[Cite as *State v. Swain*, 2014-Ohio-1308.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-12-079

Appellee — Trial Court No. 2012-CR-106

v.

Tion A. Swain — **DECISION AND JUDGMENT**

Appellant — Decided: March 28, 2014

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, Mary Ann Barylski and Frank Romeo Zeleznikar, Assistant Prosecuting Attorneys, for appellee.

Geoffrey L. Oglesby, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Following a jury trial, defendant-appellant, Tion Swain, appeals the November 15, 2012 judgment of the Erie County Court of Common Pleas finding him guilty of complicity to commit felonious assault, in violation of R.C. 2903.11(A)(2) and

2923.03(A)(2), complicity to commit aggravated robbery, in violation of R.C. 2911.01(A)(1) and 2923.03(A)(2), having weapons while under disability, in violation of R.C. 2923.13(A)(2), and a firearm specification, in violation of R.C. 2941.145. For the reasons that follow, we affirm the judgment of the trial court.

I. Background

{¶ 2} Ashlei Kimble-Palmer was a dancer at a strip club called "Lido" in Cleveland, Ohio, in November and December of 2011. While employed at Lido, she met a man who lived in Cleveland named Derek Jackson, whom she knew only as "D the Barber." Jackson did not know Ashlei's name, but referred to her as "Light Skinned Dancer." Jackson was attracted to Ashlei. They texted with one another on occasion, beginning in November of 2011. Unbeknownst to Jackson, however, Ashlei was in a relationship with Justin Stowers. Stowers was released from prison on December 31, 2011, after Ashlei posted bond for him. She did so with a check that bounced. The bondswoman expected to be paid and Stowers had no money. The state's theory of this case centers around a scheme concocted by Stowers to obtain money. Under this plan, Ashlei would lure an unsuspecting man to Sandusky, Ohio, so that Stowers could rob him. There were several potential victims, but Jackson was the first to take the bait. According to the state, Stowers enlisted help from Tion Swain and Keith Alexander to execute this robbery.

{¶ 3} On January 9, 2012, Ashlei sent a text message to Jackson inviting him to come to Sandusky. He agreed to do so, and she provided him with an address at which to

meet her. Jackson texted with Ashlei during his drive, advising her as he got closer to Sandusky. He had programmed the address provided to him by Ashlei into his GPS. He discovered that the address was invalid. He texted Ashlei and she asked him to meet her at a bar called the Sail Inn. Upon his arrival, he texted her and she indicated that she would be there after changing her clothes.

{¶ 4} Ashlei walked to the Sail Inn and on her way, she passed by the corner of Meigs and East Madison Street where Stowers' cousin lived. Stowers was on the porch with Alexander and Swain. When Ashlei arrived at the bar, she was preoccupied with her cell phone. She was texting, using Twitter, and making phone calls. Jackson offered to buy a drink for her but she declined. He insisted, she quickly consumed the drink, and she suggested that they leave. She asked Jackson what kind of car he drove and he told her that he drove a red Chevy truck. Ashlei communicated this to a person with whom she was speaking on the phone. Jackson assumed that Ashlei was providing this information to a friend out of concern for her safety. She was, however, providing the information to Stowers who would be watching for them.

{¶ 5} When they left the Sail Inn, Ashlei directed Jackson where to drive. She instructed him to park along a curb on East Madison Street. Ashlei exited the vehicle first and walked behind the truck, waiting for Jackson to get out. She saw Alexander approaching in the middle of the street. Ashlei and Jackson began to cross the street and Ashlei intended to walk towards Meigs and Madison Street where she would return to Stowers' cousin's house. As she was making her way to the sidewalk, Alexander and

another man confronted Jackson. One of the men said to Jackson, "you know the procedure," signifying to Jackson that he was being robbed. Both men had guns, but much to the surprise of his assailants, so did Jackson. Jackson testified that one of the men fired his gun, Jackson fired back twice, the other man fired at him, and Jackson fired again.

