

[Cite as *State v. Burrus*, 2009-Ohio-7037.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

VALYNIA K. BURRUS

Defendant-Appellant

Appellate Case No. 22960

Trial Court Case No. 08-CR-2472

(Criminal Appeal from
Common Pleas Court)

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OPINION

Rendered on the 30th day of December, 2009.

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BROGAN, J.

I

{¶ 1} On June 18, 2008, Angel Watson was sitting on her neighbor's porch at the apartment complex where she lived. Three juveniles approached her. One grabbed a baseball bat sized stick, swung it at Watson, and struck her in the head. The juvenile then struck her in the head with the stick again. Watson ran and the three juveniles chased her. When they caught her the one hit her one or two more times with the stick. The juvenile then dropped the stick and all three began punching and kicking Watson.

{¶ 2} Valyncia Burrus saw the fight and ran toward it. Upon reaching them, Burrus punched Watson. She held Watson's hair in one hand and punched her with the other. Soon after Burrus arrived, a neighbor also ran over and dove on top of Watson to protect her, and another neighbor pulled Burrus away. When someone said that the police were coming, Burrus and the juveniles left the scene in Burrus's car with Burrus driving.

{¶ 3} Watson was in the hospital for five days. For the first three days she could not feel her legs. She left the hospital on crutches with a knee brace. Watson continues to take pain medication for her leg. She has tremors on the right side of her body and has difficulty holding objects in her hand. She has migraine headaches on the left side of her head and hears ringing in her left ear.

{¶ 4} Burrus was indicted on one count of complicity to commit felonious assault causing serious physical harm and one count of complicity to commit felonious assault with a deadly weapon. At the close of the State's case, Burrus made an oral motion for a judgment of acquittal on both counts under Criminal Rule 29, which the trial court

overruled. In September 2008, a jury found Burrus guilty on both charges. The trial court sentenced her to two years in prison.

{¶ 5} Burrus timely appealed the trial court's decision to overrule her motion for judgment of acquittal, which is now before us. Burrus assigns two errors to the court's decision—one for each offense. We begin with the second assignment of error.

II

Second Assignment of Error

{¶ 6} "THE COURT ERRED WHEN IT OVERRULED APPELLANT'S RULE 29 MOTION AS THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A VERDICT OF FELONIOUS ASSAULT UNDER R.C. 2903.11(A)(1)."

{¶ 7} A defendant files a motion under Criminal Rule 29 because he believes that the inculpatory evidence offered by the prosecution is legally not sufficient.¹ When presented with such a motion, the trial court must construe the evidence in the way that most strongly favors the prosecution. *State v. Parker*, Montgomery App. No. 18926, 2002-Ohio-3920, at ¶31 ("Upon review of a denial of a motion of acquittal, the evidence is construed in a light most favorable to the State.") (Citation omitted). Upon considering the prosecution's evidence in this light, the court will overrule the defendant's motion if it concludes that "the evidence is such that 'reasonable minds can

¹"The court on motion of a defendant * * *, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Crim.R. 29(A).

reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.” Id., quoting *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263. As the question of sufficiency is one of law, we will review the trial court’s conclusion de novo.

{¶ 8} “An accomplice is an individual who can be indicted and punished for complicity, and accomplices can also be prosecuted and punished as if they were the principal offenders.” *State v. Brewster*, 157 Ohio App.3d 342, 2004-Ohio-2722, at ¶44, citing R.C. 2923.03(F).

{¶ 9} Here, Burrus was convicted of being an accomplice to the three juvenile offenders’ commission of felonious assault inflicting serious physical harm. Specifically, Burrus was convicted of aiding or abetting the principals. She challenges the sufficiency of the evidence supporting certain material elements of the aiding and abetting offense, found in Section 2923.03 of the Revised Code. Burrus was convicted under division (A)(2), which states, “(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: * * * (2) Aid or abet another in committing the offense.” Burrus contends that reasonable minds could not find the prosecutor’s evidence sufficient to prove that she either acted “with the kind of culpability required” to commit felonious assault inflicting serious physical harm or knowingly aided or abetted the principals in committing the felonious assault offense. We conclude that the trial court properly denied Burrus’s motion for acquittal on this charge of complicity because when the evidence is construed most strongly in favor of the State, a reasonable mind could conclude that the prosecutor presented sufficient evidence to prove these two elements beyond a reasonable doubt.

{¶ 10} The prosecutor presented sufficient evidence to prove that Burrus acted “with the kind of culpability required for the commission” of felonious assault inflicting serious physical harm. Burrus contends that the serious physical harm suffered by Watson was not as a result of actions taken by her. While she did strike Watson, she argues, she did so late in the attack and only a few times. At most, she argues, she is guilty of simple assault. The State responds that it is virtually impossible to determine which blow delivered by which of the four assailants caused the serious physical harm to Watson. The State argues that it was the totality of the blows delivered by the principals and Burrus that resulted in the serious harm. These arguments miss the point.

{¶ 11} The focus here is not on Burrus’s physical actions but on her mental state, her attitude towards the principal offender’s conduct. See *State v. Mendoza* (2000), 137 Ohio App.3d 336, 343. Ohio follows, what one commentator has called, the “statutorily prescribed mental state” model. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law* (2008), 60 S.C. L. Rev. 237, 248. This means that Ohio “extend[s] criminal responsibility to an accomplice who harbored the mental state necessary for the commission of the crime.” *Id.* In other words the State must show “that the defendant shared the criminal intent of the principal.” *State v. Johnson* (2001), 93 Ohio St.3d 240, at the syllabus.

{¶ 12} Here, the State must produce enough evidence to prove that Burrus acted “knowingly.” Burrus was convicted of aiding or abetting felonious assault causing serious physical harm, which is prohibited by Section 2903.11(A)(1) (“No person shall knowingly * * * [c]ause serious physical harm to another.”). “A person acts knowingly,

regardless of his purpose, when,” pertinently, “he is aware that his conduct will probably cause a certain result.” R.C. 2901.22(B). This mental-state element may be inferred from the defendant’s presence, companionship, and conduct before and after the principal commits the offense. See *State v. Johnson*, supra, at 245 (Citation omitted); see, also, *State v. Stepp* (1997), 117 Ohio App.3d 561, 569 (Citation omitted); *State v. Brewster*, supra, at ¶45. The State must have produced sufficient evidence from which a reasonable mind could conclude that Burrus was aware that the punching and kicking of Watson by the principals would probably cause Watson serious physical injury.

{¶ 13} We find the evidence is sufficient. The witnesses’ testimony shows that Burrus was present at the attack for, at least, several minutes, that she participated in the attack by striking Watson several times, and that she left in her car with the principals immediately after someone said that the police were on their way. Also, Watson testified that at the time Burrus hit her blood was covering her face, which means that a reasonable mind could infer that Burrus, seeing the blood, was aware that the principals were causing Watson serious injury.

{¶ 14} Burrus argues second that she did not knowingly do anything to aid or abet the principal offenders’ in committing the assault. Burrus concedes that she struck Watson but contends that her action did not assist, encourage, or incite the principals to commit the felonious assault. By the time she got here, Burrus says, the principals had already caused the serious harm. We conclude that a reasonable mind could conclude from the evidence that Burrus knowingly aided or abetted the principal offenders.

{¶ 15} There are two elements at issue here—a physical act done with a

particular level of culpability—which the prosecutor may prove “by direct or circumstantial evidence.” *State v. Stepp*, supra, at 569 (Citation omitted); *State v. Brewster*, supra, at ¶45 (“[A]iding and abetting may be demonstrated by direct or circumstantial evidence.”).

The evidence must show first that the defendant did the requisite physical act. Baldwin’s Ohio Practice Criminal Law (2009), § 92:5 (“An accomplice must perform some act to facilitate the commission of the principal offense.”). Here “the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal[s]” in causing Watson serious physical harm. *State v. Johnson*, supra, at the syllabus. The opinion in *State v. Hubbard*, 150 Ohio App.3d 623, 2002-Ohio-6904, is instructive. In *Hubbard*, the defendant was convicted of complicity to a murder and argued on appeal that the evidence supporting his conviction was lacking. The court said that “[defendant’s] admission that he went outside and shot at [the victim] along with five or six other men is an admission that he assisted in the killing of [the victim]. Whether or not [defendant’s] gun actually fired the fatal shot is of no consequence. He was there shooting at [the victim].” *Hubbard*, at ¶64. The same reasoning applies here. Burrus admits that she struck Watson along with the three principals. Whether or not her blows were the ones that caused the serious physical harm is irrelevant. We find that a reasonable mind could conclude that by striking Watson, Burrus assisted the principals in causing the serious injury to the victim.

{¶ 16} The evidence must show second that the defendant intended her act to aid or abet the principal offender. Baldwin’s Ohio Practice Criminal Law (2009), Section 92:2 (“[T]he accomplice must *intend* to aid, abet, solicit, procure, conspire, or

cause the principal to commit the offense.”). Ohio’s accomplice liability statute requires proof of a second mental element. *State v. Mendoza*, supra, at 343, citing 3 Katz & Giannelli, *Criminal Law* (1996) 233, Section 92.3 (“[C]omplicity also requires a second mental element.”). While the one we discussed above concerns the defendant’s attitude towards the principal offender’s conduct, this mental element examines the defendant’s attitude towards her own conduct. See *State v. Mendoza*, supra, at 343. The issue is whether the defendant aided or abetted “knowingly.” See *State v. Seals*, Clark App. No. 04CA0063, 2005-Ohio-4837, at ¶30. The Third District has explained that “the statutory terms ‘aid’ and ‘abet’ were merely meant to require that the defendant’s conduct be directed—with the culpable mental state of the principal offense—towards accomplishing, assisting, inciting, or encouraging commission of the principal offense.” *State v. Mendoza*, supra, at 344. In the context of felonious assault, said the court, “the terms merely indicate that the defendant must have knowingly directed his conduct towards the goal of serious physical harm to [the victims], and his conduct must have acted to assist [the principal’s] knowingly causing that serious physical harm.” *Id.* at 344-345.

{¶ 17} The State must offer sufficient evidence from which a reasonable mind could conclude that the defendant knew her act would assist the principal in causing serious bodily harm. “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature.” R.C. 2901.22(B). Here, the State offered evidence showing that Burrus participated in the assault aware that doing so would probably assist the principals in causing Watson serious harm, or that Burrus was aware that her

participation in the assault had the likely effect of aiding that harm. *State v. Mendoza*, supra, at 345. (“[T]here are a number of ways the State could have sufficiently proved that defendant had the culpable mental state of knowing.”).

{¶ 18} We think that a reasonable mind could conclude that Burrus participated in the assault aware that she was probably assisting the principals in causing Watson serious harm. The evidence shows that Burrus was not part of the initial attack on Watson but came later. And there is no evidence that Burrus had an independent reason to assault Watson. So it is reasonable to infer that Burrus participated solely in order to assist the principals.

{¶ 19} We recognize that a court must use particular care when analyzing the second mental element in a charge of aiding or abetting assault in the context of a multi-party fight. A defendant's mere participation in a fight is not sufficient to establish that he aided and abetted because “Ohio case law clearly requires the State to prove an alleged aider and abettor’s culpable mental state.” *State v. Mendoza*, supra, at 345 n.2 (Citation omitted). The court must ensure, however, that the defendant acted with the intention to aid or abet the principal rather than for an independent reason. To illustrate, “[t]wo persons acting independently to kill the same victim are not accomplices, even if they are aware of each other's intent.” Baldwin’s Ohio Practice Criminal Law (2009), Section 92:2, n.5, citing *State v. Mendoza*, supra, at 343.

{¶ 20} We finally note our opinion in *State v. Seals*, supra, a case involving a fight with multiple assailants and golf clubs. There the defendant argued also that the evidence was not sufficient to sustain his conviction for felonious assault. The defendant admitted that he hit the victim but claimed that his blow was not the one that

caused the serious harm. The serious harm, he argued, came when another defendant struck the victim. The defendant argued that he could not be held liable for felonious assault based on a theory that he aided and abetted another assailant in knowingly causing serious physical harm to the victim because he did not share the other defendant's intent to cause such serious harm. At most, he concluded, he is guilty of simple assault.

{¶ 21} We rejected his argument, saying, “these three Defendants acted together in concert in causing serious physical harm to the victims during this fight. Each victim was struck by more than just one defendant, and it is virtually impossible to determine which blow by which Defendant caused serious physical harm. Rather, the totality of all of the blows by these Defendants resulted in serious physical harm to the victims.” *Seals*, at ¶26. The evidence, when construed most strongly in favor of the State, showed that the defendant started the fight by punching the victim in the head and then began fighting with another victim. All three defendants, we said, participated in beating the victim by punching, kicking, and hitting him with weapons. “This evidence,” we said, “when considered as a whole, is sufficient to prove that Seals knowingly assisted, incited or encouraged, that is aided or abetted, [the other defendants] to knowingly cause serious physical harm to [the victim].” *Id.* at ¶30.

{¶ 22} *Seals* strongly supports our decision here. While we recognize, as Burrus points out, that Burrus did not start the fight nor did she hit Watson with the stick, we find these factual distinctions immaterial here. The complicity statute does not specify a particular quantity or quality of aid to the principal needed for conviction.

{¶ 23} The second assignment of error is overruled.

First Assignment of Error

{¶ 24} “THE COURT ERRED WHEN IT OVERRULED APPELLANT'S RULE 29 MOTION, AS THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A VERDICT ON THE FELONIOUS ASSAULT WITH A DEADLY WEAPON CHARGE.”

{¶ 25} Burrus contends also that the State failed to offer sufficient evidence to support her conviction for aiding or abetting felonious assault with a deadly weapon. Burrus contends specifically that there is not sufficient evidence showing that she possessed the kind of culpability required for commission of this offense, or that she knowingly aided or abetted the principals.

{¶ 26} The relevant part of the felonious assault statute reads, “(A) No person shall knowingly do either of the following: * * * (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon.” R.C. 2903.11. The Appellant’s second assignment of error is Overruled based on our reasons given in the resolution of the first assignment of error.

{¶ 27} The judgment of the trial court is Affirmed.

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DONOVAN, P.J., and FROELICH, J., concur.

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