

[Cite as *State v. Jordan*, 2010-Ohio-5131.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94168

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHAYLA JORDAN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515799

BEFORE: Kilbane, P.J., Boyle, J., and Sweeney, J.

RELEASED AND JOURNALIZED: October 21, 2010

ATTORNEY FOR APPELLANT

Craig W. Smotzer
1914 Clark Avenue
Cleveland, Ohio 44109

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Erica Barnhill
Assistant County Prosecutor
The Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Shayla Jordan (“Jordan”), appeals her convictions for aggravated robbery, felonious assault, and having a weapon while under disability. She argues that these convictions are against the manifest weight of the evidence and that the trial court erred in denying her motion for acquittal under Crim.R. 29. After reviewing the facts and the appropriate law, we affirm.

{¶ 2} On September 26, 2008, a Cuyahoga County Grand Jury charged Jordan and codefendant, Herchel Eleby (“Eleby”), in a seven-count indictment. Only counts 1, 2, 3, 6, and 7 applied to Jordan. Count 1 alleged aggravated robbery, a first degree felony, in violation of R.C. 2911.01(A)(1).

Count 2 alleged felonious assault, a first degree felony, in violation of R.C. 2903.11(A)(1). Count 3 alleged aggravated robbery, a second degree felony, in violation of R.C. 2911.01(A)(1). Counts 1 through 3 carried firearm specifications, in violation of R.C. 2941.141 and 2941.145, and a forfeiture specification, in violation of R.C. 2941.1417. Count 6 alleged having a weapon while under disability, a third degree felony, in violation of R.C. 2923.13(A)(3). Count 7 alleged falsification, a first degree misdemeanor, in violation of R.C. 2921.13(A)(2). Prior to trial, the State dismissed Count 3, aggravated robbery.

{¶ 3} On September 23, 2009, Jordan's case proceeded to trial. Jordan elected to try all counts to a jury, except Count 6, having a weapon while under disability, which she bifurcated and elected to try to the bench. On September 25, 2009, a jury found Jordan guilty of aggravated robbery and felonious assault with firearm and forfeiture specifications, and having a weapon while under disability. That same day, at the close of the State's case, the trial court granted Jordan's Crim.R. 29 motion for acquittal as to the falsification charge.

{¶ 4} On October 20, 2009, the trial court found Jordan guilty of having a weapon while under disability and proceeded to sentence Jordan to consecutive sentences of four years on Count 1 and four years on Count 2. The trial court sentenced Jordan to one year on Count 6, to be served

consecutively with Counts 1 and 2. The trial court also sentenced Jordan to a mandatory three years on the firearm specifications to be served consecutively with Counts 1 and 2. The trial court also imposed a mandatory five-year period of postrelease control.

{¶ 5} On October 29, 2009, Jordan appealed.

{¶ 6} Jordan's first assignment of error states:

“Appellant’s conviction for aggravated robbery and having a weapon under disability is against the manifest weight of the evidence.”

Standard of Review

{¶ 7} In *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, the court illuminated its test for manifest weight of the evidence as follows:

“Weight of the evidence concerns ‘the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.’ It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in*

***inducing belief.”* Id., quoting Black’s Law Dictionary (6 Ed. 1990) 1594. (Emphasis sic.)**

{¶ 8} The court, reviewing the entire record, essentially sits as a “thirteenth juror,” weighing the evidence and all reasonable inferences. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. In so doing, we consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, “the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” Id. The 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.

{¶ 9} The following evidence was adduced at trial.

{¶ 10} On September 15, 2008, at approximately 10:40 p.m., the victim, John Hardge (“Hardge”), who is homeless, was standing outside the Sunoco gas station at East 93rd Street and Union Avenue in Cleveland, Ohio, panhandling for money. Video surveillance of the incident and Hardge’s own testimony revealed that while Hardge was asking a female for money, Jordan and Eleby arrived in a white sedan. Jordan approached Hardge and the female and asked her if Hardge was bothering her. A verbal altercation ensued.

