**[Cite as *State v. Curley*, 2019-Ohio-2600.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF SUMMIT | ) | |

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| STATE OF OHIO<br><br>Appellee<br><br>v.<br><br>RICHARD L. CURLEY<br><br>Appellant | C.A. No. 29156<br><br><br><br>APPEAL FROM JUDGMENT<br>ENTERED IN THE<br>COURT OF COMMON PLEAS<br>COUNTY OF SUMMIT, OHIO<br>CASE No. CR-2017-09-3307-A |

DECISION AND JOURNAL ENTRY

Dated: June 28, 2019

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CALLAHAN, Presiding Judge.

**{¶1}** Appellant, Richard Curley, appeals his conviction in the Summit County Court of Common Pleas. This Court affirms.

I.

**{¶2}** At approximately 3:45 a.m. on September 16, 2017, two armed individuals robbed two pedestrians at the intersection of Kirn Avenue and Power Street in Akron. One of the victims pursued the gunmen when they fled on foot, but lost sight of them near the intersection of Power Street and Brown Street. Seconds later, the victim saw a vehicle speed away from a nearby parking lot. At the same time, that victim, who was also a member of the University of Akron off-campus civilian patrol, contacted the University of Akron's dispatch using a walkie-talkie.

**{¶3}** A University of Akron ("University") police officer in the vicinity heard the resulting dispatch. As he turned left from Wolf Ledges Parkway to Thornton Street, he noted

that an oncoming vehicle traveling "at a good rate of speed" lifted off the ground as it went through the intersection of Thornton Street and Grant Street. The officer observed that the front seat occupants and the vehicle matched the description provided in the dispatch call, so he performed a U-turn and followed the vehicle. When the vehicle accelerated through a yellow light, the officer activated his overhead lights and went through the intersection in pursuit. The vehicle travelled approximately one-half mile before stopping near the intersection of Wolf Ledges Parkway and South Street, where the officer waited for backup to arrive before approaching the vehicle.

**{¶4}** At 3:54 a.m., police officers from the City of Akron were dispatched to assist officers from the University with an incident that was reported as "a suspicious person with a gun." When they arrived at the scene of the traffic stop at 3:56 a.m., University police officers had already initiated a traffic stop and detained four individuals suspected of being involved in the robbery. Because the incident had occurred on private property, the University officers turned the investigation over to the officers from the City of Akron, who drove the victims to the scene of the traffic stop to identify the occupants of the vehicle. The victims identified the front-seat passenger, Hayden Fife, as one of the gunmen with certainty. They did not identify the second gunman with certainty. During a search of the vehicle, officers found several items of the victims' personal property and two guns that matched the description of those used in the robbery.

**{¶5}** Mr. Curley was charged with two counts of aggravated robbery in violation of R.C. 2911.01(A)(1), accompanied by firearm specifications pursuant to R.C. 2941.145; one count of having weapons under disability in violation of R.C. 2923.13(A)(2); and one count of gross sexual imposition in violation of R.C. 2907.05(A)(1). The State dismissed the charge of

gross sexual imposition before trial. A jury found Mr. Curley guilty of both counts of aggravated robbery, but not guilty of the firearm specifications and the remaining charge. The trial court sentenced Mr. Curley to consecutive five-year prison terms, and Mr. Curley filed this appeal. His three assignments of error are rearranged for purposes of discussion.

II.

**ASSIGNMENT OF ERROR NO. 2**

> APPELLANT'S CONVICTION WAS BASED UPON INSUFFICIENT EVIDENCE TO SUSTAIN [A] CONVICTION. THE TRIAL COURT ERRED BY DENYING APPELLANT'S CRIM.R. 29 MOTION.

**{¶6}** Mr. Curley's first assignment of error argues that the State did not produce sufficient evidence to convict him of aggravated robbery as an accomplice. This Court disagrees.

**{¶7}** "Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo." *State v. Williams*, 9th Dist. Summit No. 24731, 2009–Ohio–6955, ¶ 18, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins* at 390 (Cook, J., concurring). In reviewing the evidence, we do not evaluate credibility, and we make all reasonable inferences in favor of the State. *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991). The evidence is sufficient if it allows the trier of fact to reasonably conclude that the essential elements of the crime were proven beyond a reasonable doubt. *Id*.

**{¶8}** R.C. 2911.01(A)(1), which prohibits aggravated robbery, provides that "[n]o person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly weapon on or about the offender's person or under

the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]" A "theft offense" includes a violation of R.C. 2913.02(A), which prohibits theft. R.C. 2913.01(K)(1). Theft occurs when any person, "with purpose to deprive the owner of property or services, * * * knowingly obtain[s] or exert[s] control over either the property or services" without consent, or beyond the scope of consent, or by deception, threat, or intimidation. R.C. 2913.02(A).

**{¶9}** Complicity is established when a person acts with the level of culpability required for an offense in soliciting or procuring another to commit the offense, aiding or abetting in the commission of the offense, conspiring to commit the offense, or causing an innocent or irresponsible individual to commit the offense. R.C. 2923.03(A). A conviction based on complicity by aiding and abetting under R.C. 2923.03(A)(2) must be based on evidence showing "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." *State v. Johnson*, 93 Ohio St.3d 240 (2001), syllabus. This intent may be inferred from the surrounding circumstances. *Id.* "When an individual acts to aid or abet a principal in the commission of an offense, the individual and principal are equally guilty and the individual is prosecuted and punished as if he were a principal offender." *State v. Shabazz*, 146 Ohio St.3d 404, 2016-Ohio-1055, ¶ 21, citing R.C. 2923.03(F).

**{¶10}** In this case, the State produced sufficient evidence demonstrating that Mr. Curley purposely aided and abetted in aggravated robbery. The State's theory of the case was that two individuals, Hayden Fife and Porsha Daniels, robbed two pedestrians at gunpoint on September 16, 2017. Both victims testified at trial. According to their testimony, an African-American individual and a lighter-skinned individual accosted them at the corner of Kirn Avenue and

Power Street at approximately 3:45 a.m. The lighter-skinned individual carried a rifle with a laser sight. According to the victims' testimony, that gunman approached the female victim, held the firearm to her head, and demanded her money. The male victim, M.T., testified that the African-American individual held a pistol to his chest and instructed him to empty his pockets. The female victim noted that the African-American gunman wore a "beanie" covered by a tightly-drawn hoodie—neither of which had distinguishing characteristics—and had no facial hair. That individual flung M.T.'s walkie-talkie to the ground during the course of the robbery.

**{¶11}** The victims testified that the gunmen fled on foot after taking their possessions. M.T. recalled that he retrieved his walkie-talkie, used it to contact the University's dispatch center, and pursued the pair on foot. He testified that he lost sight of the robbers for approximately thirty to forty-five seconds near the corner of Power Street and Brown Street. At that point, MT testified that he saw a Toyota Sedan from the late 1990s or early 2000s "tak[e] off * * * aggressively accelerating" down Brown Street toward Exchange Street. M.T. provided a detailed description of the gunmen, their weapons, and the vehicle to the University dispatch.

**{¶12}** Officer Jeff Barton, a University police officer in the vicinity, heard the resulting dispatch. He testified that as he turned left from Wolf Ledges Parkway to Thornton Street, he noticed that an oncoming vehicle traveling "at a good rate of speed" lifted off the ground as it went through the intersection of Thornton Street and Grant Street. Officer Barton observed that the front seat occupants and the vehicle matched the description provided in the dispatch, so he performed a U-turn and followed the vehicle. When the vehicle accelerated through a yellow light, he activated his overhead lights and went through the intersection in pursuit. He recalled that the vehicle travelled approximately one-half mile before stopping near the intersection of Wolf Ledges Parkway and South Street, where he waited for backup to arrive before

approaching the vehicle. Officer Barton testified that the location where he first saw the vehicle was four or five blocks from the location of the robbery, and he agreed that the distance could be covered by car in approximately a minute's time.

**{¶13}** Akron police officer Mark Northrup testified that at 3:54 a.m., police officers from the City of Akron were dispatched to assist officers from the University. At 3:56 a.m., another dispatch issued, informing officers that the University police had initiated a traffic stop of the vehicle. When Officer Northrup arrived at the scene of the traffic stop at the same time, University police officers had detained four individuals suspected of being involved in the robbery. Officer Northrup testified that because the incident had occurred on private property, the investigation was turned over to the officers from the City of Akron, who then drove the victims to the scene of the traffic stop to identify the occupants of the vehicle.

**{¶14}** At trial, M.T. testified that the vehicle he saw at the scene of the traffic stop was the same vehicle that he had seen immediately after the robbery. Officer Northrup and the victims testified that during the traffic stop, the victims identified the front-seat passenger, Hayden Fife, as one of the gunmen with certainty, but could not conclusively identify the other gunman. Officer Barton testified that during a search of the vehicle, officers found several items of the victims' personal property and two guns that matched the description of those used in the robbery.

**{¶15}** The State presented the results of DNA testing through the testimony of a forensic scientist. He testified that the DNA profiles analyzed from a hoodie and from the trigger of a handgun found in the vehicle were consistent with a sample obtained from Porsha Daniels. He also testified that the major DNA profile obtained from a sample collected from the trigger of another firearm was consistent with the sample obtained from Porsha Daniels, while the major

DNA profile obtained from a sample collected from the forestock, grip, and sight of the same weapon was consistent with a sample obtained from Hayden Fife. Mr. Curley was excluded as the source of the DNA samples obtained from both weapons.

**{¶16}** Detective Ronald Kennedy explained that the DNA evidence indicated that Hayden Fife, the front passenger, and Porsha Daniels, the rear passenger, were the two individuals who committed the robbery. Detective Kennedy also testified that the officers confiscated several mobile phones, one of which belonged to Christopher Morris, who had been sitting in the rear passenger seat of the vehicle, and the other of which belonged to Mr. Curley. Detective Kennedy testified that police obtained a search warrant to extract data from both phones, but that the extraction was ineffective with Mr. Curley's phone due to damage it had sustained. The data extracted from the other phone, however, demonstrated that Mr. Morris called Mr. Fife's mobile phone four times around 3:52 a.m., a period of time just after the robbery and just before the University's dispatch issued. As several other witnesses also noted, Detective Kennedy testified that Mr. Curley was the driver of the vehicle.

**{¶17}** This evidence is sufficient to lead a reasonable trier of fact to conclude that Mr. Curley was complicit in aggravated robbery by aiding and abetting Porsha Daniels and Hayden Fife in the commission of the crime. As this Court has noted

> The criminal intent of the aider and abettor "can be inferred from the presence, companionship, and conduct of the defendant before and after the offense is committed." *In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, ¶ 13, citing *Johnson* [93 Ohio St.3d] at 245. Although presence at the scene of the crime by itself is not sufficient evidence of complicity, "[t]his rule is to protect innocent bystanders who have no connection to the crime other than simply being present at the time of its commission." *Id.* at 243.

*State v. Smith*, 9th Dist. Summit No. 25650, 2012-Ohio-794, ¶ 7. Driving a getaway car is an "'overt act[] of assistance'" that may establish the existence of aiding and abetting for purposes

of R.C. 2923.03(A)(2). *State v. Graham*, 9th Dist. Medina No. 14CA0084-M, 2016-Ohio-3210, ¶ 26, citing *State v. Lett*, 160 Ohio App.3d 46, 2005-Ohio-1308, ¶ 29 (8th Dist.). The evidence in this case, if believed, established that Mr. Curley drove a vehicle that, through Christopher Morris, was in communication with Ms. Daniels and Mr. Fife at approximately the time that they fled the scene of the robbery on foot and that he drove the vehicle from the place where Ms. Daniels and Mr. Fife were last seen while the firearms, the victims' belongings, and some of Ms. Daniels' clothing were stashed throughout the vehicle. This evidence demonstrated that Mr. Curley was more than an "innocent bystander" to the crimes; he actively participated in Ms. Daniels' and Mr. Fife's attempted flight. *Compare State v. Bitting*, 9th Dist. Summit No. 28317, 2017-Ohio-2955, ¶ 10.

**{¶18}** Mr. Curley's second assignment of error is overruled.

**ASSIGNMENT OF ERROR NO. 3**

> THE JURY VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

**{¶19}** Mr. Curley's third assignment of error argues that his convictions for aggravated robbery are against the manifest weight of the evidence. This Court does not agree.

**{¶20}** When considering whether a conviction is against the manifest weight of the evidence, this Court must:

> review 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 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.

