[Cite as *State v. Robinson*, 2015-Ohio-1167.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26441
	:	
v.	:	Trial Court Case No. 2014-CR-2250
	:	
MALIK ROBINSON	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 27th day of March, 2015.

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WELBAUM, J.

{¶ 1} Defendant-appellant, Malik Robinson, appeals from his conviction for one count of aggravated robbery in the Montgomery County Court of Common Pleas following a bench trial. Robinson challenges the legal sufficiency of the evidence presented at trial and contends that the trial court's verdict was against the manifest weight of the evidence. Robinson also contends the trial court erred in prohibiting him from introducing impeachment testimony concerning alleged prior inconsistent statements made by the victim. For the reasons outlined below, the judgment of the trial court will be affirmed.

Facts and Course of Proceedings

{¶ 2} On July 21, 2014, Robinson was indicted on one count of aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree, and one count of felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree. Robinson was then re-indicted on August 27, 2014, for purposes of adding a firearm specification to each count. The charges arose from the robbery and assault of Joe Webb on June 24, 2014, at Webb's home on 360 Malden Avenue in Dayton, Ohio.

{¶ 3} Robinson pled not guilty to the charges and waived his right to a jury trial. On September 23, 2014, the case proceeded to a bench trial where the State presented testimony from five witnesses: (1) Joe Webb; (2) Mr. Webb's wife, Dorothy Webb; (3) Officer Jacob Rillo; (4) Officer Christopher Savage; and (5) Detective Jeffrey Watkins.

{¶ 4} Joe Webb testified that on June 24, 2014, he was in the backyard of his home trimming weeds with a weed eater when he noticed two males dressed in black walking

together on 2nd Street towards Malden Avenue. Mr. Webb's home is located at the corner of Malden Avenue and 2nd Street with a portion of his backyard abutting 2nd Street. Mr. Webb testified that the two men walked up to the edge of his house at the intersection of 2nd and Malden, stopped for a few seconds, looked around, talked with each other, turned around, and then came back down 2nd Street towards him. Mr. Webb then saw one of the men walk a little bit ahead of the other and stop five feet from where he was weeding, while the other man entered his yard holding a gun with something black covering his face.

{¶ 5} Mr. Webb testified that the man who entered his yard hit him in the face with the gun and said: "Put the weed eater down. Put the weed eater down. I'm going to shoot you. I'm going to shoot you. * * * If you don't give me your wallet, I'm going to shoot you." Trial Trans. (Sept. 23, 2014), p. 14. In response, Mr. Webb testified that he gave the man his wallet. After Mr. Webb handed over his wallet, the man with the gun walked out to the street where the other man had been waiting. Mr. Webb then testified that he saw the two men walk away together heading east on 2nd Street. As they were walking away, Mr. Webb noticed that one of the men was tall and the other was short. Shortly thereafter, Mr. Webb testified that his wife, Dorothy Webb, came home. Upon speaking with him, Mrs. Webb immediately left to follow the assailants in her vehicle. Meanwhile, Mr. Webb activated his home burglary system in order to get in touch with the police.

{¶ 6} Dorothy Webb testified that upon driving home from a memorial service, she saw two men walking away from her backyard on 2nd Street. Mrs. Webb also testified that one of the men was tall and the other was short, and the short one had a black t-shirt over his head. When she came to the end of her driveway she saw that Mr. Webb's face

was bleeding. She asked what happened and he indicated that he had been robbed. In response, Mrs. Webb testified that she turned her vehicle around and started driving east on 2nd Street toward Whitmore Avenue. She testified that when she turned onto Whitmore Avenue, she saw the two men walking together. Mrs. Webb then testified that she followed slowly behind the two men at a distance when all of a sudden the shorter man turned around and fired shots at her. Following the shots, Mrs. Webb testified that she immediately turned around and went home.

{¶ 7} According to the Webbs, the police arrived at their home approximately 20 minutes later. Officers Jacob Rillo and Christopher Savage were called to the Webbs' residence and they obtained a description of the events and suspects. Thereafter, Savage testified that he went to the area where the shots were fired on Whitmore Avenue and found two shell casings in the street. Detective Jeffrey Watkins, who was driving an unmarked vehicle in the area, met Savage on Whitmore Avenue and obtained a description of the suspects. Watkins testified that he then drove to a nearby apartment complex on Whitmore Avenue where he saw two men matching the description of the suspects. According to Watkins, the two men were together talking to a female. Watkins testified that he went back to notify Savage about what he saw.