{¶ 6} Jackson quickly jumped into his truck and sped off. His assailants continued to shoot at him, striking one of his tires and causing it to go flat. When the shots were fired, Ashlei ran toward Stowers' cousin's home. Stowers came up behind her and quickly surpassed her. As she was running, her foot went numb. When she got to the home, she discovered that she had been shot and claimed that it was Swain who shot her. She lay on the floor while Stowers bandaged her foot. Alexander and Swain came into the house. Swain had a gun and he and Stowers "tossed" it between each other.

{¶ 7} After speeding away from Madison Street, Jackson stopped when he came upon Post 22 of the State Highway Patrol office on Fremont Road. He spoke with troopers and explained what had happened. He described the shooters as a white masked male, whose height he estimated to be between 5'11" to 6'1", and a stocky black man. Jackson eventually told troopers that he had a weapon with him and had fired back at the men. He told them that his weapon was in the console of his truck and the troopers retrieved it. He did not realize it that night, but the next day he discovered that his leg had been grazed by a bullet.

{¶ 8} Meanwhile, neighbors who heard the gunfire had called 9-1-1 and the state highway patrol communicated with Sandusky police after learning about the incident from Jackson. The police went to the scene of the shooting, collected evidence, and looked for the perpetrators of the assault. They recovered bullet casings from three types of guns: a .45 caliber, a .25 caliber, and a 9 mm pistol. Jackson had been carrying the 9 mm gun. Five casings from that gun were retrieved. A .25 caliber bullet was removed from Ashlei's foot.

{¶ 9} Jackson could not identify his assailants and Ashlei's name was not at that point known to Jackson. Police ascertained her identity from cell phone records. The state's theory of this case was developed with assistance from Ashlei and from Alexander, both of whom agreed to provide testimony in exchange for reduced charges and a recommendation from the prosecutor that they receive a more lenient sentence.

{¶ 10} According to Alexander, Stowers called him that day and asked him to help with the robbery. Swain picked up Alexander and Stowers in his girlfriend's car and took them to Stowers' cousin's home. Alexander denied talking with Swain about the plan to rob Jackson, but he admitted that Swain was on the porch with him and Stowers. He said they were all wearing black hoodies that night and both he and Swain were carrying guns. Alexander testified that he was carrying the .45. He said that Swain was carrying a small gun that he thought was a .22 but could have been a .25. No one testified to seeing Swain shoot Jackson and no one would admit to seeing Swain at the scene. In prior statements to police and prosecutors, however, Alexander and Ashlei had implicated Swain as a

participant and, by process of elimination, the other shooter. At trial they reluctantly acknowledged these prior statements.

{¶ 11} In addition to Alexander's and Ashlei's testimony, the jury heard a recorded telephone conversation between Stowers and Swain that took place while Stowers was in the county jail. During that conversation, Stowers told Swain that Ashlei approached police with information implicating him and that without that evidence, there would be no case against Swain. He said that the state had concealed that Ashlei was acting as an informant because of concerns that Swain's attorney would reveal her identity to defendants and their families and would attempt to intimidate her.

{¶ 12} Swain presented no witnesses of his own and did not testify, but he questioned the state's theory on a number of points. First, he argued that he does not match the description that Jackson gave of the shooter. Swain, is approximately 5'7" and is African-American. Second, he emphasized that no one identified him as the shooter and no one admitted seeing him at the scene. Third, he insisted that there was no evidence that Swain had communicated with Ashlei, Stowers, or Alexander in planning the robbery. Fourth, he questioned the state's theory that Stowers needed the money and submitted that neither Ashlei nor Stowers had reason to believe that Jackson would be carrying money that night. Fifth, he pointed out that Ashlei and Alexander had motive to be untruthful because they had reached plea agreements with the state. And he urged that in the jailhouse phone call, Swain did not implicate himself as a participant in the crime.

{¶ 13} Ultimately, the jury found Swain guilty on all counts. Swain appeals that ruling, assigning the following errors for our review.

