

[Cite as *State v. Simpson*, 2010-Ohio-4045.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23773
v.	:	T.C. NO. 2009CRB01848
	:	
MICHAEL L. SIMPSON	:	(Criminal appeal from Municipal Court)
Defendant-Appellant	:	

**OPINION**

Rendered on the 27<sup>th</sup> day of August, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Michael L. Simpson, filed November 24, 2009. On September 17, 2009, Simpson was charged by way of Complaint in Kettering Municipal Court with one count of assault, in violation of R.C. 2903.13, and one count of theft, in violation of R.C. 2913.02, both misdemeanors of the first

degree. On November 4, 2009, Simpson filed a Notice of Alibi.

{¶ 2} Following a jury trial, Simpson was found guilty of both offenses. He was sentenced to 180 days on the assault charge, and to 180 days for the theft offense, to be served consecutively. He received a credit of three days on each sentence. Simpson was fined \$1000.00 for the theft offense, and the court suspended \$900.00 of the fine and 90 days of the sentence for the theft offense only, on the condition that Simpson comply with the terms of his probation. Finally, Simpson was ordered to pay restitution to the victim, Samuel Zechar, in the amount of \$150.00.

{¶ 3} The events giving rise to this matter began on Thursday, August 13, 2009, at approximately 2:30 a.m., when Elizabeth Brandenburg, who was Zechar's girlfriend at the time, and Zechar, were talking outside an apartment at a complex called The Wynds, in Kettering. The apartment belonged to Jordan Gregory, and a party was going on inside. According to Brandenburg, while the couple spoke, brothers Michael and Doug Simpson approached them, and one of them asked, "Who's that?" Next, Brandenburg testified that "Mike, I believe, tackled him to the ground, and then Doug comes up behind him and starts knocking him in the head." Brandenburg stated that she did not know the Simpson brothers, and she was "not really that clear on which one was which." According to Brandenburg, "then somehow they had ahold [sic] of [Zechar's] wallet, and one of them took the money out, and threw it back on the ground, and then the other one picked it up, \* \* \* " and "then handed the wallet back to Sam \* \* \* and then they went inside the apartment. And Sam's nose was all bloodied up, it looked like it was broken. He had blood rushing down his face \* \* \* ." When the brothers went inside, Zechar advised Brandenburg that he

knew his attackers by name. On cross-examination, Brandenburg stated that she could not identify which brother was punching Zechar and which brother took his wallet, “because I don’t know them, and they look similar.” On redirect examination, Brandenburg identified Simpson in court and stated that he participated in both the assault and theft offenses. On recross-examination, Brandenburg stated that only one of the brothers picked up the wallet, removed the money, and threw the wallet down.

{¶ 4} Zechar testified that he knew both Michael and Doug Simpson in high school. According to his testimony, Zechar and Brandenburg were outside the apartment when he heard someone say, “Who’s that?” After Zechar responded, Doug Simpson tackled him and “ \* \* \* Michael ran up and started hitting me too, and they then took my wallet, or it fell out when I got tackled, but they took \* \* \* the money out of my wallet and then threw it back on me. And then they had gone inside \* \* \*.” When asked if both brothers handled his wallet, Zechar replied, “I can’t be too sure about that, but I think so.” Zechar stated that he did not observe which of the brothers initially picked up his wallet and took his money, but that Michael Simpson gave the empty wallet back to him. After the Simpsons left the apartment, Zechar went inside and attended to his injuries and went to bed at the apartment. Zechar reported the incident to police the following afternoon. On cross-examination, Zechar stated that people at the party were drinking, and that he was intoxicated at the time of the offense.

{¶ 5} Anthony Sprouse attended the party at Gregory’s apartment, and he testified that when the Simpson brothers entered the apartment together, “they were saying how they jumped Sam Zechar and took his money, \* \* \*.” Sprouse stated that he heard Doug

Simpson say, “we jumped him, and took his money.”

{¶ 6} Detective Paul Markowski of Kettering testified that he investigated the incident herein, and he interviewed Michael Simpson at the Kettering jail. According to Markowski, “when I was interviewing him, I was advising him of his rights from a Miranda form. Got to the third right which speaks about his right to an attorney, and he invoked that right. I told him at that point, the interview would be concluded. He went on to explain that the last time the cops had talked to me, they got me so mixed up they said I confessed to something that I didn’t do. \* \* \* I said well, you got your right to remain silent, you’ve invoked that, so we’re done. I’ll take you back to your cell. Then he said, I was questioning him about a robbery, and he said that he could understand if, he said he didn’t do a robbery, but he could understand if he was being accused of an assault or a theft.” At the close of the State’s case, defense counsel moved for an acquittal, and her motion was denied.

{¶ 7} The defense offered an alibi defense. Brittany Hotton, Doug Simpson’s girlfriend and the mother of his daughter, testified that she and the Simpson brothers went to the emergency room around midnight on August 12, 2009, because Hotton had “a very bad migraine.” She left her daughter in the care of the Simpsons’ mother, Lori Simpson. According to Hotton, they were at the hospital for two hours waiting for a CAT scan to be done, but Hotton had to leave before she was treated because her daughter was sick, and because Gregory needed a ride home from work. Hotton claimed that the Simpsons left the hospital with her and went to Bar Louie’s, where Gregory worked. After picking him up, they dropped him off at his apartment. According to Hotton, Gregory alone got out of the car

at The Wynds, and she did not see anyone else outside of the building. She asserted that all three of them returned to the Simpsons' mother's house, and "Michael actually fell asleep."

Hotton claimed that she and Doug tended to their baby and then went to bed. Lori Simpson also testified on behalf of her son.

{¶ 8} At the end of Simpson's case, defense counsel renewed the motion for acquittal, and the motion was overruled.

{¶ 9} Simpson asserts two assignments of error. His first assignment of error is as follows:

{¶ 10} "THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 11} This assigned error is addressed to both offenses.

{¶ 12} "When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, 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. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 13} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231.

"Because the factfinder \* \* \* has the opportunity to see and hear the witnesses, the cautious

exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 14} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 15} R.C. 2903.13(A) provides: "No person shall knowingly cause or attempt to cause physical harm to another \* \* \* ."

{¶ 16} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C.2901.22(B).

{¶ 17} R.C. 2913.02(A)(1) provides: "No person, with purpose to deprive the owner of property \* \* \* shall knowingly obtain or exert control over \* \* \* the property \* \* \* in any of the following ways: (1) Without the consent of the owner \* \* \*."

{¶ 18} According to Simpson, regarding the assault, Brandenburg's description of Zechar's attackers is not clear in that she could not identify the individual brothers, Sprouse's testimony as to what he heard Doug Simpson say regarding the assault and theft is "second-hand" evidence, and Zechar's testimony is not credible because he was intoxicated.

Regarding the theft, Simpson asserts that “[a]ll the testimony has demonstrated is that Michael could have been the one who threw down Sam’s wallet,” and the jury was not instructed on complicity. Specifically Simpson complains of the following unanswered jury question: “Is a persopn guilty of theft if he never touched the money but he helped attack someone with the intent to deprive the victim of money?”

{¶ 19} Regarding the theft offense, the court instructed the jury as follows: “\* \* \* Before you can find the Defendant guilty, you must find beyond a reasonable doubt that on or about the 13<sup>th</sup> day of August, 2009, and in the City of Kettering, Montgomery County, Ohio, the Defendant, with purpose to deprive the owner of money, knowingly obtained or exerted control over the money and property of Samuel Zechar without the consent of the owner.”

{¶ 20} We note, a “person who is complicit in an offense may be charged and punished as if he were the principal offender, and a charge of complicity may be stated under R.C. 2923.03 or in terms of the principal offense. R.C. 2923.03(F).” *State v. Ousley*, Montgomery App. Nos. 23496, 23506, 2010-Ohio-3116, ¶ 18.

{¶ 21} We further note, there is no assigned error before us regarding the court’s failure to answer the jury’s question regarding complicity to theft, and we only “[d]etermine the appeal on its merits on the assignments of error set forth in the briefs under App.R. 16, \* \* \*.” App.R. 12(A)(1)(b). On this record, such an assigned error would fail on its merits as Simpson could have been convicted as principal or complicitor on both counts

{¶ 22} Having reviewed the entire record, weighed all of the evidence and all the reasonable inferences, and considered the credibility of the witnesses, we cannot conclude

that the jury clearly lost its way and created such a manifest miscarriage of justice that Michael Simpson's convictions must be reversed and a new trial ordered. Zechar, who the jury clearly believed, testified that Michael Simpson, whom he knew from high school, "ran up and started hitting me" after Doug Simpson tackled him, and Zechar was visibly injured from the assault. Brandenburg testified that Michael Simpson participated in the assault and theft. While Hotton testified that the Simpsons remained in her car when she dropped Gregory off at the apartment, the jury was free to disbelieve and thus reject this alibi defense.

The testimony of Brandenburg, Zechar and Sprouse, when credited by a jury, supports convictions for theft and assault. Zechar observed his wallet in Michael Simpson's hand, and when it was then returned to him, his money was gone. The testimony of both Zechar and Brandenburg establishes the brothers acting in concert to commit both offenses. Additionally, Michael Simpson's statement to Markowski, that he could "understand if I was being accused of an assault or a theft," is inculpatory as to both offenses.

{¶ 23} Since the evidence herein does not weigh heavily against the convictions for assault and theft, Michael Simpson's first assigned error is overruled.

{¶ 24} The second assigned error is as follows:

{¶ 25} "THE COURT ERRED IN OVERRULING THE RULE 29 MOTION."

{¶ 26} Crim.R. 29(A) provides in part: "The court on motion of a defendant \* \* \* after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the \* \* \* complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶ 27} "According to the Ohio Supreme Court, the relevant inquiry is 'whether, after



reviewing 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.’ (Citation omitted). ‘The weight to be given the evidence and the credibility of witnesses are primarily jury issues.’” *State v. Keys* (Dec. 4, 1998), Montgomery App. No. 16799.

{¶ 28} According to Michael Simpson, “because the three witnesses who were at the place of the alleged incident at the time it allegedly occurred all have credibility issues, it was error to deny the Rule 29 motion and submit the case to the jury.” As noted above, credibility determinations are for the jury to decide.

{¶ 29} Since the evidence was not insufficient to sustain a conviction for the offenses of theft and assault herein, Michael Simpson’s second assignment of error is overruled.

{¶ 30} The judgment of the trial court is affirmed.

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GRADY, J. and FROELICH, J., concur.,

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