*State v. Otten*, 33 Ohio App.3d 339, 340 (9th Dist.1986). A reversal on this basis is reserved for the exceptional case in which the evidence weighs heavily against the conviction. *Id.* at 340, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

**{¶21}** In support of this assignment of error, Mr. Curley maintains that the evidence does not support a conviction for aiding and abetting Ms. Daniels and Mr. Fife in the commission of the robbery because "there is a complete absence of evidence that Mr. Curley had knowledge of involvement in the robberies when they entered the car, or that the items in their possession were in fact contraband." This Court has observed that "'[w]hen the defendant's culpable mental state is in issue, the proof of a mental state must be derived from circumstantial evidence, as direct evidence will not be available.'" *State v. Syed*, 9th Dist. Medina Nos. 17CA0013-M, 17CA0014-M, 2018-Ohio-1438, ¶ 23, quoting *State v. Flowers*, 9th Dist. Lorain No. 03CA008376, 2004-Ohio-4455, ¶ 15. In this respect, we note the well-established principle that "[c]ircumstantial evidence and direct evidence inherently possess the same probative value[.]" *Jenks*, 61 Ohio St.3d 259 at paragraph one of the syllabus.

**{¶22}** The testimony of the two victims and the officers who responded to the dispatches regarding the robbery and the traffic stop established the identity of each occupant of the vehicle and a timeline that demonstrated that Mr. Curley "supported, assisted, encouraged, cooperated with, advised, or incited" the principal offenders in the commission of the robbery. *Johnson*, 93 Ohio St.3d 240, at syllabus. Hayden Fife participated in the robbery, carrying a rifle. Porsha Daniels also participated, wearing a hoodie drawn close around her face and carrying a handgun. M.T. testified that he followed the assailants on foot until they disappeared for approximately thirty seconds, after which a car sped away from the same area. Within minutes, a police officer saw a vehicle matching the dispatch description in the vicinity of the robbery. Mr. Curley drove several blocks before pulling over so that the officer could initiate a traffic stop.

**{¶23}** Less than five minutes elapsed between the point when the vehicle sped away from the scene of the robbery and the traffic stop. The officers who searched the vehicle found

that the rifle carried by Mr. Fife during the robbery was stowed behind the rear driver-side seat, although Mr. Fife himself sat in the front passenger-side seat when the car was stopped. Mr. Daniels' handgun and hoodie were found concealed in the same location. Many of the victims' possessions were found in the rear passenger compartment of the car. Other items were strewn along the route that the vehicle took from the location of the robbery. Mr. Curley's demeanor at the time of the traffic stop was "calm."

**{¶24}** Based on this evidence, this Court cannot say that the jury lost its way in concluding that Mr. Curley was complicit in aggravated robbery. This is not the exceptional case in which the evidence weighs heavily against the conviction, and Mr. Curley's third assignment of error is overruled.

**ASSIGNMENT OF ERROR NO. 1**

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.

**{¶25}** In his first assignment of error, Mr. Curley argues that the trial court erred by denying his motion to suppress evidence gained as a result of the traffic stop. He has also argued that the results of the show-up and photographic identifications should have been suppressed.

**{¶26}** This Court's review of the trial court's ruling on the motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. The trial court acts as the trier of fact during a suppression hearing and is best equipped to evaluate the credibility of witnesses and resolve questions of fact. *Id.*; *State v. Hopfer*, 112 Ohio App.3d 521, 548 (2d Dist.1996), quoting *State v. Venham*, 96 Ohio App.3d 649, 653 (4th Dist.1994). Consequently, this Court accepts a trial court's findings of fact if supported by competent, credible evidence. *Burnside* at ¶ 8. Once this Court has determined that the trial court's factual findings are supported by the evidence, we consider the trial court's legal

conclusions de novo. *See id.* In other words, this Court then accepts the trial court's findings of fact as true and "must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id*., citing *State v. McNamara*, 124 Ohio App.3d 706, 710 (4th Dist.1997).

**{¶27}** The investigatory stop of an automobile is a seizure for purposes of the Fourth Amendment and, consequently, must be based on a law enforcement officer's reasonable suspicion "that a motorist has committed, is committing, or is about to commit a crime." *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, ¶ 7, citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). In justifying the stop, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The touchstone of this analysis is whether the officer acted reasonably. *State v. Lozada*, 92 Ohio St.3d 74, 78 (2001). This question is evaluated in light of the totality of the circumstances surrounding the stop. *State v. Freeman*, 64 Ohio St.2d 291 (1980), paragraph one of the syllabus.

**{¶28}** Mr. Curley has not challenged the trial court's findings of fact, so this Court accepts them as true and reviews the trial court's legal conclusions de novo. *See Burnside* at ¶ 8. The trial court found that Officer Barton heard a dispatch to be on the lookout for an African-American male and a Hispanic male suspected of committing an armed robbery. Officer Barton noted that the car driven by Mr. Curley matched the description in the dispatch and that the occupants of the front seats matched the description of the suspects. The trial court noted that Officer Barton's attention was also piqued when the vehicle accelerated through a yellow light after he pulled into the lane of traffic behind it. The trial court concluded that Officer Barton was justified in initiating a traffic stop based on his reasonable suspicion that the car and its

occupants matched the descriptions in the dispatch related to the armed robbery that had just occurred nearby.

**{¶29}** A police officer may rely solely upon information provided in a dispatch in initiating a traffic stop, but at a suppression hearing, the State must demonstrate that the facts that led to the dispatch justified a reasonable suspicion of criminal activity. *Maumee v. Weisner*, 87 Ohio St.3d 295 (1999), paragraph one of the syllabus. In this case, the information that precipitated the dispatch was provided by M.T., a victim of the crime at issue who observed the assailants and the suspected getaway car and contacted the University dispatch within minutes of the robbery. M.T. was, therefore, an "'identified citizen informant,'" which is "generally considered to be highly reliable[.]" *State v. Saravia*, 9th Dist. Summit No. 25977, 2012-Ohio-1443, ¶ 7, quoting *Weisner* at 300-301. As the trial court concluded, Officer Barton was justified in initiating a traffic stop based on the reasonable suspicion that the vehicle and its occupants matched the dispatched description of the suspects in an armed robbery and their getaway car. The trial court did not err in denying Mr. Curley's motion to suppress on this basis.

**{¶30}** Mr. Curley has also argued that the trial court erred by denying his motion to suppress the results of the show-up and photographic identifications that occurred after his arrest. Even if this Court were to assume, without deciding, that the trial court erred in this respect, any such error would be harmless beyond a reasonable doubt. *See generally Chapman v. California*, 386 U.S. 18, 24 (1967) (holding that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."). When a trial court errs by failing to suppress evidence, but the defendant is ultimately acquitted of the related charges, the error in connection with the suppression is harmless. *See State v. Howard*, 146 Ohio App.3d 335, 342 (5th Dist.2001). Similarly, when errors in a photographic

identification procedure do not result in prejudice to the defendant, failure to grant a motion to suppress can be harmless. *See State v. Vore*, 12th Dist. Warren No. CA2011-08-093, 2012-Ohio-2431, ¶ 65.

**{¶31}** In this case, police officers transported the victims to the scene of the traffic stop and conducted a show-up identification. Later, investigating officers presented the victims with recent photographs of the four individuals from the vehicle for the purpose of identifying the gunmen. The victims identified Mr. Fife as one of the gunmen with certainty, and they did not waiver in this identification, including their testimony at trial. The victims could not positively identify which of the three occupants of the car had been the second gunman, but they consistently maintained that the second gunman did not have any facial hair—a distinguishing feature that did not describe Mr. Curley. At trial, the State's theory of the case was not that Mr. Curley was one of the principal offenders, but that he was the accomplice who drove the getaway car. As Detective Kennedy testified, "[b]ased on the physical evidence with the hoodie and their DNA being on the guns, it appears that Hayden Fife and Porsha Daniels were the two that actually got out during the robbery." Consistent with this testimony and the State's theory of the case, the jury found Mr. Curley guilty of aggravated robbery, but not guilty of the accompanying firearm specifications and of possessing a weapon under disability. The evidence gained as a result of the identification procedures used in this case served not to convict Mr. Curley, but to acquit him of some of the charges. Under these circumstances, this Court concludes that any possible error in the suppression was harmless beyond a reasonable doubt.

**{¶32}** Mr. Curley's first assignment of error is overruled.

III.

**{¶33}** Mr. Curley's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

LYNNE S. CALLAHAN
FOR THE COURT

HENSAL, J.
CONCURS.

CARR, J.
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

ALAN M. MEDVICK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.