[Cite as *State v. McGowan*, 2010-Ohio-2888.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93244

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRE MCGOWAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512298

BEFORE: Jones, J., Rocco, P.J., and Blackmon, J.

RELEASED: June 24, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Andre McGowan ("McGowan"), appeals the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

STATEMENT OF THE CASE

{¶ 2} On June 25, 2008, the Cuyahoga County Grand Jury returned a three-count indictment in Case No. CR-512298 against McGowan. He was indicted as follows: Count 1, aggravated robbery, pursuant to R.C. 2911.01(A)(1), a first- degree felony, with firearm specifications, a repeat violent offender specification, and notice of prior conviction; Count 2, robbery, pursuant to R.C. 2911.02(A)(2), a second-degree felony, with firearm specifications, a repeat violent offender specification, and notice of prior conviction; and Count 3, having weapon while under disability, pursuant to R.C. 2923.13(A)(2), a third-degree felony. Counts 1 and 2 included one- and three-year firearm specifications, pursuant to R.C. 2941.141 and 2941.145, as well as a repeat violent offender specification with a notice of prior conviction.

{¶ 3} McGowan entered pleas of not guilty at his arraignment and his case was assigned to the trial judge. On November 24, 2008, the court heard McGowan's motion to suppress identification, and on November 25, 2008, the trial court denied the motion. McGowan waived his right to a jury trial with respect to

the repeat violent offender and notice specifications. McGowan also waived his right to a jury trial as to the weapon while under disability charge.

{¶ 4} A jury trial commenced on April 3, 2009, with Counts 1 and 2 only being tried to the jury.

{¶ 5} The state rested its case-in-chief on April 6, 2009. Thereafter, the defense moved for a judgment of acquittal pursuant to Crim.R. 29. The motion was denied. The trial concluded, and later that day, the jury announced its verdict, finding McGowan not guilty as to Counts 1 and 2. The court announced its verdict as to Count 3, finding McGowan guilty. McGowan was sentenced to 305 days of community control sanctions, given credit for 305 days in jail, and ordered released. McGowan now appeals.

STATEMENT OF THE FACTS

{¶ 6} On June 3, 2008, Domerice Jefferson ("Jefferson"), the victim in this matter, resided at 13508 Claiborne in East Cleveland, Ohio. On that day, Jefferson came home from work and pulled into his driveway. As he proceeded to open the car door, a man stuck a gun to his head demanding his cellular phone, wallet, money, and car keys.

{¶ 7} During trial, Jefferson testified that the person who robbed him was approximately 5'2" tall with a scraggly beard, that he identified the person who robbed him approximately 15 minutes after the robbery, and again during the course of the trial. Jefferson also testified as to what the gun looked liked. Jefferson stated that he got a good look at the gun when McGowan made him pick

up $5.00 that had dropped to the ground. Jefferson described the gun as silver-plated with a black grip.

ASSIGNMENTS OF ERROR

{¶ 8} McGowan assigns two assignments of error on appeal:

{¶ 9} "[1.] The trial court erred in denying appellant's motion for acquittal as to the charge when the state failed to present sufficient evidence to sustain a conviction.

{¶ 10} "[2.] Appellant's conviction is against the manifest weight of the evidence."

LEGAL ANALYSIS

Motion for Acquittal

{¶ 11} In McGowan's first assignment of error, McGowan argues that the trial court should have granted his motion for acquittal because the evidence was insufficient to support his conviction. We disagree.

{¶ 12} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus, which provides the following:

> "Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394; *State v. Davis* (1988), 49 Ohio App.3d 109, 550 N.E.2d 966.

{¶ 13} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus in which the Ohio Supreme Court held:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

{¶ 14} In the case at bar, there is substantial testimony and evidence to support the lower court's decision. Jefferson testified that the man who robbed him was short, wearing a gray sweatshirt, white pants, and a bandana. Jefferson further testified that the attacker pointed a silver gun with a black grip at his head. When McGowan was apprehended, he was wearing clothing like those described by Jefferson. Moreover, McGowan is 5'2" tall, matching Jefferson's description regarding the height of his assailant.

{¶ 15} In addition, Officer Kaleal ("Kaleal") testified that he was on duty on the night of June 3, 2008. Kaleal heard the description of the suspect over the radio and was on the lookout for the suspect. Kaleal joined in the pursuit of the suspect through the park. He testified that he heard something get thrown in the woods during the pursuit. Kaleal identified McGowan as being the same man he chased through the park and who was taken into custody on the night of the offense. Kaleal further testified that there was no one else in the vicinity of the wooded area during the course of his pursuit of the suspect. Kaleal later located

a silver firearm with a black grip in the area from where he heard the item thrown.

{¶ 16} Contrary to McGowan's argument, the certified copy of McGowan's prior conviction was presented to the court, however, that document did not go to the jury with the other admitted exhibits. The journal entry was sufficient to establish that McGowan was a convicted felon, and the victim's and officer's testimony was sufficient to establish that the defendant had a firearm on or about his person — evidence to support a conviction of having a weapon while under disability.

{¶ 17} Consequently, viewing the evidence in the light most favorable to the state, we conclude that any rational trier of fact could have found that the state proved all of the essential elements of the instant charge beyond a reasonable doubt. Thus, the trial court properly denied McGowan's motion for acquittal.

{¶ 18} Accordingly, we overrule McGowan's first assignment of error.

Manifest Weight of Evidence

{¶ 19} In McGowan's second assignment of error, he argues that his conviction is against the manifest weight of the evidence. We disagree.

{¶ 20} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may, nevertheless, conclude that the judgment is against the weight of the evidence. 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 jurors 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*.'"

{¶ 21} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the fact-finder's resolution of the conflicting testimony." Id.

{¶ 22} As to a claim that a judgment is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines 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. 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. *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶ 23} As previously discussed in McGowan's first assignment of error, McGowan's convictions were based on substantial and sufficient evidence. A review of the testimony and additional evidence presented to the trial court

demonstrates that McGowan was properly convicted of having a weapon while under disability, in violation of R.C. 2923.13(A)(2).

{¶ 24} A review of the journal entry is sufficient to establish that McGowan was a convicted felon. In addition, the victim's and officer's testimony was sufficient to establish that McGowan had a firearm, on or about his person, or under his control on the date of the offense. Nothing in the record or evidence demonstrates that the fact-finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

{¶ 25} Accordingly, McGowan's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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. Case remanded to the trial court for execution of sentence.

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

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA A. BLACKMON, J. CONCUR