{¶ 8} The officers testified that Savage and Rillo followed Watkins's unmarked vehicle in their cruiser to the apartment complex where Watkins saw the potential suspects. The officers testified that when they arrived, they saw two males matching the description of the suspects walking side by side. Savage got out to make contact with the individuals and upon seeing him, the shorter man fled while the taller man stopped walking and was apprehended by Savage. The taller man was identified as the

appellant herein, Malik Robinson.

{¶ 9} Watkins testified that the shorter man who fled had a gun. Watkins chased after the shorter man, but was unable to catch him. The gun was later found by Savage in some bushes at the apartment complex. Watkins testified that he spoke to Robinson the next day and Robinson told him that he just happened to be in the area when Mr. Webb was robbed and when the shots were fired at Mrs. Webb. However, Robinson eventually provided the authorities with the identity of the shorter suspect, whose name was not disclosed in the record. The officers testified that they never saw Robinson with a gun or wallet. In addition, Mr. and Mrs. Webb were unable to positively identify Robinson as one of the assailants at trial.

{¶ 10} After the State rested, the defense attempted to introduce impeachment testimony from Reverend Arvin Ritley and Robinson's mother, Mia Robinson, regarding an alleged prior inconsistent statement made by Mr. Webb. Specifically, Ritley and Mrs. Robinson testified that Mr. Webb had told them that Robinson was standing "afar" and "at a distance" when the robbery took place. Trial Trans. (Sept. 23, 2014), p. 75, 82. The State moved to strike Ritley and Mrs. Robinson's testimony for lack of foundation and on grounds that it was not inconsistent with Mr. Webb's testimony. The trial court sustained the motion to strike upon concluding that Ritley and Robinson's testimony was not inconsistent with Mr. Webb's testimony.

{¶ 11} Following the presentation of all evidence, the trial court found Robinson not guilty of felonious assault, but guilty of aggravated robbery and the attendant firearm specification. Robinson was found guilty through complicity by aiding and abetting the aggravated robbery. The trial court sentenced Robinson to an aggregate prison term of

six years, but allowed him to remain free on bond pending appeal. Robinson now appeals from his conviction raising three assignments of error for review.

First and Second Assignments of Error

{¶ 12} For purposes of convenience, we will address Robinson's First and Second Assignments of Error together. They are as follows:

I. THE EVIDENCE WAS INSUFFICIENT TO FIND THAT MR. ROBINSON AIDED OR ABETTED AGGRAVATED ROBBERY.

II. MR. ROBINSON'S CONVICTION FOR AIDING OR ABETTING AGGRAVATED ROBBERY WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

{¶ 13} Under his First and Second Assignments of Error, Robinson challenges the legal sufficiency and manifest weight of the evidence. Specifically, Robinson contends that there was insufficient evidence to convict him and that the evidence presented does not establish beyond a reasonable doubt that he was present at the time of the robbery. Robinson also argues that the State failed to prove that he took part in planning or committing the robbery.

{¶ 14} "A challenge to the sufficiency of the evidence differs from a challenge to the manifest weight of the evidence." *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 69. "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 10, citing *State v.*

Thompkins, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "When reviewing a claim as to sufficiency of evidence, the relevant inquiry is whether any rational factfinder viewing the evidence in a light most favorable to the state could have found the essential elements of the crime proven beyond a reasonable doubt." (Citations omitted.) *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997). "The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." (Citations omitted.) *Id*.

{¶ 15} In contrast, "[a] weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." (Citation omitted.) *Wilson* at ¶ 12. When evaluating whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, 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." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). "The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence." *State v. Adams*, 2d Dist. Greene Nos. 2013 CA 61, 2013 CA 62, 2014-Ohio-3432, ¶ 24, citing *Wilson* at ¶ 14.

