[Cite as *State v. Stephens*, 2009-Ohio-6305.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92430

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

FRANCO STEPHENS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506069

BEFORE: McMonagle, P.J., Blackmon, J., and Sweeney, J.

RELEASED: December 3, 2009
JOURNALIZED:

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant Franco Stephens appeals the trial court's judgment, rendered after a jury verdict, finding him guilty of two counts of murder and one count of attempted murder and sentencing him to 30 years to life in prison. For the reasons that follow, we reverse the judgment and vacate Stephens's conviction.[1]

I

{¶ 2} A Cuyahoga County jury indicted Stephens in a ten-count indictment, charging him with four counts of aggravated murder with multiple specifications, four counts of aggravated robbery with firearm specifications, one count each of attempted aggravated murder with firearm specifications, and having a weapon while under a disability.

{¶ 3} The charges arose out of a shooting by Stephens's cousin, Jonathan Nicholson, in the early morning hours of September 8, 2007. The testimony and statements of all those present at this shooting were remarkably similar. To the extent that details differed, they were insignificant, understandable under the circumstances of the event, and surely not dispositive.

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[1]The trial exhibits were not included with the record on appeal. However, at oral argument, both the prosecutor and defense counsel informed the court that the exhibits were not necessary for our review and decision in this case.

{¶ 4} Anthony Burns and Edward Walker were friends who lived together on East 114th Street in Cleveland, Ohio. Justin Taylor and Tremayne Chandler were likewise friends who joined Burns and Walker in their backyard in the early morning hours of September 8, 2007. Some of the group had been at the nearby Phase III bar before congregating at the house. There was discussion about playing a video game; however, Walker wanted to gamble and went inside the house to retrieve some dice. Walker and Taylor had been outside playing with the dice for only a few minutes, and two one-dollar bills were on the ground, when both Burns and Chandler saw two men walk down the sidewalk and go past their house. The two men turned around, and one of them, Stephens, proceeded up the driveway and asked to join in the dice game. The other man, Nicholson, did not ask to join the game, but stood apart watching. Both Burns and Chandler thought something was amiss and feared that perhaps the two men were going to rob them.[2]

{¶ 5} Stephens introduced himself by his street name "Frank Nitty" and tried to cajole the men into allowing him to play. The men said no, and Stephens replied, "my money is no good?" as he removed a wad of money from

[2]They claimed they were suspicious because of Stephens's dress. Stephens was wearing a "hoodie"—a cotton jacket with a hood—and bike gloves. The hood was not up, but Stephens was wearing a hat. No explanation was offered as to why this dress was suspicious other than it was summertime, and the jacket had long sleeves and a hood.

his pocket. They assured him that in fact, his money *was* no good, and asked him to leave. Stephens continued to press the men to allow him to play, and paid no attention to their requests that he leave what they described as a "family game."

{¶ 6} Walker, apparently annoyed at the intrusion, first punched Nicholson. Nicholson did not fall down, but rather left the scene. Walker then punched Stephens, breaking both his jaw and some facial bones. According to both Stephens (in his statement to the police) and Burns, Stephens was knocked unconscious.[3]

{¶ 7} Both Burns and Chandler testified that after several minutes Nicholson returned to the scene, took a swig of beer from the bottle in his hand, and proceeded to fatally shoot Walker in the head. Burns testified that Stephens was unconscious when Nicholson shot; Chandler said Stephens was just getting up from the ground. Nonetheless, Nicholson continued to shoot, and in so doing, also shot and killed Justin Taylor. Everyone ran from the scene.

{¶ 8} Stephens went to his girlfriend's house nearby; she convinced him to go to the hospital. At the hospital, he was told he had a broken jaw and fractured facial bones, and surgery was performed to wire his jaw. Subsequent to the surgery, he was interviewed by the police, and gave a

statement that was read in its entirety to the jury by an investigating detective. In substance, it stated the facts as outlined above.

{¶ 9} Stephens was indicted on multiple counts of aggravated murder, attempted murder, aggravated robbery and having a weapon while under disability, each with numerous specifications. The matter was tried as a death penalty case. At the conclusion of the State's case, the court granted dismissal pursuant to Rule 29 as to Counts 3, 4, 5, 6, 7, 8 and 10, and all specifications on all counts (i.e., all matters having to do with robbery, with Stephens having a gun, and with a course of conduct of purposeful killings). The court reduced the charge in Count 9 (attempted aggravated murder of Burns) to attempted murder.

{¶ 10} The jury was instructed on aggravated murder (Counts 1 and 2), murder as a lesser included offense of Counts 1 and 2, and attempted murder under Count 9. The jury returned verdicts of not guilty of aggravated murder under Counts 1 and 2, guilty of murder as lesser and included offenses of Counts 1 and 2, and guilty of attempted murder under Count 9.

II

{¶ 11} Stephens first argues that the evidence was insufficient to support his convictions. Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury. *State v. Smith*, 80

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[3]Chandler testified that Stephens was knocked down, but not unconscious.

Ohio St.3d 89, 113, 1997-Ohio-355. In essence, sufficiency is a test of adequacy and requires a court to determine whether the State has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52. If the State's evidence is found to have been insufficient, as a matter of due process the issue should not have been presented to the jury. *Thompkins* at 386; *Smith* at 113.

{¶ 12} Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. An appellate court's function in 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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Reviewing courts will not overturn convictions on sufficiency of evidence claims unless reasonable minds could not reach the conclusion reached by the trier of fact. See *State v. Tibbetts*, 92 Ohio St.3d 146, 2001-Ohio-132.

{¶ 13} In dismissing the charges, the trial court found that there was absolutely no evidence whatsoever that these two killings had anything to do with a robbery. This court concurs in toto with the trial court; the record is

utterly devoid of any evidence of a robbery, attempted or otherwise. In fact, the only real references to even the concept of a robbery were that Burns and Chandler feared that Nicholson and Stephens *could be* robbers and accordingly determined not to gamble with them, and the State's argument to the jury that in essence was: "What else could explain these otherwise senseless killings?" However, neither Stephens nor Nicholson asked any of the four for anything, no one tried to take anything, no one took anything, and no one threatened to take anything.

{¶ 14} Remaining for the jury's consideration after the appropriate dismissal of the charges and specifications that involved robbery, possession of a firearm, brandishing of a firearm, and course of conduct involving purposeful killings, was whether Stephens aided and abetted Nicholson in the killing of Walker and Taylor and the attempted murder of Burns. Upon this issue, the apposite facts are known. Stephens and Nicholson were cousins, and were together after drinking at the Phase III bar when they walked into a yard where Burns and Walker lived. With Walker and Burns were Chandler and Taylor. A dice game had just begun. Stephens begged to be included; Burns repeatedly told him to leave. When Stephens and Nicholson did not leave, Walker first punched Nicholson, then Stephens. Nicholson left, but Stephens did not (he was either unconscious or dazed). Nicholson

returned moments later with a gun, and shot at all four people, killing two.[4] Nicholson and Stephens ran from the scene, either together according to Chandler's testimony, or separately according to Stephens's statement to police.

{¶ 15} To support a conviction for complicity by aiding and abetting, 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. R.C. 2923.03(A)(2); *In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, ¶13. In order to constitute "aiding and abetting," the accused must have taken some role in causing the commission of the offense. *State v. Jordan*, 168 Ohio App.3d 202, 2006-Ohio-538, appeal not allowed, 109 Ohio St.3d 1507, 2006-Ohio-2998. We have no evidence here, either direct or circumstantial, that Stephens and Nicholson had any sort of plan or agreement. The trial court ruled as a matter of law at the conclusion of the State's case that there was no evidence which, if believed, would constitute a plan of a robbery, an attempted robbery, or a completed robbery. Likewise, the trial court ruled that there was no evidence that Stephens possessed, brandished or used a gun during the incident.

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[4]The gun that Nicholson had belonged to Stephens; however there was no evidence of when and under what circumstances this gun came into Nicholson's possession.

{¶ 16} We are hence left solely with the issue of whether Stephens aided and abetted Nicholson in the shootings; absent any evidence of a plan or agreement, we look solely to the facts of the shootings. It was unrebutted that prior to the shootings, Walker hit Stephens in the face with enough force (or with a weapon) to fracture his jaw and facial bones. Stephens was either unconscious on the ground (Burns's testimony), or just dazed and getting up (Chandler's testimony) when Nicholson opened fire. There was no testimony of any communication between Nicholson and Stephens.

{¶ 17} In sum, the only facts before the jury on the issue of whether Stephens aided and abetted Nicholson were: (1) they arrived at the scene together; (2) they may have left the scene together; and (3) the gun used by Nicholson was owned by Stephens. There was no evidence of a plan to shoot, and there was no evidence of Stephens inciting, advising, encouraging or assisting in the shooting. "Mere presence of an accused at the scene of a crime and the fact that he was acquainted with the perpetrator is not sufficient proof, in and of itself, that he was an aider and abettor." *Columbus v. Russell* (1973), 39 Ohio App.2d 139, syllabus.

{¶ 18} Appellant's first assignment of error is sustained; the judgment of conviction is reversed and Stephens's conviction is ordered vacated. His other assignments of error are therefore moot and we need not consider them. See App.R. 12(A)(1)(c).

It is ordered that appellant recover from appellee 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. Case remanded to trial court with instructions to vacate the conviction.

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

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
JAMES J. SWEENEY, J., CONCUR