[Cite as *State v. McCraney*, 2010-Ohio-6128.]

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

STATE OF OHIO Appellee v. DARSHAWN G. MCCRANEY Appellant	C.A. Nos. 24750 25285 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 10 3270 (A) (B)

DECISION AND JOURNAL ENTRY

Dated: December 15, 2010

Per Curiam.

{¶1} Defendant-Appellant Darshawn McCraney and Defendant-Appellant Adolph Owens appeal their convictions from the Summit County Court of Common Pleas. For the reasons set forth below, we affirm.

I.

{¶2} On the evening of October 2, 2008, two college students, Colin Holub and Roger Reinert, were walking to a nearby Speedway gas station from their apartment building. Four African-American males entered the Speedway ahead of them. A member of that group came up to Mr. Reinert while he was in line and said something in his ear. As Mr. Holub and Mr. Reinert were leaving the store, one of the members of the group put his arm around Mr. Reinert and asked him for money. The group began to follow Mr. Reinert and Mr. Holub. The two continued to walk towards their apartment complex. Mr. Reinert was walking in front and a member of the group walked next to him. Mr. Holub was walking behind Mr. Reinert and an

individual, later identified as Mr. Owens, was walking next to him. The remaining two members of the group followed a short distance behind Mr. Holub and Mr. Owens. The individual walking next to Mr. Reinert hit him. At that point, Mr. Reinert and Mr. Holub ran back towards their apartment and called the police. By the time the two came back outside, the police had already arrived and arrested the group. The individual who hit Mr. Reinert is not a subject of this appeal.

{¶3} That same evening, Christopher Lucas was attending a party at a friend's house in Akron. He decided to go to the nearby Speedway to buy alcohol for the party. Mr. Lucas noticed five African-American males standing outside the gas station. After buying two cases of beer, Mr. Lucas left and noticed that the five men were following fifteen to twenty feet behind him. Mr. Lucas heard running and then was punched, causing him to drop the beer. As he was getting up, he was hit again. Mr. Lucas saw the whole group running at him. He turned and ran back to the house as one of the members of the group was chasing him.

{¶4} When Mr. Lucas got to the house, he and several of the people from the party came back outside, looking for the individuals that attacked him. At the time, Mr. Owens was on his way up to the house to return the beer. Mr. Owens told the group of Mr. Lucas' friends that he saw what happened but was not a part of it.

{¶5} Mr. Lucas then saw members of the group that attacked him picking up beer. When that group saw Mr. Lucas and his friends, most of the group fled; only one individual continued to pick up beer. Shortly thereafter, two people from the group came back and they began to challenge Mr. Lucas and his friends. Officer Burnette, who was undercover at the time investigating a string of robberies and home invasions that were occurring in the area, interrupted the two groups. He became interested in the group of African-American males at the Speedway

as they matched the description of the perpetrators of the robberies and home invasions. Officer Burnette observed the entire incident with Mr. Lucas and confirmed that the group acted as a unit in the attack. Officer Burnette was able to identify both Mr. McCraney and Mr. Owens as being involved in the incident.

{¶6} Mr. McCraney and Mr. Owens were each indicted on two counts of robbery. Subsequently, supplemental indictments were filed, charging each man with one count of criminal gang activity. The matter proceeded to a jury trial, wherein the robbery counts were tried under a complicity theory. The jury found Mr. McCraney not guilty of the robbery charge involving Mr. Holub and Mr. Reinert, but guilty of the charge involving Mr. Lucas. Mr. McCraney was also found guilty of criminal gang activity. He was sentenced to a total prison term of four years. Mr. Owens was found guilty of all charges and sentenced to a total of four years in prison. This Court found Mr. Owens' original sentence to be void due to errors in post-release control notification, and the trial court subsequently resentenced Mr. Owens.

{¶7} Mr. McCraney's and Mr. Owens' appeals were consolidated. Mr. McCraney raises a single assignment of error for our review and Mr. Owens raises three assignments of error for our review.

II.

MR. OWENS' ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT PERMITTED THE ADMISSION OF DEFENDANT[']S JUVENILE COURT CONVICTIONS FOR GENERAL IMPEACHMENT PURPOSES[.]"

{¶8} In Mr. Owens' first assignment of error, he asserts that the trial court committed reversible error in allowing the admission of Mr. Owens' juvenile record. We disagree.

{¶9} Mr. Owens maintains that evidence of his juvenile adjudications was improperly admitted in violation of Evid.R. 609(D) and R.C. 2151.557(H). While it is true that Mr. Owens did object to the admission of evidence concerning his juvenile record, it does not appear from the transcript that he did so based upon either Evid.R. 609(D) or R.C. 2151.557(H). His objections during trial were primarily based upon hearsay and the issue of what evidence the State was required to present to establish that Mr. Owens was the same individual as the person discussed in the juvenile record. Further, the cases the trial court discussed related to the objection, which do not reference Evid.R. 609(D) or R.C. 2151.557(H), confirm that Mr. Owens was not objecting on that basis. Thus, we examine whether the trial court's ruling amounts to plain error. See *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 160-161 ("And although there was an objection to the challenged testimony from Smith and Rowekamp, defense counsel objected on physician-patient privilege grounds only. There was no objection based on Evid.R. 404, the only ground raised on this appeal. Because he failed to object at trial on the specific ground raised here, Tibbetts has forfeited the issue, limiting us to a plain-error analysis.").