> ASSIGNMENT OF ERROR NO. I: TION SWAIN WAS DENIED HIS RIGHT TO EQUAL PROTECTION, AS GUARANTEED BY THE UNITED STATES CONSTITUTION, ART I, SEC. 10 OF THE OHIO CONSTITUTION, WHEN THE STATE OF OHIO USED TWO PEREMPTORY CHALLENGES TO STRIKE TWO AFRICAN-AMERICAN PROSPECTIVE JURORS.
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> ASSIGNMENT OF ERROR NO. II: THE TRIAL COUR [sic] ERRED BY ALLOWING IN NUMEROUS HEARSAY STATEMENTS OF CO-DEFENDANTS WHEN THE STATEMENTS WERE NOT MADE DURING THE COURSE AND FURTHERANCE OF THE CONSPIRACY AND THERE WAS NO IDEPENDENT [sic] PROOF OF A CONSPIRACY[.]
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> ASSIGNMENT OF ERROR NO. III: THE TRIAL COURT ERRED BY ALLOWING INTO EVIDENCE A TAPE OF A JAIL HOUSE CALL FROM AN ALLEGED CO-DEFENDANT TO THE DEFENDANT WHEN THE CO-DEFENDANT DID NOT TESTIFY AND WAS NOT SUBJECT TO CONFRONTATION CROSS EXAMINATION [sic] IN VIOLATION OF THE UNITED STATES CONSTITUTION AND THE ART. I, SEC. 10 OF THE OHIO CONSTITUTION[.]

ASSIGNMENT OF ERROR NO. IV: THE TRIAL COURT ERRED BY ALLOWING INTO EVIDENCE A TAPE OF A JAIL HOUSE CALL FROM AN ALLEGED CO-DEFENDANT TO THE DEFENDANT WHEN THE CO-DEFENDANT MADE DISPARAGING AND UNTRUE REMARKS ABOUT THE DEFENDANT'S COUNSEL MADE BY THE STATE OF OHIO [sic] TO THE CO-DEFENDANT'S ATTORNEY[.]

ASSIGNMENT OF ERROR NO. V: THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. Law and Analysis

{¶ 14} Swain's assignments of error range from jury selection to admissibility issues to the overall sufficiency and weight of the evidence. We examine each of his assignments in turn.

A. First Assignment of Error

{¶ 15} In his first assignment of error, Swain argues that the state excluded potential jurors on the basis of their race. Swain is African-American. The state used its peremptory challenges to excuse two African-American members of the venire: June Campbell and Bernita Turner. Swain claims that the state's exercise of its peremptory challenges to eliminate Campbell and Turner from the jury was racially motivated.

{¶ 16} The United States Supreme Court in *Batson v. Kentucky,* 416 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986) made clear that racial discrimination in jury selection is prohibited. It set forth the constitutional analysis to be applied in determining whether the exercise of a peremptory challenge was racially motivated. The Ohio Supreme Court applied this analysis in *Hicks v. Westinghouse Materials Co.*, 78 Ohio St.3d 95, 676 N.E.2d 872 (1997).

{¶ 17} Under this analysis, the party opposing the peremptory challenge must first demonstrate a prima facie case of racial discrimination in the use of the strike. *Id.* at 98. To do this, the party must show that he is a member of a cognizable racial group, that the peremptory challenge will remove a member of his race from the venire, and that there is an inference of racial discrimination. *Id.* In determining whether a prima facie case exists, the trial court must consider all relevant circumstances, including statements by counsel exercising the peremptory challenge, counsel's questions during voir dire, and whether a pattern of strikes against minority venire members has been exhibited. *Id.*

{¶ 18} Assuming a prima facie case exists, the striking party must then articulate a race-neutral explanation related to the case for striking the potential juror. *Id.* Although a simple affirmation of good faith is not sufficient, the explanation "need not rise to the level justifying exercise of a challenge for cause." *Id.* The critical issue is whether discriminatory intent is inherent in counsel's use of the strike and that the explanation is merely a pretext for excluding the potential juror on the basis of race. *Id.*

{¶ 19} Finally, "the trial court must determine whether the party opposing the peremptory strike has proved purposeful discrimination." *Id.* The trial court must examine the persuasiveness and credibility of the justification offered by the striking party. The critical question is whether counsel's race-neutral explanation should be believed. *Id.*

{¶ 20} It is without question that Swain is African-American and so were the two potential jurors against whom the state exercised its peremptory strikes. The question then becomes whether the state provided a race-neutral explanation for exercising those strikes. We are convinced that it did.

