

[Cite as *State v. Kimbro*, 2010-Ohio-4111.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93622

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TERRANCE KIMBRO

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522278

BEFORE: Gallagher, A.J., Kilbane, J., and Jones, J.

RELEASED AND JOURNALIZED: September 2, 2010

ATTORNEY FOR APPELLANT

Scott D. Claussen
Law Office of Scott Claussen
8813 Memphis Villas Blvd.
Brooklyn, OH 44144

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Carrie Heindrichs
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Terrance Kimbro appeals his conviction from the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we affirm.

{¶ 2} On March 24, 2009, Kimbro was indicted on one count of aggravated robbery, one count of felonious assault, and two counts of robbery. Kimbro waived his right to a jury trial, and a bench trial commenced on June 2, 2009.

{¶ 3} The state presented five witnesses. The teenaged victims, Daniel Kotsybar and Shane Sayre, testified that on March 5, 2009, they were riding their bicycles on West 105th Street in Cleveland, Ohio, at approximately 7:00 p.m. In addition to riding his own bike, Sayre was “doubling another bike,” which he described as holding another bike alongside as he rode, such that the boys had three bikes between them. The two boys were approached by a group of males walking toward them. The males surrounded the two boys and attempted to take their bicycles. In the course of the scuffle over the bikes, Kotsybar was punched in the face with enough force that his nose was broken and required stitches.

{¶ 4} While this was occurring, Sayre flagged down a minivan with a couple inside. The man exited his car and attempted to scare off the assailants. Kotsybar and Sayre testified that three of the males rode off on the three bikes, and the other assailants ran off, all in different directions.

{¶ 5} Sayre testified he chased one of the males and saw him enter a yard on Parkhurst Drive. Sayre then got into the minivan and proceeded to a nearby Dairy Queen. Kotsybar walked to Dairy Queen, where the police met

them. When the police questioned the boys, Sayre told them he saw one of the assailants go to a house on Parkhurst. The police knocked at the house and asked the woman who answered to have the males in the house come outside. Sayre testified that two men, Kimbro and Kenneth White, came out on the front porch, and he was able to identify Kimbro as the man who punched Kotsybar in the face.

{¶ 6} Samantha Taylor was the state's third witness. Taylor was the passenger in the minivan that Sayre flagged down. Taylor testified she saw Kimbro punch Kotsybar in the face. She also testified that she was able to tell the police which house one of the assailants ran to on Parkhurst. The house Taylor identified was the same as the one Sayre identified. Taylor accompanied the police to the Parkhurst house, where she identified Kimbro as the man who punched Kotsybar in the face. She testified that she had seen Kimbro's face as he was riding away from Kotsybar, and she recognized him because he was the only assailant wearing a hat.

{¶ 7} At the close of the state's case, defense counsel made a Crim.R. 29 motion, which the court denied. The defense presented four witnesses, including Kimbro. Joshua Klein testified he and Kimbro had been playing basketball and were walking home when they saw two white males on bicycles, doubling two additional bicycles. Klein stated their companions, Kenneth White and Xavier Hisle, Kimbro's brother, started the altercation by

trying to take the bikes. He stated that Kimbro tried to stop his brother from stealing the bike and fighting. Klein testified that White and Hisle took two bikes after the fight, but he also testified that no bikes remained in the area, and that he and Kimbro walked away from the scene.

{¶ 8} White and Hisle both testified they tried to steal Kotsybar's and Sayre's bikes. They both stated that Hisle punched Kotsybar, and that Kimbro neither hit anyone nor stole a bike. They testified that Kimbro was not wearing a hat as they were walking home from playing basketball.

{¶ 9} Kimbro testified he tried to break up the fight and persuade his brother and White not to steal the bikes. He stated that he ran off after seeing White and Hisle each steal a bike, and that he went home via back streets. He also testified that the police inspected his knuckles and did not see any cuts or bruises on them that would indicate a recent fight; however, Kimbro testified that he examined Hisle's knuckles and they were bruised.

{¶ 10} The defense renewed its Crim.R. 29 motion, which the court denied.

{¶ 11} The court found Kimbro guilty of the lesser-included offense of robbery in violation of R.C. 2911.02(A)(2), a second degree felony, on Count 1; assault in violation of R.C. 2903.13, a first degree misdemeanor, on Count 2; and robbery in violation of R.C. 2911.02(A)(2), a second degree felony, on Count 3. Kimbro was acquitted on Count 4. The court sentenced him to two

years of community control sanctions, electric home monitoring from 6 p.m. to 7 a.m. for six months, 100 hours of community service, and restitution in the amount of \$1,000. Kimbro timely appealed.

{¶ 12} Within one assignment of error, Kimbro argues both that the state failed to present sufficient evidence to support his convictions and that the guilty verdicts were against the manifest weight of the evidence. The crux of his argument is that the two witnesses who identified him were mistaken, and that the testimony from the defense witnesses demonstrates that Kimbro's brother, Hisle, was actually the assailant who punched Kotsybar and stole his bike.

{¶ 13} When an appellate court reviews a claim of insufficient evidence, “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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37.

{¶ 14} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial

evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.” (Internal citations and quotations omitted.) *State v. Leonard*, supra at ¶ 81.

{¶ 15} Kimbro was convicted of robbery and assault. R.C. 2911.02(A)(2) states: “No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: * * *(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another; * * *.”

{¶ 16} R.C. 2903.13 states: “(A) No person shall knowingly cause or attempt to cause physical harm to another or to another’s unborn.”

{¶ 17} Kimbro fails to argue with any specificity on which element of either crime the state failed to present sufficient evidence.¹ What he is really arguing is a case of mistaken identity. Clearly, the state presented evidence that one of the assailants inflicted physical harm on Kotsybar by punching him in the face. Sayre and Taylor testified they saw Kimbro punch Kotsybar

¹ Kimbro makes the argument that the testimony of the witnesses who identified him was unreliable. However, no objection was made to Sayre’s or Taylor’s testimony prior to or simultaneous with their testifying. Where an accused fails to object timely to testimony at trial, he waives any such error related thereto. See *State v. Aziz*, Cuyahoga App. No. 84181, 2004-Ohio-6631.

in the face. There was testimony that all three bicycles in Kotsybar's and Sayre's possession were stolen by three assailants from the group of males who accosted them. Kotsybar, Sayre, and Taylor testified that Hisle, White, and Kimbro took the bicycles.

{¶ 18} There was sufficient evidence on all elements of the crimes of robbery and assault to survive Kimbro's Crim.R. 29 motions. Viewing the evidence in a light most favorable to the prosecution, the trial court did not err in denying his Crim.R. 29 motions.

{¶ 19} As to whether the guilty verdicts were against the manifest weight of the evidence, we find this court's decision in *State v. Doubrava*, Cuyahoga App. No. 91792, 2009-Ohio-2369, instructive. In *Doubrava*, the appellant argued that his conviction resulted from mistaken identity, in essence conceding the state presented evidence on all essential elements of felonious assault, but arguing instead, he was not driving the car that hit and injured five people. *Id.* This court held that based on eyewitness testimony placing Doubrava in the driver's seat, a jury could reasonably find him guilty of felonious assault. *Id.*

{¶ 20} The issue of credibility is one left to the fact-finder. In this case, the court found the testimony of Sayre and Taylor more credible and thus more reliable than that of Klein, White, and Hisle. Sayre testified he saw Kimbro punch his friend. He also testified that Kimbro fled on one of the

bikes originally in the boys' possession. Likewise, Taylor testified she saw Kimbro punch Kotsybar and flee on a bike. Relying on the evidence before the court, we find that the fact-finder did not lose its way in determining that it was Kimbro who broke Kotsybar's nose and stole one of the bikes. The guilty verdicts were not against the manifest weight of the evidence.

{¶ 21} Kimbro's sole 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. 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
LARRY A. JONES, J., CONCUR