{¶10} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The Supreme Court of Ohio has discussed three requirements necessary to establish plain error:

> "First, there must be an error, *i.e.*, a deviation from a legal rule. Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." (Internal citations omitted.) *State v. Barnes* (2002), 94 Ohio St.3d 21, 27.

"Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it. Crim.R. 52(B) states only that a reviewing court 'may' notice plain forfeited errors; a court is not obliged to correct them." Id.

{¶11} R.C. 2151.357(H) provides in pertinent part that

> "[e]vidence of a judgment rendered and the disposition of a child under the judgment is not admissible to impeach the credibility of the child in any action or proceeding. Otherwise, the disposition of a child under the judgment rendered or any evidence given in court is admissible as evidence for or against the child in any action or proceeding in any court in accordance with the Rules of Evidence * * * ."

Evid.R. 609(D) states that "[e]vidence of juvenile adjudications is not admissible except as provided by statute enacted by the General Assembly."

{¶12} Nonetheless, we cannot say the error amounts to plain error for several reasons. First, later during the trial, Mr. Owens testified in his own defense and discussed his prior juvenile adjudications on direct exam. Thus, even without the State having presented evidence of Mr. Owens' adjudications, evidence of Mr. Owens' adjudications would have still been part of the record. Second, Mr. Owens does not offer an explanation as to how the admission of evidence of his juvenile adjudications affected the outcome of the trial; instead he offers a conclusory statement that the admission of evidence "likely changed the outcome of this case." See *Barnes*, 94 Ohio St.3d at 27. Accordingly, we cannot say that plain error exists, and therefore, we overrule Mr. Owens' first assignment of error.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENDANT-APPELLANT OWENS' MOTION FOR JUDGMENT OF ACQUITTAL UNDER CRIM.R. 29."

{¶13} In Mr. Owens' second assignment of error he asserts that the trial court erred in denying his Crim.R. 29 motion and thus claims that his convictions for robbery and his conviction for participation in criminal gang activity are based upon insufficient evidence. Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." A Crim.R. 29

motion is asserted to test the sufficiency of the evidence. "Whether a conviction is supported by sufficient evidence is a question of law that [we] review[] de novo." *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, at ¶18, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). In reviewing the evidence, we do not evaluate credibility and make all reasonable inferences in favor of the State. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. The evidence is sufficient if, when viewing the evidence in a light most favorable to the prosecution, it allows the factfinder to reasonably conclude that the essential elements of the charged crime were proven beyond a reasonable doubt. Id.

ROBBERY – ROGER REINERT

{¶14} With respect to the robbery of Mr. Reinert, Mr. Owens asserts that the State presented insufficient evidence to establish that Mr. Owens committed the crime. We disagree.

{¶15} R.C. 2911.02(A)(2) states that "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, attempt to inflict, or threaten to inflict physical harm on another[.]" Further,

> "[t]o support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), 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." *State v. Johnson* (2001), 93 Ohio St.3d 240, syllabus.

Mr. Owens could be regarded as if he were the principal offender if he aided, helped, assisted, encouraged, or associated with others in the commission of, or for the purpose of committing, a crime. See R.C. 2923.03(F).

{¶16} The evidence is sufficient to support Mr. Owens' conviction for the robbery involving Robert Reinert. Mr. Holub affirmatively indentified Mr. Owens as part of the group following them home from Speedway and as the individual walking uncomfortably close to Mr. Holub while another member of the group assaulted Mr. Reinert after he refused to show that member of the group his wallet. While Mr. Holub at first seemed slightly unsure in his identification of Mr. Owens at trial, later he became confident and stated on cross-examination that "I know that's him[,]" in reference to Mr. Owens. Mr. Holub noted that the individual who was following him and Mr. Reinert had gold teeth. The evidence confirmed that Mr. Owens does have removable gold teeth. Further, when shown a picture of Mr. Owens, Mr. Holub identified the man in the photo as the individual that was walking next to him on the way home from Speedway. And while Mr. Reinert did not make an in-court identification of Mr. Owens, when he was shown a photograph of Mr. Owens taken the night of the incident, Mr. Reinert stated that "this looks like the kid that was standing behind me when I was walking back. He was talking to Colin [Holub]." Mr. Reinert stated the person walking next to Mr. Holub had gold teeth.

{¶17} Further there is sufficient evidence, if believed, to establish that Mr. Owens participated in the robbery of Mr. Reinert. Mr. Owens was identified as a member of a group that was in the Speedway while Mr. Reinert and Mr. Holub were there. That group began to follow Mr. Reinert and Mr. Holub as they left the gas station. Mr. Owens was identified as walking next to Mr. Holub, while another member of the group, who was walking next to Mr. Reinert, proceeded to ask him for money and then hit him. From Mr. Owens' close proximity to the group, and to Mr. Holub, before and during the assault, it would be reasonable to infer that Mr. Owens was in the very least complicit in the robbery. See *Johnson*, 93 Ohio St.3d at 245

(Internal quotations and citation omitted.) ("[P]articipation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed."). Thus, when viewing the evidence in a light most favorable to the prosecution, there is sufficient evidence to establish that Mr. Owens committed a robbery against Mr. Reinert. Thus, we overrule this portion of Mr. Owens' second assignment of error.

ROBBERY – CHRISTOPHER LUCAS

{¶18} Mr. Owens also asserts that the State failed to present sufficient evidence to establish that he was involved in the robbery of Mr. Lucas.

{¶19} Mr. Lucas testified that five African-American males followed him home from Speedway after he had purchased two cases of beer. He estimates they were fifteen to twenty feet behind him. One of the men asked him if there was a party. Shortly thereafter, Mr. Lucas heard running and was punched in the head. As he was getting up, he was punched again and turned and saw the five men running at him as a group. Officer Burnette, who was undercover at the time, noticed the five men following Mr. Lucas and witnessed the attack. Officer Burnette testified that Mr. Owens was part of that group and that all members of the group were involved.

{¶20} Based on the foregoing testimony, we conclude sufficient evidence was presented, if believed, to establish beyond a reasonable doubt that Mr. Owens was one of the members of the group who robbed Mr. Lucas. We therefore overrule this portion of Mr. Owens' second assignment of error.

PARTICIPATION IN CRIMINAL GANG ACTIVITY

{¶21} Mr. Owens asserts that his conviction for participation in criminal gang activity is based upon insufficient evidence. His sole contention is that the State failed to prove that Mr. Owens belonged to a gang. We disagree.

{¶22} R.C. 2923.42(A) provides that

> "[n]o person who actively participates in a criminal gang, with knowledge that the criminal gang engages in or has engaged in a pattern of criminal gang activity, shall purposely promote, further, or assist any criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code, or shall purposely commit or engage in any act that constitutes criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code."

"Accordingly, there is no criminal liability under Section 2923.42(A) unless the defendant actively participated in a gang, knew the gang engaged in criminal gang activity, and promoted, furthered, or assisted criminal conduct, or engaged in criminal conduct himself." *State v. Hairston*, 9th Dist. Nos. 23663, 23680, 2008-Ohio-891, at ¶15. "'[T]he common and ordinary meaning of 'actively participates in a criminal gang' is involvement with a criminal gang that is more than nominal or passive.'" Id. at ¶16, quoting *State v. Stallings* (2002), 150 Ohio App.3d 5, 11. The definitions section of the statute defines several of these phrases including "criminal gang," "pattern of criminal gang activity," and "criminal conduct."

> "'Criminal gang' means an ongoing formal or informal organization, association, or group of three or more persons to which all of the following apply: (1) It has as one of its primary activities the commission of one or more of the offenses listed in division (B) of this section. (2) It has a common name or one or more common, identifying signs, symbols, or colors. (3) The persons in the organization, association, or group individually or collectively engage in or have engaged in a pattern of criminal gang activity." R.C. 2923.41(A).
>
> "'Pattern of criminal gang activity' means, subject to division (B)(2) of this section, that persons in the criminal gang have committed, attempted to commit, conspired to commit, been complicitors in the commission of, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of two or more of any of the [listed offenses.] * * *." R.C. 2923.41(B)(1)
>
> "There is a 'pattern of criminal gang activity' if all of the following apply with respect to the offenses that are listed in division (B)(1)[] of this section and that persons in the criminal gang committed, attempted to commit, conspired to commit, were in complicity in committing, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in committing:

> "(a) At least one of the two or more offenses is a felony.
>
> "(b) At least one of those two or more offenses occurs on or after January 1, 1999.
>
> "(c) The last of those two or more offenses occurs within five years after at least one of those offenses.
>
> "(d) The two or more offenses are committed on separate occasions or by two or more persons." R.C. 2923.41(B)(2).
>
> "'Criminal conduct' means the commission of, an attempt to commit, a conspiracy to commit, complicity in the commission of, or solicitation, coercion, or intimidation of another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of an offense listed in division (B)(1)(a), (b), or (c) of this section or an act that is committed by a juvenile and that would be an offense, an attempt to commit an offense, a conspiracy to commit an offense, complicity in the commission of, or solicitation, coercion, or intimidation of another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of an offense listed in division (B)(1)(a), (b), or (c) of this section if committed by an adult." R.C. 2923.41(C).

