[Cite as *State v. Townsend*, 2015-Ohio-1124.]

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

STATE OF OHIO Appellee v. JAQUAN D. TOWNSEND Appellant	C.A. No. 27316 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2013 08 2168 (B)

DECISION AND JOURNAL ENTRY

Dated: March 25, 2015

HENSAL, Presiding Judge.

{¶1} Jaquan Townsend appeals his convictions for aggravated robbery, felonious assault, and assault in the Summit County Court of Common Pleas. For the following reasons, this Court affirms.

I.

{¶2} Early on the morning of July 14, 2014, Heath Phillibert arranged to meet Cameron Jenkins at a parking lot in Sagamore Hills to buy an eighth of an ounce of marijuana. When Mr. Phillibert arrived, he was with two friends, Brenden Boch and Cole Heim, who went to the same high school as him. Mr. Jenkins was also accompanied by two men. The one who drove Mr. Jenkins to the location, Victor Freeman, introduced himself as Vic and told them that he was from a different city. The other man did not say anything. Mr. Boch testified that he was almost certain the other man was Jaquan Townsend, who he knew from school, but was not completely sure because the man did not acknowledge him when greeted.

{¶3} According to Mr. Boch, after Mr. Jenkins produced the marijuana, Mr. Phillibert asked Mr. Jenkins to weigh it. Someone eventually found a scale, and the men crowded around it. When the amount came up light, Mr. Jenkins explained that he must have dropped some on the ground. Although it was dark, a few of the men, including Mr. Heim, bent over and attempted to look for the missing marijuana by the light of their cell phones. Suddenly, the friend of Mr. Phillibert who had not identified himself started a fight by kicking Mr. Heim in the face, knocking him out. Mr. Phillibert and Mr. Jenkins began scuffling, with Mr. Jenkins being pushed to the ground after the unidentified man came over to help. Mr. Boch and Mr. Freeman, however, just looked at each other, surprised about what was happening and wondering whether they were going to have to fight each other. The stalemate broke when Mr. Freeman ran back to his car. After subduing Mr. Phillibert, Mr. Jenkins and the unidentified man grabbed the marijuana and returned to Mr. Freeman's car. The trio left shortly thereafter. Mr. Boch and Mr. Phillibert, meanwhile, woke Mr. Heim and took him to a nearby emergency medical center for treatment.

{¶4} Upon learning about the incident, the Sagamore Hills police department assigned Officer Timothy Ellis to investigate it. In the course of his investigation, Officer Ellis learned that, a few hours before the meeting, several of the individuals had been seen together at a graduation party that was a short distance from where it occurred. He also learned from Mr. Freeman that Mr. Townsend was the unidentified man who initiated the fight. At trial, Mr. Freeman testified that he drove to the parking lot with Mr. Jenkins and Mr. Townsend. He corroborated that the fight started when Mr. Townsend kicked one of the other men in the face. He said that, after it was over, he, Mr. Jenkins, and Mr. Townsend drove to Mr. Jenkins's house to smoke the marijuana.

{¶5} The Grand Jury indicted Mr. Townsend for aggravated robbery, felonious assault, and two counts of assault. A jury found him guilty of aggravated robbery, felonious assault, and one of the assault charges. The trial court sentenced him to a total of five years imprisonment. Mr. Townsend has appealed, assigning three errors.

II.

ASSIGNMENT OF ERROR I

> THE STATE OF OHIO FAILED TO ESTABLISH BEYOND A REASONABLE DOUBT WHEN VIEWED BY THE MANIFEST WEIGHT OF THE EVIDENCE THAT JAQUAN TOWNSEND EITHER PARTICIPATED OR WAS AN ACCOMPLICE IN THE CRIMES CHARGED; THERE IS INSUFFICIENT EVIDENCE TO SUPPORT MR. TOWNSEND'S CONVICTION OF AGGRAVATED ROBBERY, FELONIOUS ASSAULT, AND ASSAULT AND THUS APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND BASED ON INSUFFICIENT EVIDENCE AS PERTAINS TO THE FINDING THAT HE COMMITTED THE CRIMES[.]

{¶6} Mr. Townsend argues that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Whether a conviction is supported by sufficient evidence is a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In making this determination, we must view the evidence in the light most favorable to the prosecution:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

State v. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. If, on the other hand, a defendant asserts that his conviction is against the manifest weight of the evidence:

> [A]n 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, 33 Ohio App.3d 339, 340 (9th Dist.1986). Weight of the evidence pertains to the greater amount of credible evidence produced in a trial to support one side over the other side. *Thompkins* at 387. An appellate court should only exercise its power to reverse a judgment as against the manifest weight of the evidence in exceptional cases. *State v. Carson*, 9th Dist. Summit No. 26900, 2013–Ohio–5785, ¶ 32, citing *Otten* at 340.

{¶7} Mr. Townsend argues that there was insufficient evidence to prove that he was at the parking lot. He contends that the lot was too dark for anyone to identify the man who was with Mr. Jenkins and Mr. Freeman, that Mr. Freeman was biased, and that Mr. Boch's testimony was too unreliable to corroborate Mr. Freeman's testimony.

{¶8} Regarding whether there was sufficient evidence, we note that Mr. Boch and Mr. Freeman both identified Mr. Townsend as the man who arrived at the parking lot with Mr. Jenkins and Mr. Freeman. Although Mr. Boch did not know who knocked Mr. Heim out, he testified that he saw Mr. Townsend kick Mr. Phillibert. Mr. Freeman, meanwhile, testified that he saw Mr. Townsend kick Mr. Heim in the face. Viewing Mr. Boch's and Mr. Freeman's testimony in a light most favorable to the State, it was sufficient to establish Mr. Townsend's identity.

{¶9} Regarding whether Mr. Townsend's convictions are against the weight of the evidence, Mr. Boch testified that he was 99 percent certain that Mr. Townsend was the third individual who arrived with Mr. Jenkins and Mr. Freeman. He said that, although it was night, the moon was out and several of the men were using their cell phones to light the area. He also

said that he was familiar with Mr. Townsend from having gone to school with him. Mr. Freeman confirmed Mr. Boch's testimony, verifying that he drove Mr. Jenkins and Mr. Townsend to the parking lot. The fact that Mr. Townsend was one of the men in the parking lot was also supported by the statements Mr. Townsend made in telephone calls from the jail. In those calls, Mr. Townsend discussed details about the crime such as the other people involved and the quantity of the marijuana. He also attempted to coordinate the stories of the other men so that the State would not be able to prove he was at the meeting.

{¶10} In determining whether a conviction is against the manifest weight of the evidence, this Court has recognized that issues of credibility are primarily reserved for the trier of fact. *State v. Carr*, 9th Dist. Summit No. 26661, 2014-Ohio-806, ¶ 42. "This Court will not overturn the trial court's verdict on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witness[es]' testimony over the testimony of others." *State v. Hill*, 9th Dist. Summit No. 26519, 2013-Ohio-4022, ¶ 15. This Court has also recognized that the fact that an accomplice of the defendant has received leniency in exchange for his testimony does not, necessarily, make his testimony incredible. *See State v. Abel*, 9th Dist. Lorain No. 08CA009506, 2009-Ohio-2516, ¶ 34; *State v. Figueroa*, 9th Dist. Summit No. 22208, 2005-Ohio-1132, ¶ 11.

{¶11} In light of Mr. Boch's and Mr. Freeman's testimony and Mr. Townsend's jailhouse calls, we conclude that the jury did not lose its way when it found Mr. Townsend guilty of the offenses. Mr. Townsend's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE COURT ERRED IN ALLOWING IN THE RECORDINGS OF THE JAIL CALLS BETWEEN JAQUAN, HIS CO-DEFENDANT CAMERON, AND THE OTHERS[.]

{¶12} Mr. Townsend next argues that the trial court incorrectly allowed the State to play the recordings of his jailhouse telephone calls because they were inadmissible hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). A statement is not hearsay, however, if it "is offered against a party and is * * * the party's own statement * * *." Evid.R. 801(D)(2).

{¶13} In this case, the telephone recordings that were played by the State were placed by Mr. Townsend. His "statements in the recordings are admissions and are, by definition, not hearsay." *State v. Tyler*, 196 Ohio App.3d 443, 2011-Ohio-3937, ¶ 36 (4th Dist.). Similarly, the statements of the other individuals on the recordings were not hearsay because they were admitted simply to provide context for Mr. Townsend's statements. *See State v. Brown*, 1st Dist. Hamilton No. C-120327, 2013-Ohio-2720, ¶ 25; *State v. Twitty*, 2d Dist. Montgomery No. 18749, 2002-Ohio-5595, ¶ 20-21.

{¶14} Mr. Townsend argues that some of the jailhouse calls were not admissible because they were made by "John L. Lewis," not him. Officer John Toth testified that, when someone is booked at the jail, they are assigned an ID and personalized identification number, which they can use to make telephone calls from the jail. He testified that inmates often share their information, allowing them to make calls under a different name. Regarding Mr. Townsend, Office Toth testified that he examined all of the numbers that Mr. Townsend called and noticed that Mr. Lewis's ID had also been used to make calls to some of the numbers. He said that he had listened to the recordings of all of the calls and that it was the same voice on each call, whether it was made under Mr. Townsend's ID or Mr. Lewis's ID. Officer Ellis also testified that he had listened to the calls, was familiar with Mr. Townsend's voice, and that it was

Mr. Townsend who had made all of the calls, whether with Mr. Lewis's or his own ID. We further note that, on one of the "John L. Lewis" calls, the caller indicates that they can talk about anything because he is using "someone else's phone." The recipient of the call later identifies the caller as "Quan," a short-form of Mr. Townsend's first name.

{¶15} Upon review of the record, we conclude that the State presented sufficient circumstantial evidence to establish that Mr. Townsend made the "John L. Lewis" calls. *See* Evid.R. 901(B)(5); *Brown* at ¶ 21-22, *Davis v. Sun Refining and Marketing Co.*, 109 Ohio App.3d 42, 54 (2d Dist.1996). Mr. Townsend's statements during the calls, therefore, were admissible as admissions by a party opponent under Evidence Rule 801(D)(2). *Huber Heights v. Gilreath*, 2d Dist. Montgomery Nos. 19234, 19235, 2002-Ohio-4334, ¶ 22. Mr. Townsend's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT ERRED IN PERMITTING THE STATE TO USE A PREEMPTORY CHALLENGE IN A RATIONALLY DISCRIMINATORY FASHION THEREBY DENYING MR. TOWNSEND EQUAL PROTECTION UNDER THE LAW AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶16} Mr. Townsend also argues that the trial court incorrectly allowed the State to use a preemptory challenge on an African-American juror. He argues that the State failed to establish that it had a race-neutral explanation for excusing the juror.

{¶17} "The Equal Protection Clause of the United States Constitution prohibits deliberate discrimination based on race by a prosecutor in his exercise of peremptory challenges." *State v. Campbell*, 9th Dist. Summit No. 24668, 2010-Ohio-2573, ¶ 33, citing *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). "A court adjudicates a *Batson* claim in three steps." *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶ 61, quoting *State v. Bryan*, 101 Ohio St.

3d 272, 2004-Ohio-971, ¶ 106. "First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination." *Id.*, quoting *Bryan* at ¶ 106. "Second, if the trial court finds this requirement fulfilled, the proponent of the challenge must provide a racially neutral explanation for the challenge." *Id.*, quoting *Bryan* at ¶ 106. "Finally, the trial court must decide based on all the circumstances whether the opponent has proved purposeful racial discrimination." *Id.*, quoting *Bryan* at ¶106. "The judge must 'assess the plausibility' of the prosecutor's reason for striking the juror 'in light of all evidence with a bearing on it.'" *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, ¶ 63, quoting *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005). "A facially neutral reason for a strike may indicate discrimination, if the state uses it only to eliminate jurors of a particular cognizable group." *State v. Murphy*, 91 Ohio St.3d 516, 529 (2001). "A trial court's finding of no discriminatory intent will not be reversed on appeal unless clearly erroneous." *Pickens* at ¶ 64.

{¶18} The juror that the State excused was divorced and had three adult children. He had been a schoolteacher for 17 years, teaching health and physical education and also serving as an intervention specialist, but had resigned to start a nonprofit after-school care program for at-risk children. He had previously served on a Grand Jury and had been convicted seven years earlier for drug abuse involving marijuana and cocaine. The juror stated that he it would be "tough" for him to convict someone just on the basis of witness testimony without any physical evidence. He also initially opined that direct evidence and circumstantial evidence should not be given the same weight. When Mr. Townsend objected to the State's use of a preemptory challenge on the juror, the prosecutor explained that he was removing the juror because of the juror's drug abuse charge, because his work with at-risk youth might make him sympathetic to

the defendant, his reluctance to believe circumstantial evidence, "and a couple other issues he indicated some reluctance about where the law was * * *."

{¶19} A prosecutor's explanation for using a preemptory challenge on a juror does not have "to rise to the level justifying exercise of a challenge for cause." *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 97, quoting *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). In fact, "a peremptory challenge may be exercised for *any* racially-neutral reason." (Emphasis in original) *State v. Moss*, 9th Dist. Summit No. 24511, 2009-Ohio-3866, ¶ 12. This juror's answers to the questions posed gave rise to more than one-racially neutral reason why the State might want to exercise a preemptory challenge. Further, upon review of the record, we note that each of the potential jurors that the prosecution excused using its peremptory challenges had stated that they were in favor of legalizing marijuana use, including the African-American juror who was the subject of the *Batson* challenge. As the facts of this case involved an illicit marijuana sale between young adults, we conclude that the trial court did not clearly err when it determined that the prosecution had credible racially-neutral reasons for excluding the African-American juror. Mr. Townsend's third assignment of error is overruled.

III.

{¶20} Mr. Townsend's assignments of error are 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(C). 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.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
CANNON, J.
CONCUR.

(Cannon, J. of the Eleventh District Court of Appeals, sitting by assignment.)

APPEARANCES:

RICHARD P. KUTUCHIEF, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RACHEL M. RICHARDSON, Assistant Prosecuting Attorney, for Appellee.