{¶ 16} "The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve." *State v. Hammad*, 2d Dist. Montgomery No. 26057, 2014-Ohio-3638, ¶ 13, citing *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). Because the trier of fact sees and hears the witnesses

at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684, *4 (Aug. 22, 1997). "This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the factfinder lost its way." (Citation omitted.) *State v. Bradley*, 2d Dist. Champaign No. 97-CA-03, 1997 WL 691510, *4 (Oct. 24, 1997).

{¶ 17} "Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency." (Citation omitted.) *State v. McCrary*, 10th Dist. Franklin No. 10AP-881, 2011-Ohio-3161, ¶ 11. As a result, "a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Citations omitted.) *State v. Braxton*, 10th Dist. Franklin No. 04AP-725, 2005-Ohio-2198, ¶ 15.

{¶ 18} As noted above, the trial court found Robinson guilty of aggravated robbery under R.C. 2911.01(A)(1), which provides that: "No person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave 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[.]" Robinson was found guilty of aggravated robbery through complicity as an aider and abettor under R.C. 2923.03(A)(2), which provides that: "No person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." Therefore, "[i]f a person acting with the kind of culpability

required for the commission of an offense aids or abets another in committing the offense, that person is guilty of complicity in the commission of the offense, and shall be prosecuted and punished as if he were a principal offender." *State v. Wade*, 2d Dist. Clark No. 06-CA-108, 2007-Ohio-6611, ¶ 20, citing R.C. 2923.03(A)(2) and (F).

{¶ 19} " 'To aid or abet' means to support, assist, encourage, cooperate with, advise, or incite the principal in the commission of the crime." *Id.*, citing *State v. Johnson*, 93 Ohio St.3d 240, 245, 754 N.E.2d 796 (2001). "Consequently, to support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the Supreme Court of Ohio has held that '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.' " *Id*., quoting *Johnson* at 245. "Ohio courts have recognized that '[e]vidence of aiding and abetting another in the commission of crime may be demonstrated by both direct and circumstantial evidence. Thus, "participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed." ' " *Id*., quoting *State v. Cartellone*, 3 Ohio App.3d 145, 150, 444 N.E.2d 68 (8th Dist.1981), quoting *State v. Pruett*, 28 Ohio App.2d 29, 34, 273 N.E.2d 884 (4th Dist.1971).

{¶ 20} Here, the testimony and evidence presented at trial provided an adequate basis for the trial court to find that Robinson aided and abetted the aggravated robbery of Mr. Webb. Robinson's presence at the robbery can be inferred from the fact that he matched the description of the taller suspect and was seen shortly after the robbery walking in the area of the offense with a man who had a gun, fled from police, and

matched the description of the shorter suspect. In addition, Robinson's participation in the other suspect's criminal intent can be inferred from his presence, companionship, and conduct before, during and after the offense, as Robinson was seen walking with the other suspect before the robbery, convening and talking with him just prior to the robbery, waiting for him during the robbery, leaving with him after the robbery, and then walking with him again at a nearby apartment complex.

{¶ 21} Based on the testimony and evidence presented at trial, we conclude that this is not an exceptional case where the evidence weighs heavily against the conviction. Therefore, we conclude that Robinson's conviction for aggravated robbery with the attendant firearm specification was not against the manifest weight of the evidence and was necessarily supported by sufficient evidence.

{¶ 22} Robinson's First and Second Assignments of Error are overruled.

Third Assignment of Error

{¶ 23} Robinson's Third Assignment of Error states as follows:

> THE TRIAL COURT ERRED BY PROHIBITING MR. ROBINSON FROM ASKING QUESTIONS OR INTRODUCING TESTIMONY IMPEACHING THE TESTIMONY OF THE ALLEGED VICTIM.

{¶ 24} Under his Third Assignment of Error, Robinson contends that the trial court erred in striking the testimony of Reverend Arvin Ritley and Robinson's mother, Mia Robinson. As previously noted, Robinson introduced these witnesses in an effort to impeach the testimony of Mr. Webb through extrinsic evidence of alleged prior inconsistent statements made by Mr. Webb to Ritley and Robinson's mother after the

robbery.