{¶ 11} According to Hardge’s testimony, Jordan called Eleby out of the car. Jordan demanded that Hardge give them his money, while Eleby had the gun tucked in his waistband. When Eleby pulled the gun from his waistband, a physical confrontation ensued. Hardge described the gun as black with a long, silencer-type barrel on the end of it. This description corresponds exactly with what the security camera revealed.

{¶ 12} Hardge testified: “It wasn’t nothing but a couple of dollars. So I gave her the money, and the guy was about to shoot me and I was scared for my life so, what happened is I grabbed the gun and hit him and we got to tussling, me, him and her * * *.” (Tr. 153.) According to the record, the robbery took place outside the view of the surveillance camera. Hardge testified: “Well, she backed me up a different direction than the store, the gas station door. That’s why we couldn’t be seen on the camera because we was backed up, she backed me up the other way.” (Tr. 204.) The video surveillance from State’s exhibit 11¹ clearly shows Jordan and Eleby approaching Hardge, who retreats out of view as Jordan and Eleby follow him. Hardge testified that during the altercation, he did not remember seeing Jordan with the gun, but Jordan did hit him, and he lost one of his shoes.

¹State’s exhibit 11 depicts footage from four security cameras located in and outside of the Sunoco gas station.

{¶ 13} Both the video surveillance and Hardge's testimony show that eventually, Hardge was able to get away and run into the gas station, where he asked the gas station attendant to call 911. The video surveillance provided by State's exhibit 11 clearly depicts the next encounter between Hardge and Jordan: Hardge, missing a shoe, is shown waiting inside the gas station for Jordan and Eleby to leave. Approximately three minutes and fifty seconds into the video, Jordan appears inside the gas station and walks menacingly toward Hardge, who throws his hands up and backs away from her in fear. The video shows Jordan removing a black, large-barreled gun from her waistband and repeatedly hitting Hardge on the head with the gun. She then tucked the gun in her waistband and walked out, leaving Hardge bleeding from the head.

{¶ 14} Hardge testified that after Jordan assaulted him in the gas station, he waited a few more minutes before leaving the store to flag down a police car. He then saw that several police cars had pulled over the white sedan carrying Jordan and Eleby. At that point, Hardge identified Jordan to the police.

{¶ 15} Cleveland Police Officer John Mullin testified that on the night of September 15, 2008, he was on patrol with his partner, Officer Dan David, when Hardge approached them and told them that he had been robbed by two individuals who drove away in a white Oldsmobile sedan. Officer Mullin

testified that he observed the vehicle exiting the Sunoco gas station and heading eastbound on Bessemer Avenue from East 93rd Street. There were two occupants in the vehicle, a female driver and male passenger. He further testified that as soon as they started the traffic stop the passenger jumped out of the vehicle, threw something to the ground, and began running through the back yards. Officer Mullin gave chase, caught him four houses down, and placed him under arrest. Officers Mullin and David then recovered the object thrown from the vehicle, which appeared to be the same gun that was in the video.

{¶ 16} Cleveland Police Detective Timothy Toler (“Toler”) testified that he was assigned to investigate the case. He testified that after interviewing Jordan he found various inconsistencies in her oral statement that conflicted with the videotape evidence. At trial, he read much of Jordan’s statement into the record. Among the inconsistencies he found were Jordan’s statement that Hardge and another unidentified light-skinned black male “bum rushed” her outside the gas station after she rejected their advances, that Hardge attempted to rob her at gunpoint, and that codefendant Eleby came to her aid after the men attempted to rob her.

{¶ 17} In her statement to Detective Toler, Jordan stated that Eleby attempted to come to her aid, during which time Hardge and Eleby struggled for the gun and the gun went off. She further stated that Eleby actually laid

on the ground at the gas station for several minutes before she was able to get him back into the car. (Tr. 247.) (State's exhibit 4.)

{¶ 18} The thrust of Jordan's argument is that the State failed to provide uncontradicted evidence to establish that Jordan robbed the victim, that she used a dangerous ordnance, and/or that Hardge suffered serious physical harm in the robbery that occurred outside the gas station.

{¶ 19} When assessing witness credibility "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 547. The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412, 676 N.E.2d 547. Indeed, the court below is in a much better position than an appellate court "to view the witnesses, to observe their demeanor, gestures and voice inflections, and to weigh their credibility." *Briggs*, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 20} Here, the jury, as the trier of fact, weighed the evidence, considered the facts and the credibility of the witnesses, and found Jordan guilty. The jury could determine based on the facts in the testimony of the police officers, the victim's testimony, Jordan's testimony, and their own

observations of the surveillance video that Jordan robbed and later feloniously assaulted Hardge.

{¶ 21} In State's exhibit 11, the video depicting both incidents, she is shown wearing the same distinctively colored blue shirt and grey sweat pants, and appears to act in complete contradiction to the statements that she gave to the police and her testimony to the jury. In this matter, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in convicting Jordan of the offenses in light of the substantial evidence offered by the State in proving her guilt beyond a reasonable doubt. After reviewing Jordan's arguments, we are not persuaded that the evidence in this matter weighs heavily against conviction.

{¶ 22} State's exhibit 11 shows video footage of the gas station parking lot taken from four security cameras and indicates that none of the statements made by Jordan to the police actually occurred. In light of this evidence, we find her statements not credible. In fact, ample evidence exists from which a jury could conclude that Jordan robbed Hardge that night.

{¶ 23} The video record also shows that Jordan committed felonious assault by hitting Hardge in the head with a firearm. In fact, the video footage from the gas station clearly shows Jordan pulling the firearm from her waistband, repeatedly striking Hardge about the head with it, and then walking away while placing the gun back into her waistband.

{¶ 24} When reviewing the entire record, including the credibility of witnesses, we cannot say the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Since the evidence does not weigh heavily against conviction, we will not order a new trial. Jordan's first assignment of error is overruled.

{¶ 25} Jordan's second assignment of error states:

“The trial court erred in denying appellant's motion for acquittal as to the charges and whether the state presented sufficient evidence that appellant was involved in and/or knowingly committed these crimes.”

Standard of Review

{¶ 26} When reviewing a claim that there is insufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 27} Within this assignment of error, Jordan confines her sufficiency arguments solely to her aggravated robbery conviction. She argues that this was nothing more than a verbal confrontation that spiraled out of control, and that the State did not meet the essential elements of aggravated robbery

since there was no evidence that a theft offense took place or that Jordan took anything of value from Hardge. In support of this, she argues that Hardge's change could have disappeared during the physical altercation. We disagree.

{¶ 28} R.C. 2911.01 states:

“No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

“(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

“(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

“(3) Inflict, or attempt to inflict, serious physical harm on another.

“* * *

“(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.”

{¶ 29} In this case, the video record clearly shows that Jordan had a firearm on or about her person during the encounter with Hardge when she assaulted him. It is reasonable to infer that either she or Eleby had the firearm on their person when they robbed Hardge just minutes before the felonious assault, which was caught on camera.

{¶ 30} Further, Detective Toler testified that Eleby was arrested with “two dollars and some odd change” in his pocket, which corresponds to the type of coinage and amount of money Hardge testified he gave Jordan and Eleby when they robbed him. (Tr. 169, 170, 254.) Specifically, Hardge testified upon cross-examination that Jordan approached him while Eleby had the gun and said, “give it up, give it up,” and that he did not want them to harm him, so he reached into his pocket and gave them all his dimes and quarters. (Tr. 180.)

{¶ 31} Last, the aggravated robbery statute allows for convictions where defendants actually commit or attempt to commit a theft offense, regardless of whether it is successful.

{¶ 32} When viewing the evidence in a light most favorable to the State as the law requires, it is clear that the State met the essential elements of aggravated robbery. Jordan’s second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s convictions having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR