while the male was still yelling at the occupants in the other vehicle, he heard the woman inside the Jeep yell "something to the sort of: Let's go, come on, let's go, come on." Karpin said the woman was driving the Jeep as they pulled away and that she "left the gas station in urgency."

{¶14} Karpin told police what he saw on the night of the robbery and gave a written statement. Karpin agreed on cross-examination that he did not mention anything in his written statement about hearing the woman say something from inside the Jeep.

{¶15} Aaron Kissling, a sheriff deputy for Crawford County, stopped Kendall near Bucyrus around 2:00 a.m. Ohio State Highway Patrol troopers assisted at the scene. The officers handcuffed Kendall and placed her in the back of a cruiser. They also found Collins's dead body in the front passenger seat of the Jeep, and recovered a 9mm handgun on Collins's person.

{¶16} Deputy Kissling testified that when he approached Kendall in the back of the patrol cruiser, he could smell "an odor of an intoxicating beverage" as soon as he opened the back passenger door of the car. Deputy Kissling further stated that when Kendall spoke, the odor of alcohol intensified, and she slurred her words. According to Deputy Kissling, Kendall would have passed two hospital signs and a sign for a State Highway Patrol post while she was driving.

{¶17} Charles Jackson, a State Highway Patrol trooper and investigator, interviewed Kendall on the morning of August 31, 2015, and then again three days later. In her second interview with Trooper Jackson, Kendall explained what she and Collins had done before going to the Shell gas station. Kendall told him that they had gone to Collins's friend's house and then to his ex-girlfriend's mother's house. Trooper Jackson then asked Kendall about the timing of those events, and Kendall responded, "Right before we robbed the gas station. Right before he robbed the gas station. I'm sorry."

{¶18} Trooper Jackson identified photographs of Kendall's injuries, including a bruise near her eye and on her inner thigh. Trooper Jackson further identified items that were found in the Jeep, including clothes in the back seat, two cell phones, and a box of ammunition. Trooper Jackson stated that police found a straw and a baggie with a white substance in Kendall's purse, as well as red hair dye. According to a portable breath test, Kendall's blood alcohol content was 0.12.

{¶19} Surveillance cameras from a Gordon Food Service in Mansfield showed that the Jeep pulled into a Panera Bread parking lot at 10:42 p.m. and left the parking lot at 12:15 a.m. The coroner ruled that Collins's death was a suicide and that it occurred sometime between 10:58 p.m. and 11:03 p.m.

{¶20} At the close of the state's case, Kendall moved for a Crim.R. 29 acquittal, which the trial court denied.

{¶21} Kendall testified on her own behalf. She stated that she did not plan the robbery. She denied knowing that Collins intended to rob the gas station, or that she intended to help him leave the gas station. And she testified that she did not have the ability to make her own decisions when she was driving the Jeep after she and Collins left the Shell gas station that night.

{¶22} Kendall explained that she was living with her ex-boyfriend and father of her unborn child (she was eight months pregnant at the time), when her ex-boyfriend physically abused her on August 26, 2015. He shoved a door in her face and threw her

up against a steel bar. Kendall stated that she only sustained a black eye from the domestic violence incident.

{¶23} Kendall called Collins after her boyfriend abused her because she did not have anywhere to go. Kendall stated that she and Collins were “best friends”; they were never “boyfriend-girlfriend.” Collins asked Ghallab if he and Kendall could stay at Ghallab’s house for a few days.

{¶24} On August 30, 2015, Ghallab had the birthday party for her daughter. Kendall testified that Collins was so upset at the party that he was crying. Kendall said that she asked Collins to go for a walk with her, so that he could “cool off.” Kendall explained that Collins would not stop crying. They walked “just around the block,” and then Collins took off running. Kendall went back to Ghallab’s house.

{¶25} A little bit later, Collins returned. Kendall said that Collins was “sweating and red and, like crazed kind of.” He told Kendall that he wanted to go to Edgewater Park. She grabbed a bag of beach towels and they drove to the park. They sat in the parking lot and talked. Collins was still acting “crazy.”

{¶26} From Edgewater, they drove to a bar, but it was closed. They then went to Collins’s friend’s house. While there, Collins went to the store to buy some liquor. They were only at Collins’s friend’s house for about 15 minutes. They then drove to Collins’s ex-girlfriend’s mother’s house, but there were police officers there so they did not stop.

{¶27} At some point, Kendall received a call from Ghallab, who told her to take Collins to a police station or hospital because he had stolen their father's gun. But Kendall said she was not driving so she could not do anything about it. Kendall testified that she had not seen a gun at that point.

{¶28} Kendall said that Collins pulled into the Shell gas station, put the car in park, and turned off the ignition. Kendall then testified: "At that point, he started screaming at me because I saw the gun finally, and he started screaming at me and told me to shut the fuck up, get out of the car and drive by the time [he] got out here." Kendall said that Collins then hit her on her leg with the gun, and she started crying. As he got out of the Jeep, he told Kendall that she "better be in the driver's seat by the time" he came back.

{¶29} Kendall further explained that when Collins went inside the gas station, she moved to the driver's seat. She said that she was "freaking out" and that she wanted to leave and call 911. She could not see Collins inside the store, but she "immediately thought" that it could be something bad because she knew Collins had the gun with him. She turned on the ignition because she wanted to leave, but by the time she had the car in drive, Collins was back. Kendall heard him screaming, but she could not see him. He got in the car and she drove out of the gas station parking lot.

{¶30} Kendall testified that she started yelling at Collins, asking him what was happening. He told her to "shut the fuck up and drive." At this point, Kendall assumed that Collins had robbed the gas station because he had a gun, cigarettes, and money in his

hands. Kendall said that she was trying to talk Collins into turning himself in to police, but he was not really listening. Collins began screaming at Kendall because she would not stop talking. At that point, he hit her in the leg for a second time.

{¶31} Kendall testified that Collins told her to drive south on I-71, which she did. She explained that after about 30 minutes, they stopped at a Love's gas station to get gas and tape for Collins's arm, which was bleeding. Kendall said that Collins told her not to talk to anyone in the gas station because he would be watching her. The cashier asked Kendall if she was okay because of the bruising on her face. Kendall just nodded her head because she knew that Collins was watching. When asked why she did not give the cashier a note to call 911, Kendall replied, "[h]e was literally staring at me, he had all visual on me. I was so scared." Kendall then taped Collins's arm for him.

{¶32} Kendall said that they got back in the car. She told Collins that she wanted to go home. He told her "to shut the fuck up again and he hit [her] again." She told him how painful that was, and "[t]hat's when he handed her a bottle and told her to drink it with the gun to [her] head."

{¶33} They drove south again on I-71. Collins continued to force her to drink the alcohol out of the bottle. Kendall said that Collins was "kind of in and out of it, like sleep-wise." Kendall did not know if it was because Collins had lost a lot of blood, or if it was from alcohol or drugs. She decided to pull into a Panera Bread parking lot to try to figure out what to do while he was sleeping.

{¶34} Kendall testified that her plan was to find some place that was open to get help, but she was afraid that Collins would wake up and she “and her child could be dead” because he was so “crazy.” She said that she threw the liquor bottle out of the car and tried to grab the gun from between his legs. He woke up “instantly” and told her not to touch it. Kendall testified that Collins hit her leg again at that point. Collins then told her to look at him and that he did not want to hurt her, and that is when he fatally shot himself.

{¶35} Kendall testified that “it was terrifying,” and that she did not know what to do. Her ears were ringing from the gunshot. She said that she was not thinking straight, and she did not know where she was. She was scared because she knew that Collins had broken into his dad’s house and robbed a gas station. She was afraid that she was going to get into trouble too. Eventually, she began driving, but she did not know where she was.

{¶36} Kendall stated that she could not recall her first interview with police; it was “a blur to her.” When she was interviewed by police the second time, she had no recollection of what she had told police in the first interview. Kendall said that any inconsistencies in her first statement to police stemmed from the fact that she was intoxicated and in shock from Collins killing himself.

{¶37} Kendall further testified that she lied in her previous statements to police about getting out of the car to urinate at the Shell gas station. She said that she was “terrified of everything” and did not know what was going to happen to her.

{¶38} On cross-examination, Kendall admitted to several lies that she told in her previous statements in addition to urinating at the Shell gas station, including the fact that she received other injuries from her ex-boyfriend in the domestic violence incident, not just a black eye; that she lied when she said that Collins hit her with the gun four times because it was only three times; that she lied when she told police that Collins held a gun to her head at Ghallab's house and the entire time in the Jeep; and that she also lied when she told police that Collins told her that he wanted to stop at the Shell station to buy cigarettes.

{¶39} Kendall also denied on cross-examination that she and Collins were more than friends, but she admitted to sending Collins a text that stated: "I love being together and all the time we share. I want to sleep next to you every night and make your baby and have the best life in the world, I want to spend the rest of my life with you."

{¶40} At the close of the case, the jury found Kendall guilty of aggravated robbery with the one- and three-year firearm specification. The trial court sentenced Kendall to an aggregate six years in prison: three years for the firearm specifications, to be served prior to and consecutive to three years for aggravated robbery. The trial court further advised Kendall that she would be subject to a mandatory period of five years of postrelease control. The trial court also imposed costs. It is from this judgment that Kendall now appeals.

II. Sufficiency of the Evidence

{¶41} In her first assignment of error, Kendall argues that the state failed to present sufficient evidence that “she committed any offense, certainly not aggravated robbery towards the alleged victim, or participated in any crimes” and that “there is absolutely no evidence that she ever possessed or used a firearm.” She asserts that “by the evidence presented, there was nothing to indicate that [she] knew beforehand what Collins intended to do[,] [n]or was there any evidence presented that she knew what, if anything, he had done immediately after he robbed the Shell station.” Kendall further argues that Collins acted alone and that he “forced” her “to act the way she did.” We disagree.

{¶42} “[S]ufficiency’ 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* 1422 (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.

{¶43} Kendall was convicted of aggravated robbery in violation of R.C. 2911.01(A)(1), which provides in relevant part: “No person, in attempting or committing a theft offense * * * or fleeing immediately after the attempt or offense, shall * * * 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."

{¶44} Here, Kendall admitted that Collins robbed the gas station with a gun. Kendall also admitted that she drove the Jeep from the gas station immediately after the robbery. Thus, her conviction was premised on Kendall aiding and abetting in the commission of the robbery — being the "getaway driver."

{¶45} "[A] defendant charged with an offense may be convicted of that offense upon proof that [she] was complicit in its commission[.]" *State v. Meade*, 8th Dist. Cuyahoga No. 102896, 2016-Ohio-493, ¶ 24, citing *State v. Herring*, 94 Ohio St.3d 246, 762 N.E.2d 940 (2002). Ohio's complicity statute, R.C. 2923.03(A)(2), provides in pertinent part: "No person, acting with the kind of culpability required for the commission of an offense, shall * * * aid or abet another in committing the offense."

"To support a conviction for complicity by aiding and abetting * * * the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime."

Meade at ¶ 25, citing *State v. Johnson*, 93 Ohio St.3d 240, 754 N.E.2d 796 (2001), syllabus.

{¶46} Aiding and abetting may be shown by both direct and circumstantial evidence, and participation may be inferred from presence, companionship, and conduct before and after the offense is committed. *Id.*, citing *State v. Cartellone*, 3 Ohio App.3d

145, 444 N.E.2d 68 (8th Dist.1981). Driving a “getaway” car is an overt act of aiding and abetting. *Cartellone* at 150.

{¶47} “The mere presence of an accused at the scene of a crime, however, is not sufficient to prove, in and of itself, that the accused was an aider and abettor.” *State v. Widner*, 69 Ohio St.2d 267, 269, 431 N.E.2d 1025 (1982). This rule protects innocent bystanders who have no connection to the crime other than simply being present at the time of its commission. *Johnson* at 245.

{¶48} After review, we find that the state presented sufficient evidence for a reasonable jury to find Kendall guilty of aggravated robbery beyond a reasonable doubt. The gas station surveillance footage alone was sufficient evidence that Kendall actively participated in the aggravated robbery. The footage shows that 12 to 15 seconds after Collins got out of the Jeep at the Shell station, the brake lights to the Jeep came back on, which indicates that Kendall had moved from the passenger seat of the Jeep to the driver’s seat, put the vehicle into drive, and had her foot on the brake. But she did not drive away; she remained for Collins to return. Whether Collins forced her to do so, however, is a question for the weight of the evidence, not sufficiency.

{¶49} The state also presented evidence that Kendall knew that Collins had a gun before he went into the gas station. And that Kendall yelled for Collins to “come on, let’s go” when he was yelling at people in their vehicle after he came out of the Shell station. Further, the state presented evidence that Kendall drove away with “urgency.”

{¶50} The state also presented evidence that Kendall could have sought help many times throughout the night, but failed to do so.

{¶51} Accordingly, we overrule Kendall's first assignment of error.

III. Manifest Weight of the Evidence

{¶52} In her second assignment of error, Kendall argues that her conviction is against the manifest weight of the evidence. She claims that there is no evidence to establish that she "was involved in any wrongdoing" or that "she assisted Collins" in the robbery. Rather, Kendall contends that the evidence proves that Collins beat her with a gun and "literally [held] her hostage." She maintains that 6,000 pages of cell phone records did not give any indication of her guilt and that because Collins was inside the gas station for "less than a minute," she could not have actively participated in the robbery. According to Kendall, "[n]o reasonable fact finder should have found that [she was] by any stretch of the imagination * * * a knowing and willing participant in any sort of crime that night." We disagree.

{¶53} 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 380, 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.*

{¶54} 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.” *Id.* at ¶ 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 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.*

{¶55} After reviewing the entire record, we cannot say that the jury clearly lost its way. The jury heard Kendall’s versions of the events. But the jury also heard the state’s version of the events. Although Kendall claims that she was essentially held “hostage” by Collins, the state argued that Kendall had many opportunities to leave Collins on the night of the robbery, including when Collins went into the gas station. The state told the jury to consider the 27 seconds after the brake lights came back on when Kendall was in the driver’s seat at the Shell station and could have driven away. The state told the jury to consider the fact that during her second interview with police, Kendall stated that they went to Collins’s friend’s house and his ex-girlfriend’s mother’s house “right before *we* robbed the gas station.” The state argued that Kendall “slipped” when talking to Trooper Jackson and then corrected herself, saying that she meant “right before *he* robbed the gas station.” (Emphasis added.) And the state also asked the jury to consider the

many inconsistencies in Kendall's different versions of what occurred on the night of August 30, 2015.

{¶56} The jury heard all of the evidence presented and chose to believe the state's version of events. After reviewing the entire record, we simply cannot say that this is the "exceptional case" where the evidence weighed heavily against the conviction.

{¶57} Kendall's second assignment of error is overruled.

IV. Court Costs

{¶58} In her third and fourth assignments of error, Kendall raises arguments related to the trial court's judgment ordering her to pay court costs. Therefore, we will address these assignments of error together. Kendall first argues in her third assignment of error that the trial court failed to properly impose court costs pursuant to R.C. 2947.23(A)(1) because it imposed costs in the sentencing entry without orally imposing costs at the sentencing hearing. The state concedes this error and we agree.

{¶59} This court recently decided en banc that when a trial court imposes court costs in the sentencing entry without orally notifying the defendant at the sentencing hearing that it was imposing costs, it is reversible error. *State v. Taylor*, 8th Dist. Cuyahoga No. 104243, 2017-Ohio-9270, ¶ 2. As we stated in *Taylor*, it is axiomatic that a criminal defendant has a fundamental right to be present at all critical stages of his criminal trial, including the imposition of sentence. *Id.* at ¶ 3, citing Section 10, Article I, Ohio Constitution, Crim.R. 43(A) and *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864.

{¶60} Accordingly, we sustain Kendall's third assignment of error based on the trial court's failure to orally notify her at the sentencing hearing that it was imposing costs. Kendall's remaining arguments regarding costs (in her third and fourth assignments of error) have been rendered moot. Thus, Kendall's third assignment of error is sustained in part and overruled in part, and her fourth assignment of error is overruled.

{¶61} Judgment affirmed in part, reversed in part, and remanded so that the trial court can hold a sentencing hearing for the sole purpose of allowing Kendall the opportunity to move for a waiver of the payment of costs.

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 issue out of this court directing the common pleas 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.

MARY J. BOYLE, JUDGE

EILEEN A. GALLAGHER, A.J., and
MELODY J. STEWART, J., CONCUR