{¶ 25} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." (Citation omitted.) *State v. Brown*, 2d Dist. Montgomery No. 21540, 2007-Ohio-2098, ¶ 24. "Abuse of discretion" has been defined as an attitude that is "unreasonable, arbitrary or unconscionable." *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 482 N.E.2d 1248 (1985). "A decision is unreasonable if there is no sound reasoning process that would support that decision." *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Feldmiller v. Feldmiller*, 2d Dist. Montgomery No. 24989, 2012-Ohio-4621, ¶ 7.

{¶ 26} Evid. R. 613 governs impeachment by self-contradiction, and section (B) of the rule provides that:

> (B) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:
>
> (1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require; (2) The subject matter of the statement is one of the following:
>
> (a) A fact that is of consequence to the determination of the action other than the credibility of a witness;
>
> (b) A fact that may be shown by extrinsic evidence under Evid.R. 608(A),

609, 616(A), or 616(B);

(c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence.

{¶ 27} Accordingly, " '[w]hen extrinsic evidence of a prior inconsistent statement * * * is offered into evidence pursuant to Evid.R. 613(B), a foundation must be established through direct or cross-examination in which: (1) the witness is presented with the former statement; (2) the witness is asked whether he made the statement; (3) the witness is given an opportunity to admit, deny or explain the statement; and (4) the opposing party is given an opportunity to interrogate the witness on the inconsistent statement.' " *State v. Mack*, 73 Ohio St.3d 502, 514-515, 653 N.E.2d 329 (1995), quoting *State v. Theuring*, 46 Ohio App.3d 152, 155, 546 N.E.2d 436 (1st Dist.1988).

{¶ 28} " 'If the witness admits making the conflicting statement, then there is no need for extrinsic evidence. If the witness denies making the statement, extrinsic evidence may be admitted, provided the opposing party has an opportunity to query the witness about the inconsistency, and provided the "evidence does not relate to a collateral matter[.] * * * " ' " *State v. Pierce*, 2011-Ohio-4873, 968 N.E.2d 1019, ¶ 82 (2d Dist.), quoting *State v. Harris*, 2d Dist. Montgomery No. 14343, 1994 WL 718227, *7 (Dec. 21, 1994). (Other quotation omitted.) *See, also, State v. Taylor*, 2d Dist. Montgomery No. 15119, 1996 WL 417098 (July 26, 1996) ("A prior statement of a witness may be proved by extrinsic evidence if the witness denies the statement or claims he cannot remember the statement").

{¶ 29} In this case, Robinson attempted to introduce extrinsic evidence of alleged prior inconsistent statements made by Mr. Webb to Reverend Ritley and Robinson's

mother stating that Robinson was standing "from afar" and "at a distance" during the robbery. During his direct examination, Mr. Webb testified that Robinson "stopped right at the—where I was cutting weeds at" and was "about five feet from me." Trial Trans. (Sept. 23, 2014), p. 10-12.

{¶ 30} Upon reviewing the record, we find that Robinson's counsel failed to lay a proper foundation to introduce the impeachment testimony. During cross-examination, Robinson's counsel never specifically asked Mr. Webb whether he ever made a statement to Robinson's mother about Robinson being "at a distance" or "afar" from the robbery, and thus, was never given the opportunity to admit or deny making such a statement. In addition, while Robinson's counsel did ask Mr. Webb on cross-examination whether he ever told Reverend Ritley that he only saw Robinson from afar, Mr. Webb responded: "I don't know Malik Robinson from another one * * * I said I didn't know him. I don't know him." Trans. (Sept. 23, 2014), p. 26. Therefore, the record indicates that Mr. Webb never admitted or denied making the statement to Ritley. For the foregoing reasons, we conclude that the proper foundation had not been laid for the prior statements to be introduced into evidence.

{¶ 31} We note that even if proper foundation had been laid, the record also demonstrates that Mr. Webb's testimony was not inconsistent with the prior statements Robinson wanted to offer into evidence. When Robinson's counsel asked Mr. Webb "what do you mean by afar?" he answered "[f]rom here to the judge[,]" which is consistent with his testimony that the second suspect was waiting about five feet away from him during the robbery. *Id*. at p. 27.

{¶ 32} For the foregoing reasons, Robinson's Third Assignment of Error is

overruled.

Conclusion

{¶ 33} Having overruled all three assignments of error raised by Robinson, the judgment of the trial court is affirmed.

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FAIN, J. and HALL, J., concur.

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