[Cite as *State v. Sharrock*, 2015-Ohio-2253.]

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

STATE OF OHIO	C.A. No. 27452
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DAVID C. SHARROCK	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 14 02 0516

DECISION AND JOURNAL ENTRY

Dated: June 10, 2015

WHITMORE, Judge.

{¶1} Appellant, David C. Sharrock, appeals from his conviction in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} On February 20, 2014, police responded to a call regarding a fight on North Main Street in Akron. Upon arriving at the scene, police learned that John Lick had been the victim of an assault. At trial, Lick testified that Sharrock had approached him and ordered him to empty his pockets. When Lick refused, Sharrock sucker-punched Lick, causing him to fall to the ground. Lick testified that, when he was on the ground, Sharrock kicked him in the head and then took items out of his pockets, including money and a cell phone. Lick said that Sharrock only stopped the assault when witnesses, Francine McClain and Latoni Whiteside, told Sharrock to stop. McClain testified at trial that she observed Sharrock kick Lick in the head while Lick was on the ground, search Lick's pockets, and then kick Lick once more.

{¶3} Sharrock was charged with robbery, a second degree felony, in violation of R.C. 2911.02(A)(2). This section provides that no person, in attempting or committing a theft offense, or in fleeing immediately after the attempt or offense, shall inflict, attempt to inflict, or threaten physical harm to another. R.C. 2911.02(A)(2).

{¶4} The matter proceeded to a bench trial. The court granted Sharrock's motion to consider the lesser-included offenses of misdemeanor theft and misdemeanor assault.

{¶5} The court found Sharrock guilty on the charge of robbery and the lesser-included offenses of misdemeanor theft and assault, and found that the convictions merged for sentencing purposes. The State opted to proceed on robbery. The court sentenced Sharrock to five years in prison.

{¶6} Sharrock now appeals. Although he purports to raise only one assignment of error for our review, Sharrock in fact raises two separate assignments of error which the Court will consider separately.

II

Assignment of Error Number One

> THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT/APPELLANT'S MOTION FOR JUDGMENT OF AQUITTAL UNDER CRIM.R.29 AS THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED TO CONVICT THE DEFENDANT/APPELLANT OF ROBBERY 2911.02(A)(2) O.R.C.

{¶7} In his first assignment of error, Sharrock argues that the trial court erred by denying his Crim.R. 29 motion because the State failed to produce sufficient evidence to support his robbery conviction. We disagree.

{¶8} "We review a denial of a defendant's Crim.R. 29 motion for acquittal by assessing the sufficiency of the State's evidence." *State v. Slevin*, 9th Dist. Summit No. 25956,

2012-Ohio-2043, ¶ 15. To determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991). Thus, the relevant inquiry is whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id*.

{¶9} As discussed, R.C. 2911.02(A)(2) provides that no person shall inflict, attempt to inflict, or threaten to inflict physical harm on another in attempting or committing a theft offense, or in fleeing immediately following the attempt or offense. Whoever commits the foregoing is guilty of robbery. R.C. 2911.02(B).

{¶10} Sharrock does not dispute that he assaulted Lick, or that he took Lick's belongings. Instead, Sharrock challenges the evidence presented regarding his use of force *during* the theft. He also contends that the trial court's consideration of the lesser-included misdemeanor offenses of theft and assault demonstrate that the robbery conviction was not supported by sufficient evidence. Sharrock's arguments lack merit.

{¶11} As an initial matter, Sharrock's arguments to a great extent sound in weight rather than sufficiency of the evidence because he challenges the evidence based on reliability of the witnesses and alleged inconsistencies in the testimony. *See State v. Johnson*, 9th Dist. Lorain No. 06CA008911, 2007-Ohio-1480, ¶ 4-10. Nonetheless, we briefly address Sharrock's assertion that his conviction is based on insufficient evidence.

{¶12} There is ample evidence that Sharrock intended to steal Lick's belongings during the assault. First, Lick's testimony at trial was that, on the evening of the incident, he was walking down the street when Sharrock approached and said, "Empty your pockets." After he refused, Sharrock punched him and he fell to the ground. While on the ground, Sharrock kicked

him in the head a few times and took items from his pockets, including money and a cell phone. Lick testified that the assault stopped only when McClain and Whiteside intervened.

{¶13} Further, McClain testified that she observed a person being "kicked, stomped in the Family Dollar parking lot" while she was a passenger in a vehicle driven by her co-worker, Whiteside. Whiteside turned the car around and pulled into the parking lot. McClain testified that Sharrock was going through Lick's pockets as they entered the lot. Whiteside told Sharrock to, "Stop kicking him in his head like that." McClain observed that Sharrock kicked Lick "one more time before we were able to get out the truck" after going through Lick's pockets. Whiteside testified that Sharrock took Lick's backpack and Lick told her that, "He got my things."

{¶14} Moreover, a police officer who responded to the 911 call regarding the incident testified that Lick had a few cuts on his face, and lumps, and was bleeding from his mouth. Sharrock had the victim's cell phone and additional stolen property when he was confronted by police. An officer who apprehended Sharrock testified that Sharrock made a statement like the "MF-er got what was coming to him. I did him right. Yeah, I took his stuff."

{¶15} Sharrock admitted to taking Lick's belongings during an interview at the police station. A police detective who interviewed Lick noted in his report Lick's statement that Sharrock punched him and knocked him to the ground, kicked him, and went through his pockets.

{¶16} Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have concluded that the State set forth sufficient evidence to prove that Sharrock assaulted Lick and stole his belongings as part of the same, ongoing act. Indeed, McClain's testimony alone is enough to establish this. She observed Sharrock assaulting Lick, then taking

his belongings, and finally kicking Lick in the head one more time. According to McClain, all of this occurred within the space of a few seconds. Sharrock's argument that there is insufficient evidence to show that he inflicted physical harm upon Lick while committing a theft offense is not well-taken.

{¶17} Equally baseless is Sharrock's argument that the court's inclusion of the lesser-included offenses of misdemeanor theft and assault reveal a lack of evidence to support a second-degree felony robbery conviction. After considering the evidence, the trial court, acting as the factfinder, found that the elements of all three offenses were satisfied. That the trial court agreed to consider lesser-included offenses did not, as a matter of necessity, imply the State's inability to prove each element of the original charge of robbery. Sharrock's first assignment of error is overruled.[1]

Assignment of Error Number Two

> ADDITIONALLY THE DEFENDANT/APPELLANT'S CONVICTION OF ROBBERY, WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶18} In his second assignment of error, Sharrock argues that his conviction is against the manifest weight of the evidence. We disagree.

{¶19} In determining whether a conviction is against the manifest weight of the evidence 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

[1] Our finding that the manifest weight of the evidence supports Sharrock's conviction, discussed in connection with Sharrock's second assignment of error below, is further dispositive of Sharrock's first assignment of error. "[A]lthough sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction was supported by the manifest weight of the evidence necessarily includes a finding of sufficiency." *Johnson*, 2007-Ohio-1480 at ¶ 11, citing *State v. Thompkins*, 78 Ohio St.3d 380, 388 (1997).

> 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 concerns whether a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, "the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Id.* Therefore, the 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." *State v. Browning*, 9th Dist. Summit No. 26687, 2013-Ohio-2787, ¶ 14, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983).

{¶20} Sharrock argues that his conviction was against the manifest weight of the evidence because of alleged inconsistencies in the testimony provided by McClain and Lick. First, Sharrock attributes importance to the fact that McClain is the only witness who testified that Sharrock kicked Lick in the head once after stealing from him. Second, Lick initially told a detective that he was attacked for no reason, but at trial said that Sharrock told him to empty his pockets and then attacked him.

{¶21} Here, the alleged inconsistencies that Sharrock identifies in the testimony are minor, if indeed they are inconsistencies. Contrary to Sharrock's position, "[a] conviction is not against the manifest weight of the evidence merely because there is conflicting evidence before the trier of fact." *State v. Urbin*, 148 Ohio App.3d 293, 2002-Ohio-3410, ¶ 26 (9th Dist.), quoting *State v. Hayden*, 9th Dist. Summit No. 19094, 1999 WL 1260298, *7 (Dec. 22, 1999). An appellate court will not overturn a judgment on this basis alone, and may not merely substitute its judgment for that of the factfinder. *State v. Serva*, 9th Dist. Summit No. 23323,

2007-Ohio-3060, ¶ 8. In this case, the trial court heard all of the evidence and chose to believe the testimony that McClain and Lick gave at trial. Having reviewed the record, this is not the exceptional case where the factfinder lost its way and created a manifest miscarriage of justice. *Otten* at 340. Thus, Sharrock's second assignment of error is overruled.

III

{¶22} Sharrock'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.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
SCHAFER, J.
CONCUR.

APPEARANCES:

RHONDA L. KOTNIK, Attorney at Law, for Appellant.

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