[Cite as *State v. Page*, 2010-Ohio-6569.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
LEROY A. PAGE	:	Case No. 10-CA-80
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 10CR201
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 30, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH W. OSWALT 20 South Second Street Fourth Floor Newark, OH 43055	WILLIAM T. CRAMER 470 Olde Worthington Road Suite 200 Westerville, OH 43082

Farmer, J.

{¶1} On April 23, 2010, the Licking County Grand Jury indicted appellant, Leroy Page, on one count of robbery in violation of R.C. 2911.02(A)(2) and one count of theft of dangerous drugs in violation of R.C. 2913.02(A)(2). Said charges arose from the theft of marijuana from the mother of appellant's child, Jacinda Collins, by appellant and Christopher Parks. Mr. Parks had a firearm in his possession at the time of the incident.

{¶2} A jury trial commenced on July 13, 2010. The theft charge was dismissed during trial. The jury found appellant guilty of the robbery count. By judgment entry filed July 15, 2010, the trial court sentenced appellant to six years in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "APPELLANT'S RIGHTS TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS WERE VIOLATED BECAUSE THE VERDICT OF GUILTY WAS NOT SUPPORTED BY THE WEIGHT OR SUFFICIENCY OF THE EVIDENCE."

I

{¶5} Appellant claims his conviction for robbery was against the sufficiency and manifest weight of the evidence. We disagree.

{¶6} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, 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." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175. We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger,* 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶7} Appellant was convicted of robbery in violation of R.C. 2911.02(A)(2) which states the following:

{¶8} "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶9} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another."

{¶10} The trial court instructed the jury on complicity (T. at 331-333) pursuant to R.C. 2923.03(A) which states the following:

{¶11} "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶12} "(1) Solicit or procure another to commit the offense;

{¶13} "(2) Aid or abet another in committing the offense;

{¶14} "(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

{¶15} "(4) Cause an innocent or irresponsible person to commit the offense."

{¶16} In *State v. Horner,* 126 Ohio St.3d 466, 2010-Ohio-3830, ¶41, the Supreme Court of Ohio explained the following:

{¶17} "In *Colon I,* we considered the culpable mental state for the offense of robbery in violation of R.C. 2911.02(A)(2), i.e., physical-harm robbery.***Rather, we simply concluded in *Colon I* that while the statute did not specify a particular degree of culpability for the physical-harm element, its language does not plainly indicate that strict liability is the mental standard. Thus, the court concluded that the state was required to prove recklessness and that the indictment was defective for failure to charge recklessness, a point that the state conceded. 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, at ¶14-15."

{¶18} The *Horner* court at 473 specifically overruled *Colon I.* For this reason alone, we find appellant's argument that his conviction must be reversed because "the element of recklessness has not been proven" to be without merit.

{¶19} Appellant argues there was insufficient evidence to support a finding of "recklessness" because he did not know his co-conspirator Christopher Parks had brought along a firearm, and the specifics of the planned theft included no weapon.

{¶20} R.C. 2901.22(C) defines "recklessness" as follows:

{¶21} "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶22} Appellant does not dispute the facts, but argues under the definition of conspiracy, he is not guilty of robbery but theft. The undisputed facts are that appellant and Mr. Parks planned to set-up Jacinda Collins and take her marijuana in a "fake" theft offense. T. at 237. They planned to meet Ms. Collins at a gas station under the guise that she would front-end the marijuana to them as they had a buyer for the "weed." Id. Their plan was to take the marijuana and later tell Ms. Collins that the buyer did not pay them. Id. Ostensibly, the whole "fake" theft was concocted to scare Ms. Collins away from selling illegal substances as she was the mother of appellant's child. Id.

{¶23} Appellant admitted to the police that he and Mr. Parks planned the set-up, but stated he had told Mr. Parks that "a gun was not needed" as Ms. Collins "wouldn't fight him" so he advised Mr. Parks not to bring a gun. T. at 121-122, 126. The plan was that once they met Ms. Collins at the gas station, appellant would "pretend" to have some pills to sell and Mr. Parks would take both the pills and Ms. Collins's marijuana so it would appear as if he was also robbed by Mr. Parks and not a part of the plan. T. at 121-122.

{¶24} In reality, after everyone met at the gas station, the plans changed. T. at 237. Appellant and Ms. Collins began arguing over appellant's girlfriend because the

girlfriend had driven appellant to the gas station. T. at 124, 238. Ms. Collins pulled out her cell phone and Mr. Parks pulled out his gun, pointed the gun at appellant, and demanded that they he and Ms. Collins give him their cell phones. T. at 125-126, 238. After Mr. Parks left, appellant fled the scene because Ms. Collins had threatened to tell the police that he was the one with the gun. T. at 128, 130.

{¶25} Ms. Collins testified that after Mr. Parks got into her vehicle, she felt something was wrong, so she pulled out her cell phone. T. at 162. Mr. Parks pulled out his gun and demanded the cell phones. T. at 161. Appellant told Ms. Collins to give Mr. Parks her cell phone and she accused appellant of setting her up to get robbed which he denied. T. at 162-163. Ms. Collins obtained the license plate number of Mr. Parks's vehicle and reported the robbery to the police. T. at 164-165.

{¶26} Mr. Parks testified he brought the gun because he was worried about Ms. Collins's drug dealer. T. at 247. Appellant knew Mr. Parks owned a gun and that Mr. Parks had thought about bringing the gun to the gas station meeting; however, Mr. Parks claimed that appellant did not know that he "had the gun on me." T. at 250. It is undisputed that both Mr. Parks and appellant wanted it to look like a robbery and had discussed whether or not to use a firearm. T. at 126, 128, 250-251.

{¶27} The authenticity of appellant's motive was definitely an issue. He claimed he wanted to teach Ms. Collins a lesson, but told the police "this was a deal where they could take the marijuana and not have to buy it." T. at 121. Appellant stated the plan was for he and Mr. Parks to split the marijuana. T. at 122.

{¶28} The "fake" robbery and the robbery of the marijuana could only have been accomplished by the use of force. The jury as the trier of fact could have easily seen

through the testimony of Mr. Parks and concluded that to plan a robbery implicitly indicated that force or a weapon would be used. R.C. 2911.02(A)(2) does not require a weapon, but proof of threat to inflict physical harm.

{¶29} Upon review, we find sufficient evidence to find appellant guilty of robbery and no manifest miscarriage of justice.

{¶30} The sole assignment of error is denied.

{¶31} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer J.

Hoffman, P.J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ William B. Hoffman_____

_s/ Patricia A. Delaney_____

JUDGES

SGF/sg1210

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
LEROY A. PAGE	:	
Defendant-Appellant	:	CASE NO. 10-CA-80

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio is affirmed. Costs to appellant.

_s/ Sheila G. Farmer_____

_s/ William B. Hoffman_____

_s/ Patricia A. Delaney_____

JUDGES