{¶ 21} During voir dire, it was discovered that charges were pending against one of Campbell's sons. One of the assistant prosecutors participating in Swain's trial was assigned to that case. It was also discovered that another of Campbell's sons had been prosecuted by the Erie County prosecutor's office and convicted, and that the lead prosecutor in the Swain case had opposed his motion for judicial release. When questioned by the court outside the presence of the venire, Campbell stated that she believed she could be fair, but that she didn't want to be on the jury because she has "been going through lots * * * with my kids and everything" and "had one that was sent to prison." She also mentioned that her family members had been represented by defense counsel's father in the past. Campbell also expressed during voir dire that in order to find Swain guilty of a firearm specification, she would have to see the gun in question.

{¶ 22} Like Campbell, Turner indicated during voir dire that with respect to the firearm specification, proof of guilt would have to be "absolute" and she would need to see the gun in order to convict Swain of the firearm specification charge. She also revealed that she knew the mother of co-defendant, Keith Alexander, and would be uncomfortable being selected as a juror because of this relationship. Turner also indicated that she attends Ohio Business College, where defense counsel and one of his partners teach.

{¶ 23} Appellate courts review *Batson* determinations with great deference. *Batson* judgments will be reversed only if found to be clearly erroneous. *State v. Talley*, 6th Dist. Lucas No. L-07-1153, 2008-Ohio-6807, ¶ 19. We conclude that the trial court committed no error. The state provided credible, legitimate, race-neutral reasons for striking Campbell and Turner from the jury panel. Both women indicated that they would hold the state to a higher degree of proof than what was required of it; two of Campbell's children had been or were being prosecuted not only by the Erie County prosecutor generally, but by two of the assistant prosecutors involved in the Swain matter; Campbell's family had once been represented by defense counsel's father; and Turner had a relationship with the mother of one of Swain's co-defendant's who would be testifying against Swain. Finally, the record indicates that there was another African-American member of the venire against whom the state made no effort to exercise its peremptory challenges. The state sufficiently articulated race-neutral reasons for using its peremptory strikes to excuse Campbell and Turner.

{¶ 24} We find Swain's first assignment of error not well-taken.

B. Second Assignment of Error

{¶ 25} In his second assignment of error, Swain argues that the trial court erred when it allowed the state to present statements made by Alexander and Ashlei. In his brief, Swain cites certain passages of his cross-examination of Ashlei and Alexander, intending to show that the state failed to prove that either Ashlei or Alexander conspired with Swain, thus precluding the state from relying on Evid.R. 801(D)(2)(e) to admit out-of-court statements offered through those witnesses to establish that Swain participated in the offense. What Swain fails to do, however, is to identify what hearsay statements he believes were improperly admitted through these witnesses.

{¶ 26} "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Under Evid.R. 801(D)(2)(e), certain statements are not "hearsay." The rule states, in pertinent part:

> A statement is not hearsay if: * * * [t]he statement is offered against a party and is * * * a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

{¶ 27} Swain's entire argument in support of his second assignment of error revolves around whether a conspiracy existed. He is correct that the existence of a conspiracy must be established before a trial court may admit what otherwise may

constitute inadmissible hearsay statements. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 100. But while Swain argues vehemently that the state failed to provide independent proof that a conspiracy existed, he has provided us with no potential hearsay statements to evaluate as having been correctly or incorrectly allowed by the trial court under Evid.R. 801(D)(2)(e).

{¶ 28} We find Swain's second assignment of error not well-taken.

