[Cite as *State v. Umphries*, 2010-Ohio-866.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 09CA3114
vs.	:	
JEFFREY L. UMPHRIES,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Eric W. Brehm, Brehm & Associates, 604 East Rich Street, Ste. 2100, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: Michael M. Ater, Ross County Prosecuting Attorney, and Richard W. Clagg, Ross County Assistant Prosecuting Attorney, 72 North Paint Street, Chillicothe, Ohio, 45601

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 2-26-10

ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. A jury found Jeffrey L. Umphries, defendant below and appellant herein, guilty of (1) aggravated robbery in violation of R.C. 2911.01; and (2) aggravated burglary in violation of R.C. 2911.11.

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT DID ERR BY IMPOSING CONSECUTIVE SENTENCES, WHEN THE OFFENSES

> WERE ALLIED OFFENSES OF SIMILAR IMPORT."
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT DID ERR WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 3} On the evening of October 5, 2008, April Huntley put her children to bed and then heard a knock at her kitchen door. She opened the door to see her friend, Kathleen Hamilton, standing in the doorway with a man standing behind her holding a knife to her neck. The man, who was accompanied by another woman, barged into the house and demanded that Huntley give him "money" and "dope." When Huntley said that she did not have any, the man gave the knife to his female accomplice and began to search the apartment.

{¶ 4} Huntley wrestled the knife away from the accomplice and told the couple to leave her apartment. As the intruders retreated to their car, they were given chase by a pit-bull terrier. Huntley observed the vehicle's license plate as it drove away and called the Chillicothe Police Department.

{¶ 5} A short time later, Officer Tonya Gannon passed the car. When she turned to investigate, a man standing outside the vehicle took flight. Officer Gannon secured the woman in the car (later identified as Jessica Dozier) and other officers found a man (later identified as appellant) hiding underneath a trailer in a parking lot a short distance from the car.

{¶ 6} On November 7, 2008, the Ross County Grand Jury returned an indictment

charging appellant with both aggravated robbery and aggravated burglary. He pled not guilty and the matter proceeded to a jury trial over two days in April 2009. After hearing the evidence, the jury found appellant guilty on both counts in the indictment. The trial court sentenced appellant to serve five year terms of imprisonment on both counts, with sentences to be served consecutively for a total of ten years imprisonment. This appeal followed.

I

{¶ 7} We consider appellant's two assignments of error in reverse order. In his second assignment of error, appellant asserts that the evidence adduced at trial was insufficient to sustain his convictions and, thus, is against the manifest weight of the evidence. Our analysis of this claim begins with the observation that appellant has conflated two separate issues. "Sufficiency" of the evidence and "manifest weight" of the evidence are distinct legal concepts. See State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541.

{¶ 8} When reviewing the sufficiency of the evidence, courts must focus on the adequacy of the evidence; that is, whether the evidence adduced at trial, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. Id. at 386; State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. The pertinent standard of review is whether, after viewing all of the evidence and the inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense beyond a reasonable doubt. Jenks, supra at 273; Jackson v. Virginia (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. Furthermore, a reviewing court is not to assess "whether the state's

evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." Thompkins, 78 Ohio St.3d at 390, 678 N.E.2d 541 (Cook, J., concurring).

{¶ 9} Appellant offers a number of arguments to support his contention that the evidence is insufficient. First, appellant posits that insufficient evidence linked him to the actual perpetration of the crime. We disagree.

{¶ 10} Although Huntley could not identify appellant as the man who entered her apartment, during the escape she did view the vehicle's license plate. When authorities located that vehicle, it contained a video camera stolen from Huntley. Officer Gannon reported that a man was standing outside that vehicle and that he fled on foot when she turned her cruiser. A short time later, authorities found appellant hiding under a trailer, approximately 100 to 150 feet from the get-away vehicle. In view of the fact these events occurred between 11:30 PM and midnight, and considering that few people will choose to position themselves beneath a trailer at that hour of the evening unless to conceal their location, we believe that the evidence is sufficient to establish that appellant (1) is the man that Officer Gannon observed running from the vehicle, the same vehicle that contained Huntley's video camera, and (2) is the perpetrator of the crime.

{¶ 11} Appellant also argues that "the State has produced no evidence that [he] had a deadly weapon on or about his person." Again, we disagree. However, as we noted supra, Huntley testified that the assailant held a knife to the neck of her friend (Hamilton), then later gave the weapon to his female accomplice from whom Huntley wrestled the weapon away. Once again, evidence adduced at trial, if believed,

supports the prosecution's version of the events.

{¶ 12} As to appellant’s claim that his convictions are against the manifest weight of the evidence, an appellate court may not reverse a conviction on that ground unless it is obvious 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. See State v. Earle (1997), 120 Ohio App.3d 457, 473, 698 N.E.2d 440; State v. Garrow (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814.

{¶ 13} As noted earlier, the video camera stolen from Huntley was found in the car located 100 to 150 feet from appellant. These events occurred at midnight, when, again, it is logical to assume that few people are crawling under trailers, unless they are trying to evade authorities. We recognize that witness testimony differed as to the clothing that the perpetrator wore that evening. The victim testified about a “black hoodie” with the hood pulled over the head so that she could not get a good look at the perpetrator's face. The arresting officer, Jonathan Robinson, testified that appellant wore “dark colored clothes,” but confirmed Huntley’s identification was “accurate.” By contrast, Officer Gannon testified that appellant was wearing a “black shirt” when she observed him.

{¶ 14} Any inconsistencies in the evidence and testimony, however, involve the weight and credibility of the evidence which, generally speaking, are issues for the trier of fact to consider and to resolve. State v. Dye (1998), 82 Ohio St.3d 323, 329, 695 N.E.2d 763; State v. Ballew (1996), 76 Ohio St.3d 244, 249, 667 N.E.2d 369. We further note that if appellant had attempted to conceal his identity, it is not conceivable

that appellant could have removed the "hoodie" after he had left the scene. Once again, this is an issue that the trier of fact must resolve. Obviously, the jury considered, but rejected, the argument that the few differences in the description of the assailant's clothing undermined the prosecution's theory of the case.

{¶ 15} Therefore, based upon our review of the evidence, we cannot conclude that the jury lost its way and created a manifest miscarriage of justice.

{¶ 16} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error.

II

{¶ 17} In his first assignment of error, appellant asserts that his aggravated robbery and aggravated burglary convictions constitute allied offenses of similar import. Innumerable courts have considered this issue, however, and all have determined that aggravated robbery and aggravated burglary do not constitute allied offenses of similar import. See, e.g., State v. Ketterer, 111 Ohio St.3d 70, 855 N.E.2d 48, 2006-Ohio-5283, at ¶119; State v. Nieves, Lorain App. No. 08CA9500, 2009-Ohio-6374, at ¶43; State v. Jones, Mahoning App. No. 06MA109, 2008-Ohio-1541, at ¶97. Appellant has offered no reason to depart from this well-settled law.

{¶ 18} Accordingly, we hereby overrule appellant's second assignment of error.

{¶ 19} Having reviewed all errors assigned and argued in the brief, and having found merit in none, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Kline, J.: Concur in Judgment & Opinion

For the Court

BY:__________________
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.