[Cite as *State v. McClure*, 2010-Ohio-3002.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. ROBERT L. MCCLURE Appellant	C.A. No. 25070 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 06 1835

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

MOORE, Judge.

{¶1} Appellant, Robert McClure, appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} In the early morning hours of May 31, 2009, Charles King and Jessica Goff were sleeping in their home. Goff heard someone kick in her back door. She tried to arouse King from his sleep but was unsuccessful. A few moments later, McClure walked into the room, grabbed King from the bed, and attacked him. Prior to and during the attack, McClure demanded money and stated that he did not want to hurt King. King wrestled away from McClure and ran out of the home. McClure followed. Goff ran to a neighbor's home to call 911. Both King and Goff identified McClure as the attacker.

{¶3} On June 22, 2009, McClure was indicted on one count of aggravated burglary, in violation of R.C. 2911.11(A)(1), and one count of robbery, in violation of R.C. 2911.02(A)(2).

He pled not guilty and on September 8, 2009, the matter proceeded to a jury trial. The jury found McClure not guilty of robbery and guilty of aggravated burglary. The trial court sentenced him to six years of incarceration. He timely appealed from his conviction and has asserted one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> "[] MCCLURE'S CONVICTION FOR AGGRAVATED BURGLARY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND OUGHT TO BE REVERSED."

{¶4} In his sole assignment of error, McClure contends that his conviction for aggravated burglary was against the manifest weight of the evidence, and should therefore be reversed. We do not agree.

{¶5} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court 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 trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶6} This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

{¶7} McClure was convicted of aggravated burglary, in violation of R.C. 2911.11. Pursuant to this section,

> "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
>
> (1) The offender inflicts, or attempts or threatens to inflict physical harm on another[.]"

{¶8} Specifically, McClure contends that the jury clearly lost its way when it believed Goff and King's testimony over his own, as the testimony was not credible. With regard to King, McClure contends that his testimony was incompetent "because he lacked personal knowledge of the identity of his assailant." This argument is not supported by the record.

{¶9} McClure's main contention is that King's identification of him was suspect, because King testified that during that attack, he covered his face to protect against the blows. McClure concludes that because King could not testify to the clothes his attacker was wearing at the time, he must not have gotten a "good look at his attacker." The fact that the jury did not make these same conclusions based upon the evidence presented does not lead to a conclusion that McClure's conviction was against the manifest weight of the evidence.

{¶10} King and McClure testified that they were very good friends. King stated that on May 30, 2009, he was relaxing with Goff at home. The two sat outside and King drank a few cans of beer. Around 10:30 p.m., Goff and King went inside, had dinner and then watched a movie in their bedroom. King fell asleep and Goff tried to wake him to tell him that someone had broken into the house. "I opened my eyes and seen [McClure] beating on me, ripped me out of bed." King testified that McClure demanded money and informed Goff and King that he did

not want to hurt them. King stated that he saw McClure's face and heard his voice and was 100% sure that McClure was his attacker. King verified photos of injuries to his left eye, right elbow, left foot, and the right side of his neck. King stated that he was able to get away from McClure and run downstairs. McClure ran after him, and King saw him rapidly walk and get into a white vehicle. King stated that he believed McClure was after money because McClure knew that King had just received his paycheck the previous day.

{¶11} On cross-examination, King explained that approximately a week before the attack, he had been involved in a fight with three of Goff's friends. Goff left the home and, as a result of the attack, King asked McClure to stay with him for protection. Goff subsequently returned and upon seeing McClure at the home, demanded that he leave.

{¶12} Also on cross-examination, King reiterated his identification of McClure as his attacker. "There was no doubt about what I'm saying, he was a good friend of mine." He explained that he was not confused about the identity and that he "looked him dead in the eyes[.]" He explained that the TV was on and therefore there was light in the room. He stated that he did not remember what McClure was wearing. It is clear that, despite attempting to protect his face from the attack, King clearly saw McClure and identified him as his attacker, based upon not only a visual identification, but also by his voice. Further, King saw McClure after the attack as McClure walked from the house to a waiting car. Even if the jury were to conclude that King did not see McClure, it could still conclude that he could identify the voice of someone with whom he had spent a significant amount of time and considered a good friend.

{¶13} McClure contends that Goff's testimony was inconsistent regarding whether there were lights on at the time of the attack. Goff testified that the entire house was dark, but then later stated that the hall light was on. Regardless of whether any other lights were on, she

explained that the TV was on, so "I could see when [McClure] had walked in through the doorway, I seen his face." She explained that she could not remember if anyone turned on a light prior to or during the attack. She explained that there was no possibility that it was too dark in the house to identify the attacker.

{¶14} Whether the hall light or any other light was on during the attack is not dispositive of Goff's credibility. She clearly visually identified McClure as the attacker. She further testified that she had previously spoken with McClure and therefore recognized his voice. She stated that he demanded money and informed them he did not want to hurt them. When Goff called 911 immediately following the attack, she identified McClure as the attacker to the police. She testified that she observed McClure leave in a white vehicle. Goff testified that she did not "hate [McClure], but I don't like him." She verified that she had no ill will or any plan or scheme to get back at McClure. Finally, she confirmed that there was no possibility that she was mistaken as to the identity of the attacker.

{¶15} McClure further contends that Goff's testimony about his demand for money was incredible because during the attack he did not give King time to give him money, and because nothing in the house was disturbed. Testimony revealed, however, that McClure was in the home for several minutes before he came upstairs to find King and Goff in their bed. King testified that he always kept his money in his pants pockets, and that he had spent a significant amount of time with McClure. Thus, the jury could infer that McClure knew of King's habit of leaving his money in his pants' pocket, and during the time he was in the home he was looking for King's pants. In any event, the mere fact that McClure was unsuccessful in the robbery attempt does not negate both Goff and King's identification of McClure as their attacker.

{¶16} McClure testified that in 1998 he pled guilty to felony theft and in 2006, he pled guilty to felony domestic violence. He stated that he met King eight or nine years ago and that King has "been my weed connection for about six years now, I buy from him." King denied this allegation. McClure stated that the week prior to the incident, he had spoken with King. King was scared because several of Goff's friends had beaten him up and he was afraid they would come back. He invited McClure over to "have his back pretty much." He stated that King was "rattled" and was upset with Goff. Goff returned home several days later and "immediately started yelling at me and then [King] came downstairs and she started in on him." She then asked McClure to leave. McClure explained that Goff did not like him.

{¶17} McClure testified that on the night of May 30, 2009, he went with his friend, Freddy, to Freddy's step-father's house to watch a basketball game. He stated that Freddy was driving a black Cutlass Sierra. He explained that at approximately 12:30 a.m. they left the home to travel to Freddy's home in Canton. On the way to Canton, McClure received a call from his mother, via Freddy's phone. She informed him that King's house had been broken into and King identified McClure as the attacker. McClure explained that instead of driving to King's home to talk with police, he went to his mother's home.

{¶18} On cross-examination, McClure testified that he was drunk on the night of the incident. He stated that Freddy would not testify on his behalf because he had a warrant out for his arrest and did not want to come to the courthouse. He explained that Freddy was a convicted felon. McClure verified that he knew when King got paid and where he kept his money. McClure testified that, on the night of the incident, he was unemployed. He further explained that after his mother called him to tell him that King's house had been broken into; he could not convince Freddy to drive him to the home because Freddy had warrants out for his arrest and

would not go near the police. He explained that he stayed with a friend until he could afford an attorney and then turned himself over to police.

{¶19} McClure contends that King and Goff's story did not "match up" with his story. For example, he contends that King and Goff explained that after the attack, he fled in a white car while McClure testified that he was riding in a black car. "'The jury did not lose its way simply because it chose to believe the State's version of the events, which it had a right to do.'" *State v. Feliciano*, 9th Dist. No. 09CA009595, 2010-Ohio-2809, at ¶50, quoting, *State v. Morten*, 2d Dist. No. 23103, 2010-Ohio-117, at ¶28. Moreover, we do not agree with McClure's contention that "the tale told by Goff and King of an unprovoked attack by McClure does not make sense, either from a logical or evidentiary standpoint." King and Goff's testimonies were consistent. They both clearly identified McClure as their attacker. Accordingly, upon review of the record, we do not conclude that "in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Otten*, supra. McClure's assignment of error is overruled.

III.

{¶20} McClure's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

JACQUENETTE S. CORGAN, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.