C. Third Assignment of Error

{¶ 29} In his third assignment of error, Swain argues that the trial court erred in allowing the state to play a recording of the phone conversation placed by Stowers to Swain while Stowers was being held in the Erie County jail. Detective Gary Wichman testified at trial and identified Stowers' and Swain's voices. During their telephone conversation (which began with an automated message cautioning that the call would be recorded), Stowers informed Swain that Ashlei had approached the state with information linking Stowers, Swain, and Alexander to the crime. In it, Stowers says that his attorney informed him that the state was being protective of the identity of its informant because of concerns that Swain's attorney would divulge her identity to the other alleged perpetrators or to their families, subjecting the informant to harassment and intimidation. Much of the conversation between Stowers and Swain is unintelligible or barely intelligible. Swain says little, mainly just acknowledging Stowers' statements. But he contends that by allowing the taped conversation to be played for the jury, he was denied his Sixth Amendment right to confront the witnesses against him.

{¶ 30} The trial court has broad discretion in the admission of evidence, and unless it has clearly abused its discretion to defendant's prejudice, an appellate court should not disturb the trial court's decision. *State v. Barnes*, 94 Ohio St. 3d 21, 23, 759 N.E.2d 1240 (2002). An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). We must, therefore, determine whether the trial court abused its discretion in allowing the state to present the recorded phone call to the jury.

{¶ 31} The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." *State v. Anderson*, 154 Ohio App.3d 789, 2003-Ohio-5439, 798 N.E.2d 1155, ¶ 22 (7th Dist.). However, "the right to confrontation is not absolute and 'does not necessarily prohibit the admission of hearsay statements against a criminal defendant.'" *Id.* at ¶ 23, quoting *Idaho v. Wright*, 497 U.S. 805, 813, 110 S.Ct. 3139, 3145, 111 L.Ed.2d 638, 651 (1990). And not all out-of-court statements are hearsay. *State v. Blevins*, 36 Ohio App.3d 147, 149, 521 N.E.2d 1105 (10th Dist.1987).

{¶ 32} Under Evid.R. 801(D)(2), a party's own statement offered against him is not "hearsay." In addition, as previously discussed, under Evid.R. 801(D)(2)(e), a statement is not "hearsay" if it is offered against a party by a co-conspirator and was made during the course and in furtherance of the conspiracy. There must first be

independent proof of the existence of the conspiracy. *State v. Milo*, 6 Ohio App.3d 19, 22-23, 451 N.E.2d 1253 (10th Dist.1982). Five things must be shown: (1) the existence of a conspiracy; (2) the defendant's participation in the conspiracy; (3) the declarant's participation in the conspiracy; (4) the statement was made during the course of the conspiracy; and (5) the statement was in furtherance of the conspiracy. *Id.*

{¶ 33} First, we question whether this recording of Stowers' and Swain's conversation even qualifies as a statement offered to prove the truth of the matter asserted under Evid.R. 801(C). Stowers' purpose for contacting Swain was to alert him to the fact that Ashlei had provided information to the police. During the call, Stowers tells Swain: "Man, that hoe did us, bro." He tells him: "[T]hey never had no case against Mr. Swain and Mr. Alexander until she went down there that day. * * * They think they, they have a, they have a, they have a sturdy case against you guys now. * * * Without, without her being there, there would be no case against no one." It would appear that the statements made during their conversation fall more into the category of "verbal acts," offered to prove that the words were spoken—not hearsay. *See, e.g., State v. Hill*, 1st Dist. Hamilton No. C-850686, 1986 WL 6816, * 3 (June 18, 1986).

{¶ 34} In any event, independent evidence of the conspiracy was presented before the jury heard the recording. The evidence presented by the state was that Stowers asked Ashlei to lure Jackson to Sandusky. Swain picked up Stowers and Alexander, who knew that they would be committing a robbery that night. Alexander and Swain brought guns. When Ashlei passed by the house on her way to the Sail Inn, Stowers, Alexander and

Swain were together on the porch waiting for her to tell them what type of vehicle Jackson drove. Another person was with Alexander and Stowers at the scene of the shooting. Ashlei and Alexander provided statements to police indicating that Swain was involved. Following the shooting, Ashlei told people that Swain had shot her, Swain and Alexander entered the house together, and Swain had a gun with him. Taken together, this constituted prima facie evidence that Swain conspired with Stowers and others to rob Jackson, sufficient to admit Stowers' and Swain's statements under Evid.R. 801(D)(2). There is no requirement that each participant to a conspiracy communicate directly with each other or even know that additional participants would be recruited to commit the crime. *See, e.g., State v. Curry,* 9th Dist. Summit No. 23104, 2007-Ohio-238, ¶ 10 and *State v. Siferd,* 151 Ohio App.3d 103, 2002-Ohio-6801, 783 N.E.2d 591, ¶ 43 (3d Dist.) (applying R.C. 2923.32 and explaining that "a party to the conspiracy need not know the identity, or even the number, of his confederates").

{¶ 35} We also conclude that the statements were made in the course of and in furtherance of the conspiracy. "A conspiracy does not necessarily end with the commission of the crime." (Internal citation omitted.) *State v. Skipper,* 2d Dist. Montgomery App. No. 25404, 2013-Ohio-4508, ¶ 18. Statements made to conceal the crime and to avoid arrest, apprehension, and implication may also be in furtherance of the conspiracy. *See, e.g., id.* at ¶ 19 (finding that conspiracy to conceal crime continued after apprehension). The conversation that took place between Stowers and Swain would fall within this scope.

{¶ 36} We find Swain's third assignment of error not well-taken.

D. Fourth Assignment of Error

{¶ 37} In his fourth assignment of error, Swain again challenges the trial court's decision to admit the recorded phone conversation into evidence, this time arguing that certain statements made during the conversation disparaged defense counsel and were untrue.

{¶ 38} During Stowers' and Swain's conversation, in explaining how he learned that Ashlei was the state's informant, Stowers told Swain that the prosecution feared that defense counsel would intimidate Ashlei. Swain argues that these statements had no probative value and that he was prejudiced by allowing the jury to hear these "disparaging" remarks about his counsel.

{¶ 39} While we agree that the state's concern about what counsel would do does not make it more or less probable that Swain committed the offenses with which he was charged, this was not the purpose for admitting the statements. The statements were admitted because they provided context for the information that Stowers was relaying to Swain about the identity of the confidential informant—not to prove that Swain's counsel actually intimidates witnesses. There was no need for the state to set a foundation for the statements, as Swain suggests in his brief, and the statements were not being offered for their truth, thus they were not hearsay.

{¶ 40} While we understand that these comments may have offended defense counsel, Swain has not articulated that he was prejudiced by them in any way. He

suggests that a jury may infer that if counsel intends to intimidate a witness, it must be because the defendant is guilty. We do not agree with this logic. We think the comments go more to the quality of the professional relationship between defense counsel and the prosecutor's office and not to whether a particular criminal defendant is guilty or not guilty of a crime.

{¶ 41} We find Swain's fourth assignment of error not well-taken.

E. Fifth Assignment of Error

{¶ 42} Finally, in his fifth assignment of error, Swain claims that the evidence was insufficient as a matter of law and that the jury's verdict was against the manifest weight of the evidence. He argues that there was no testimony that Swain shot at or attempted to rob Jackson and no testimony to establish that Swain agreed to aid and abet Stowers, Alexander, and Ashlei. He points to the fact that plea deals were reached with Alexander and Ashlei, yet neither could say that they formed a plan to shoot or rob Jackson with Swain and no one could identify him as the shooter.

{¶ 43} Whether there is sufficient evidence to support a conviction is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). In reviewing a challenge to the sufficiency of evidence, "[t]he 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." (Internal citations omitted.) *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In making that determination, the appellate court will not weigh the evidence or

assess the credibility of the witnesses. *State v. Walker,* 55 Ohio St.2d 208, 212, 378 N.E.2d 1049 (1978).