{¶23} Mr. Owens' does not dispute that the Bloodline gang or its subgroups are criminal gangs within the meaning of the statute, that the gang engages in a pattern of criminal activity or that he knew that it did so; instead he appears to assert that he did not actively participate in the criminal gang. Viewing the evidence in a light most favorable to the prosecution, this Court concludes that the evidence was sufficient to establish beyond a reasonable doubt that Mr. Owens actively participated in a criminal gang.

{¶24} In the instant matter, two officers testified concerning the gang activity of the Bloodline gang, which the officers testified is an umbrella gang encompassing the Kaika Klan Outlaws ("KKO") and the Young Kaika Boys ("YKB"), among other smaller gangs whose territory is located in Akron's south corridor. Officer Schismenos, who is a twelve-year veteran of the Street Crimes Gang Unit and a certified gang specialist, testified about the history of the Bloodline gang and its subgroups and about the various crimes members of the gangs have committed. See R.C. 2923.41(A),(B); 2923.42(A). And while Officer Schismenos was not

officially tendered by the State as an expert witness, defense counsel did not object to his qualifications to testify, or challenge the same in this appeal. Officer Schismenos's qualifications and knowledge of gangs and gang activity were extensively detailed at trial. This Court has noted that:

> "The Ohio Supreme Court has held that a police officer may be qualified as an expert on gangs if he has gained knowledge and experience about gangs through investigating gang activities and if his testimony shows that he possesses specialized knowledge about gang symbols, cultures, and traditions, beyond that of the trier of fact." (Internal quotations and citations omitted.) *State v. Gaiter*, 9th Dist. No. 24758, 2010-Ohio-2205, at ¶61.

Officer Schismenos testified that the focus of criminal gangs is to make money. "They'll do what they have to do to earn money, to make money, anywhere from basic thefts in stores, auto thefts, robberies, home invasions, homicides. Drug trafficking is one of their major sources of money."

{¶25} Officer Criss testified about Mr. Owens' adult criminal record. As an adult, Mr. Owens had a conviction for trafficking in marijuana. Officer Criss found this as a significant indicator of Mr. Owens' connection to a gang as "[g]angs primarily are involved with the sale of drugs. It's one of their main forms of making money." Officer Schismenos testified with respect to Mr. Owens' juvenile record. Mr. Owens had juvenile adjudications for possession of criminal tools, theft, and receiving stolen property, crimes which are linked to gang activity. Officer Schismenos testified that gang members use the money from their criminal activity "to buy pricey items, flashy items like gold teeth, the gold chains, the jerseys, the expensive tennis shoes." It is undisputed that on the night Mr. Owens was arrested he was wearing a jersey and had removable gold teeth in his mouth.

{¶26} In addition, Officer Criss testified about a recent trend in gang members utilizing social networking sites.

> "The trend that we've been noticing and beginning to use is the fact that a lot of our suspected gang members in their photos and in some of the conversations they have will talk about criminal gang activity. There will be photos of individuals throwing up gang hand signs, photos of individuals doing other kinds of illegal activities, such as drugs, guns. And then there's also the kind of representing type of photos where they'll have large sums of cash, wear a lot of jewelry, kind of status-type things."

Further, Officer Schismenos testified that some important indicators of gang activity include the colors the individual wears, in this case red and black, the individual's associations with other known gang members, and continued criminal conduct by the individual.

{¶27} Officer Criss testified concerning several MySpace photographs. He noted that Mr. Owens and Mr. McCraney were friends on MySpace. Mr. Owens was pictured in two photographs on Mr. McCraney's MySpace page. In one of the photographs, Mr. Owens was wearing all black and he was standing with several other people who were wearing all black, or black and red. Further, several of the people in the photograph were displaying gang hand signs. The other photograph from Mr. McCraney's page depicted Mr. Owens, Mr. McCraney, and a known gang member.

{¶28} Officer Criss also discussed photographs taken from Mr. Owens' own MySpace page. One of the photographs depicted Mr. Owens in a red hat and a fur coat. Officer Criss said this was significant because red is a gang color and the fur coat is a status symbol in the gang community. In addition, Mr. Owens' gold teeth were also alluded to as being a status symbol. Another photograph from Mr. Owens' MySpace page depicted Mr. Owens holding a large sum of cash and wearing red and black clothing. Further, dollar signs are superimposed all over the photograph. Again Officer Criss stated that red and black are associated with the Bloodline gangs and the money symbols and the display of a large amount of cash represented that Mr. Owens was able to get large sums of money.

{¶29} Moreover, Officer Criss testified that Mr. Owens had a tribute on his MySpace page to a fallen gang member, which Officer Criss stated was common practice among fellow gang members. Officer Criss also testified concerning his prior knowledge of Mr. Owens and the group involved in the Speedway incidents:

> "[A] few of the names were familiar to myself and other members of the Gang Unit. Adolph Owens, I actually had personal knowledge of and dealt with him on the streets before. Darshawn McCraney, I was aware that Officer Schismenos had recently did a search warrant at his home related to criminal gang activity. And another individual, Jamayne Ruiz, I knew was a convicted gang member of the Hill Top gang for participating in a criminal gang[.]"

Thus, the group that was arrested consisted of at least one known gang member, further connecting the robberies themselves to gang activity. Finally, based upon all the evidence available, Officer Schismenos testified that in his expert opinion, Mr. Owens was a member of a criminal gang.

{¶30} Based upon the foregoing, and when viewing the evidence in a light most favorable to the prosecution, we can only conclude that sufficient evidence was presented to establish beyond a reasonable doubt that Mr. Owens participated in criminal gang activity. Despite Mr. Owens' contentions to the contrary, there was substantial evidence presented which warrants the conclusion that Mr. Owens actively participated in a criminal gang. See R.C. 2923.42(A); *Hairston* at ¶¶15-16. Mr. Owens was depicted wearing gang colors and wearing expensive, flashy items often purchased from the proceeds of criminal gang activity. Mr. Owens has a fairly extensive criminal record involving illegal activities designed to generate income, i.e. receiving stolen property, theft, trafficking in drugs. Further, Mr. Owens was pictured in photographs with known gang members and with individuals wearing gang colors and displaying gang signs. Finally, a certified gang specialist testified that he believed that Mr. Owens was in a criminal gang

ASSIGNMENT OF ERROR III

"DEFENDANT-APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶31} In Mr. Owens' third assignment of error, he contends that his convictions are against the manifest weight of the evidence.

{¶32} In reviewing a challenge to the weight of the evidence, the 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. Thomas*, 9th Dist. Nos. 22990, 22991, 2006-Ohio-4241, at ¶7, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶33} In reversing a conviction as being against the manifest weight of the evidence, "the appellate court sits as the 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." Id. at ¶8, citing *Thompkins*, 78 Ohio St.3d at 387. Accordingly, "this Court's 'discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶34} While Mr. Owens asserts that his convictions are against the manifest weight of the evidence, he presents no specific argument with respect to the weight of the evidence. See App.R. 16(A)(7). Instead, he merely reiterates some of the assertions he made with respect to the sufficiency of the evidence. Having already considered the sufficiency of the evidence, we decline to do so again.

{¶35} This Court, after a thorough review and an independent consideration of the evidence, cannot conclude that Mr. Owens' robbery convictions are against the manifest weight of the evidence. In the instant matter, Mr. Owens did testify at trial. He denied being a part of

either robbery and denied being part of a gang. In addition to Mr. Owens' own testimony, there was additional evidence presented which supported the conclusion that Mr. Owens was not involved in the robbery. Mr. Lucas testified that Mr. Owens did return the beer and did deny his involvement. However, Mr. Lucas also testified that he did not believe Mr. Owens' return of the beer was due to his lack of involvement in the robbery; rather Mr. Lucas stated he believed Mr. Owens was returning the beer in an effort to create the appearance that he had not been involved. In light of the conflicting evidence, the jury was free to disbelieve his testimony and instead believe that of the victims and officers. We cannot say it was unreasonable for the jury to conclude that Mr. Owens was involved in the robbery. While it may be unusual for someone who committed a robbery to return the stolen property, such activity is not incompatible with having committed the crime. Thus, it would not have been unreasonable for the jury to conclude that Mr. Owens returned the beer, not because he was not involved, but because he wanted it to appear that he was not involved, or because he wanted to avoid a confrontation with Mr. Lucas and his friends. After reviewing the testimony, we cannot say that the jury was unreasonable, or lost its way, in disbelieving Mr. Owens' testimony.

{¶36} In addition we cannot say that Mr. Owens' conviction for participation in criminal gang activity is against the manifest weight of the evidence. It is true that the individual pieces of evidence, i.e. wearing black and/or red clothing, associating with known gang members or with individuals displaying gang signs, or being convicted of money-generating crimes, could be completely unrelated to criminal gang activity; however, when all of these factors are present together, combined with testimony from an officer who researches and investigates criminal gangs on a daily basis and who averred that it was his opinion that Mr. Owens was in a criminal gang, it is not unreasonable for a jury to conclude that Mr. Owens did actively participate in a

criminal gang. While it is true that Mr. Owens denied being a gang member and also provided another explanation for his association with Mr. McCraney and the known gang member he is pictured with, it was not unreasonable for the jury to disbelieve Mr. Owens' testimony given the other conflicting evidence presented. Mr. Owens' third assignment of error is overruled.

MR. MCCRANEY'S ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR

"APPELLANT'S CONVICTIONS FOR ROBBERY AND PARTICIPATING IN CRIMINAL GANG WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶37} In Mr. McCraney's sole assignment of error, he asserts that his convictions for robbery and criminal gang activity are against the manifest weight of the evidence.

{¶38} We begin by noting that Mr. McCraney spends a good portion of his argument discussing the lack of evidence connecting him to the robbery of Mr. Reinert. The jury, however, found Mr. McCraney not guilty of the robbery of Mr. Reinert, and thus, we see no reason to discuss this robbery as it relates to Mr. McCraney.

ROBBERY – CHRISTOPHER LUCAS

{¶39} With respect to the robbery of Mr. Lucas, Mr. McCraney appears to assert that the conclusion that Mr. McCraney was one of the people who committed the robbery was against the manifest weight of the evidence as there was insufficient evidence that Mr. McCraney was involved or did anything illegal. We disagree.

{¶40} Mr. Lucas testified that he was attending a party at a friend's house in Akron. He decided to go to the nearby Speedway to buy alcohol for the party. Mr. Lucas noticed five African-American males standing outside the gas station. After buying two cases of beer, Mr. Lucas left and noticed that the five men were following fifteen to twenty feet behind him. He

stated that most of the group wore black and that one person wore a black hat with a logo on it. One of the men asked Mr. Lucas if there was a party and if so where it was located. Then, Mr. Lucas heard running and was punched, causing him to drop the beer. As he was getting up, he was hit again. Mr. Lucas saw the whole group running at him. He testified that the group moved as one. One of the group chased him back to the house and the rest of the group began to pick up the beer.

{¶41} When Mr. Lucas got to the house, he and several of the people from the party came back outside, looking for the individuals that attacked him. At the time, one of the men, who Mr. Lucas identified as Mr. Owens, was on his way up to the house to return the beer. Mr. Owens told the group of Lucas' friends that he saw what happened but was not a part of it.

{¶42} Mr. Lucas then saw members of the group that attacked him picking up beer. Mr. Lucas stated that most of the group fled and only one individual continued to pick up beer; however, shortly thereafter, two people from the group came back and they began to confront Mr. Lucas and his friends. Officer Burnette then appeared and interrupted the groups.

{¶43} Officer Burnette testified that on that evening he was undercover investigating a string of robberies and home invasions that were occurring in the area. He became interested in the group of African-American males at the Speedway as they matched the description given of the perpetrators of the robberies and home invasions. Officer Burnette observed the entire incident with Mr. Lucas and confirmed that the group acted as a unit in the attack and that it appeared coordinated. He stated that the group ran at Mr. Lucas and surrounded him in a horseshoe pattern. Officer Burnette observed a man in a blue shirt punch Mr. Lucas, causing him to drop the beer. Several members of the group then began to pick up the beer. Officer Burnette then called for back-up. He testified that Mr. Lucas ran back to the house, but shortly

after he came back out with several other people. The suspects were still picking up beer. Officer Burnette observed the man in a baseball cap with a logo motion to the others to "come on." At that point, Detective Parnell arrived on the scene. Officer Burnette then observed the man in the baseball cap then try to separate himself from the group and to try to "appear inconspicuous." Officer Burnette identified Mr. McCraney as that individual. Officer Burnette then approached and arrested the suspect who was still confronting Mr. Lucas and his friends. At trial, Officer Burnette was also able to identify Mr. Owens as being involved in the incident.

{¶44} Detective Parnell testified that on the evening of October 2, 2008, he was working undercover in an unmarked car. He heard a radio dispatch from Officer Burnette stating that there had been a fight at the Speedway at Brown and Exchange Streets, so he turned around and proceeded in that direction. A second call came in from Officer Burnette stating that African-American males had started a fight and were running across the street toward Wheeler Street. Detective Parnell heard Officer Burnette say that students had been assaulted and beer had been stolen. As Detective Parnell approached the area, other marked cars arrived on the scene. Detective Parnell observed the group of males and noticed one member of the group break off from it as the cruisers were coming towards him. Detective Parnell believed that individual was attempting to act like he was not a part of the group. Detective Parnell identified Mr. McCraney as the individual who broke apart from the group.

{¶45} From the evidence presented, we cannot conclude that the jury was unreasonable or lost its way in finding that Mr. McCraney was one of the individuals involved in the robbery of Mr. Lucas. Further, it was not unreasonable for the jury to conclude that Mr. McCraney played an active role in the robbery. Mr. Lucas observed the entire group of five individuals run at him after being hit. He described one of the individuals as wearing a hat with a logo. Officer

Burnette was able to identify Mr. McCraney as the individual who was wearing a baseball cap with a logo. Further, Officer Burnette observed the entire incident and described the attack on Mr. Lucas as coordinated and that the group all ran at Mr. Lucas. The fact that Mr. McCraney did not have any beer on him when he was arrested does not mean that he did not actively participate in the robbery. After a thorough review of the record we cannot conclude that the jury lost its way in convicting Mr. McCraney of the robbery of Mr. Lucas.

PARTICIPATION IN CRIMINAL GANG ACTIVITY

{¶46} Mr. McCraney maintains that his conviction for participating in a criminal gang is against the manifest weight of the evidence. Basically he asserts a sufficiency argument and maintains that there was no evidence that Mr. McCraney had anything to do with a gang and there was no evidence that he committed a criminal offense "in furtherance of the gang activity."

{¶47} Again we reiterate that "there is no criminal liability under Section 2923. 42(A) unless the defendant actively participated in a gang, knew the gang engaged in criminal gang activity, and promoted, furthered, or assisted criminal conduct, or engaged in criminal conduct himself." *Hairston* at ¶15. In addition, we have stated that "to be criminally liable under Section 2923.42(A) for purposely promoting, furthering, or assisting any criminal conduct, a person would 'have to be criminally liable as an aider or abettor to a crime committed by a fellow gang member.'" Id. at ¶19, quoting *Stallings*, 150 Ohio App.3d at 12.

{¶48} Considering his argument in terms of the statute, it thus appears that Mr. McCraney's argument is that he did not actively participate in a criminal gang and that he did not further criminal conduct of another gang member or commit criminal conduct himself. We disagree.

{¶49} We begin by noting that there was substantial evidence presented connecting Mr. McCraney to the Bloodline/KKO/YKB gangs. Based on the photos and testimony, Mr. McCraney's MySpace page supports the conclusion that he has an affiliation with the gang. There are several photographs of Mr. McCraney wearing red and black clothing, the colors of the Bloodline/KKO/YKB gangs. In addition there are multiple photographs of Mr. McCraney making the hand sign for the YKB gang. This is the only gang sign Mr. McCraney depicts in the photographs, suggesting that he is not randomly making hand gestures. Officer Schismenos testified that in his experience, most average citizens not involved with gangs are not familiar with the local gang hand signs. Mr. McCraney is often pictured with members of his family who are also often shown making different gang signs. Like Mr. Owens, Mr. McCraney is also seen in pictures with large amounts of cash and also has a tribute on his page to David Rucker, a deceased gang member. However, unlike Mr. Owens, some of the captions underneath the photographs also connect Mr. McCraney to gang activity. Officer Criss testified that the only person who can post pictures on someone's MySpace page is the person who has the password. There was no evidence presented at trial that suggested that someone other than Mr. McCraney had posted the pictures and captions on his MySpace page. Thus, it was not unreasonable for the jury to conclude that Mr. McCraney posted all the pictures and captions under the pictures on his page. In one of the photos, Mr. McCraney is standing next to a poster from the movie "Scarface[.]" The caption under the photo reads "O.G[.,]" which Officer Criss testified stands for original gangster, which he described as "kind of a status phrase amongst gang members for the older gang members, the ones that actually originated or formed the gang." In addition, Officer Criss stated that the movie poster was also significant.

> "Scarface is a representation of being a successful drug dealer and making lots of money and being a violent person. We've seen Scarface over the past years

> become associated quite frequently with the gang – the gang society and trying to represent that they are a kind of, say, Scarface-type of persona, that they're violent, they make lots of money and they defy the law."

One of the photographs depicts Mr. McCraney along with several other people; some people in the group are wearing gang colors, one person is displaying large sums of money and one person is making a gang sign. The caption below the photograph reads "put your mug's on and be reppit out that's how i fill[.] [sic]" Officer Schismenos testified that "[r]eppit is representing their gang by either throwing up the hand signs, wearing the colors, wearing the graffiti, the clothing, or just yelling it out, demonstrating their affiliation."

{¶50} Further there was testimony that Officer Schismenos had, prior to the October 2, 2008 incidents, searched Mr. McCraney's home for evidence relating to criminal gang activity. Officer Schismenos testified that during his search of two residences, he found photographs of Mr. McCraney and his brothers displaying gang signs and wearing Bloodline colors. The photographs depict Mr. McCraney displaying the YKB hand sign. Thus, after reviewing all the evidence, we cannot say that it was unreasonable for the jury to conclude that Mr. McCraney was an active participant in the Bloodline gang via one of its subgroups, namely, the YKB.

{¶51} With respect to Mr. McCraney's argument that there was no evidence presented that he committed any crimes, let alone crimes in furtherance of gang activity, we also disagree. While Mr. McCraney has challenged his conviction for the robbery of Mr. Lucas, we have previously affirmed that conviction. Thus, there was evidence that Mr. McCraney engaged in criminal conduct. "'Criminal conduct' means the commission of, an attempt to commit, a conspiracy to commit, complicity in the commission of, or solicitation, coercion, or intimidation of another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of an offense listed in division (B)(1)(a), (b), or (c) of this section * * * ." R.C.

2923.41(C). The offense listed in R.C. 2923.41(B)(1)(a) is any felony. There is no dispute that robbery is a felony. R.C. 2911.02(B). Further, there was evidence that even if Mr. McCraney himself did not commit the robbery, his conviction via a theory of complicity was not against the manifest of the evidence. Moreover, there was testimony that one of the individuals arrested with the group that evening was a convicted gang member of the Hill Top gang, a gang that is also sometimes affiliated with the Bloodline gang. Thus, we can say there was evidence that Mr. McCraney was "'criminally liable as an aider or abettor to a crime committed by a fellow gang member.'" *Hairston* at ¶19, quoting *Stallings*, 150 Ohio App.3d at 12. In light of the foregoing, and after a thorough, independent review of the evidence, we cannot say that the jury lost its way in convicting Mr. McCraney of participating in criminal gang activity. Therefore we overrule this portion of Mr. McCraney's assignment of error.

III.

{¶52} We overrule Mr. Owens' and Mr. McCraney's assignments of error. 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.

DONNA J. CARR
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

BELFANCE, P. J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶53} I concur with the majority of the Court's judgment and analysis. However, I respectfully dissent from the majority's conclusion that there was sufficient evidence presented to convict Mr. Owens of participation in criminal gang activity. Instead, I would conclude that because there was insufficient evidence to establish that Mr. Owens himself actively participated in a criminal gang, there was insufficient evidence to convict Mr. Owens of participation in criminal gang activity. See *State v. Hairston,* 9th Dist. Nos. 23663, 23680, 2008-Ohio-891, at ¶¶15-18.

{¶54} We have made it clear that simply associating with members of a gang is not sufficient evidence of participation in criminal gang activity. See, e.g., id. at ¶18. ("Sufficient evidence did not exist, however, to support the jury's finding that Mr. Griffin actively participated in a gang. Although Mr. Griffin may have been present when known gang members had been arrested in the past, there was no evidence that Mr. Griffin had anything more than nominal or passive association with the gang."). In addition, although it is permissible to allow

expert testimony concerning gangs, we have only affirmed convictions for participation in criminal gang activity under circumstances where there was actual evidence that the person charged had engaged in acts that constituted indicators of active participation in a criminal gang. See, e.g., *State v. Gaiter*, 9th Dist. No. 24758, 2010-Ohio-2205, at ¶¶62-63 (The evidence was sufficient to support the conclusion that defendant actively participated in a criminal gang when, inter alia, the defendant had strong ties to known gang members, almost all his contacts with the police occurred in gang territory, he was depicted in multiple photographs wearing all red, the gang's official color, he was photographed making gang hand signs, and he had two tattoos representative of two deceased gang members.). In this case, there was no evidence that Mr. Owens committed those acts, rather there was only evidence that Mr. Owens was in the presence of others who engaged in the acts typically associated with participation in a criminal gang. For example, Mr. Owens was never seen wearing red and black, the colors of the gang. Rather, he was depicted in several photographs wearing either red or black alone. While Officer Criss did discuss one photograph of Mr. Owens and stated that it was significant because Mr. Owens was wearing both red and black, examination of that photograph reveals that Mr. Owens was wearing red and either purple or dark blue. Mr. Owens was never in any photographs where he was making the gang hand sign. Instead, he was depicted in a photograph where persons other than Mr. Owens were making the gang hand sign. Furthermore, Mr. Owens did not have gang-connected tattoos or gang-connected graffiti on his clothing. In addition, all of the photographs containing Mr. Owens with either known gang members or individuals making gang hand signs were on Mr. McCraney's MySpace page, and not Mr. Owens'. There was no testimony that gang-related evidence was discovered at Mr. Owens' home. Further, while it is true that Mr.

Owens has prior convictions, one of which was for drug trafficking, there was no testimony that such crimes were, or were not, gang related.

{¶55} Essentially, the majority's decision allows one to conclude that someone actively participates in a criminal gang if that person has committed theft or drug crimes in the past, wears one color associated with a gang, and associates with people who are in a gang or who make gang hand signs. I also find it troubling that the majority suggests that despite the lack of evidence concerning the significant indicators of participation in gang activity, the gap in the evidence is satisfied simply because an officer stated that he believed Mr. Owens actively participated in a criminal gang. The State was charged with the burden of submitting sufficient evidence with respect to each element of the offense of participation in criminal gang activity as defined in R.C. 2923.42(A). One distinct element of the offense is that the person "actively participates in a criminal gang[.]" R.C. 2923.42(A). I cannot conclude that such evidence is sufficient to meet the State's burden to establish beyond a reasonable doubt that Mr. Owens actively participated in a criminal gang. Consequently, I would reverse Mr. Owens' conviction for participation in criminal gang activity and therefore not consider Mr. Owens' argument concerning whether that conviction was against the manifest weight of the evidence. See App.R. 12(A)(1)(c). With respect to the majority's resolution of the remaining arguments, I concur.

APPEARANCES:

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