{¶ 44} When reviewing a claim that a verdict is against the manifest weight of the evidence, the appellate court must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the jury clearly lost its way in resolving evidentiary conflicts so as to create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387. We do not view the evidence in a light most favorable to the state. "Instead, we sit as a 'thirteenth juror' and scrutinize 'the factfinder's resolution of the conflicting testimony.'" *State v. Robinson,* 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, ¶ 15, citing *Thompkins* at 388. Reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 45} Swain was charged with complicity, under R.C. 2923.03(A)(2), in the attempted aggravated robbery and felonious assault of Derek Jackson—violations of R.C. 2911.01 and 2903.11—along with firearms offenses. Under R.C. 2911.01(A),

> [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; * * * [or] [i]nflict, or attempt to inflict, serious

physical harm on another. Under R.C. 2903.11(A)(2), "[n]o person shall knowingly * * * [c]ause or attempt to cause serious physical harm to another * * * by means of a deadly weapon * * *.

{¶ 46} The firearms statutes under which Swain was charged were R.C. 2923.13(A)(2) and 2941.145. Under R.C. 2923.13(A)(2),

> [u]nless relieved from disability * * *, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

Under R.C. 2941.145, the indictment specified that Swain had a firearm while committing the offenses.

> To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show 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. Such intent may be inferred from the circumstances surrounding the crime. *State v. Haller*, 3d Dist. Allen No.

1-11-34, 2012-Ohio-5233, 982 N.E.2d 111, ¶ 12, *appeal not allowed*, 134 Ohio St. 3d 1508, 2013-Ohio-1123, 984 N.E.2d 1102, quoting *State v. Johnson*, 93 Ohio St.3d 240, 754 N.E.2d 796 (2001), syllabus.

A defendant's criminal intent may be inferred from his presence, companionship, and conduct before and after the offense is committed and may be demonstrated by both direct and circumstantial evidence. *Id.* Mere presence of the accused is not sufficient. *State v. Gragg*, 173 Ohio App.3d 270, 2007-Ohio-4731, 878 N.E.2d 55, ¶ 21 (12th Dist.).

{¶ 47} We have previously summarized the evidence presented by the state and we conclude that this evidence was sufficient to establish that Swain was both present and participated in the shooting and the attempt to rob Jackson. Swain's conduct before and after the incident is consistent with the state's theory of the case. The type of casings found at the scene and the testimony as to the type of guns that were carried that evening are also consistent. And the state offered evidence that Swain had previous convictions constituting a "disability" under R.C. 2923.13(A)(2) which prohibited him from carrying a firearm.

{¶ 48} Certainly Ashlei's and Alexander's testimony presented credibility issues. Each had provided inconsistent statements in the past. Each had been offered plea agreements in exchange for their testimony. But the jury was aware of these facts and defense counsel cross-examined both witnesses. It was within the jury's province to make credibility determinations. *See, e.g., State v. Ivy*, 8th Dist. Cuyahoga No. 93250,

2010-Ohio-2463, ¶ 22 (concluding that jury had not lost its way in choosing to believe testimony of state's witnesses who had accepted plea agreements that reduced charges against them).

{¶ 49} We also acknowledge that Swain, a 5'7" African-American, did not fit Jackson's description of the shooter. Jackson explained at trial that the shooter, if not white, was a light-skinned African-American, and his face was partially concealed by what Jackson thought was a mask. Eyewitnesses often have varying descriptions of a perpetrator. *See, e.g., State v. Cook*, 10th Dist. Franklin No. 02AP896, 02AP-897, 2003-Ohio-2483, ¶ 31-33. But it was for the jury to determine whether the discrepancy in Jackson's description of the shooter and his inability to identify him was fatal to the state's case. Here, the jury determined that it was not. Given the totality of the evidence presented to the jury, we cannot say that its verdict was against the manifest weight of the evidence.

{¶ 50} We find Swain's fifth assignment of error not well-taken.

III. Conclusion

{¶ 51} After considering the five errors assigned by Swain, we find all of them not well-taken and affirm the November 15, 2012 judgment of the Erie County Court of Common Pleas. The costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE