[Cite as *State v. Tate*, 2004-Ohio-6689.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2003-T-0094**
- vs -	:	
DONALD J. TATE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 02 CR 89.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH (For Plaintiff-Appellee).

Eric M. Jones, One Cascade Plaza, 20th Floor, Akron, OH 44308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, David J. Tate, was indicted on February 13, 2002 on one count of aggravated robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(1) and (C); and four counts of kidnapping, felonies of the first degree, in violation of R.C. 2905.01(A)(2) and (C); all charges were accompanied by a firearm specification pursuant to R.C. 2941.145. Appellant entered a plea of not guilty to the charges and a jury trial commenced on May 7, 2003. On May 9, 2003, the jury returned a verdict of guilty on all counts; however, because the jury determined that the kidnapping victims

had been released unharmed and in a safe place, the kidnapping counts were reduced to second degree felonies.

{¶2} Appellant was sentenced to nine years incarceration as to the aggravated robbery count with three years attaching as to the firearm specification, to be served prior to and consecutive with count one. Appellant was further sentenced to seven years on each count of kidnapping, these terms to be served concurrently with one another and with the aggravated robbery sentence. The remaining firearm specifications merged with the aggravated robbery specification. All said, appellant was sentenced to an aggregate term of twelve years incarceration.

{¶3} The following facts were adduced at trial:

{¶4} On a snowy, February morning in 2002, at approximately, 8:42 a.m., appellant arrived at the 717 Credit Union in Hubbard Township, Trumbull County, Ohio. That morning, appellant was driving a blue 1990 Lincoln Continental belonging to Cory Funderburg.[1] Appellant's passengers included Valdeoss Bender, Ken Tyler, and Eric Rivers. Appellant entered the bank and was greeted by tellers Michelle Rydarowicz and Maria Kilar. Appellant approached Rydarowicz's window and explained he was experiencing some problems with his credit bureau. Appellant indicated the credit bureau required him to execute an "unauthorized affidavit" to remedy the problems. Rydarowicz obtained the instrument and began filling it out; Rydarowicz handed appellant the instrument expecting him to sign it[2] but instead appellant took the document and left the bank at approximately 8:49 a.m.

1. Evidence indicated that appellant and Funderburg shared the same address, but their association was never clearly established.

2. Generally, Rydarowicz testified, a party seeking such an instrument will sign the affidavit and a teller would send it into the bank's bookkeeping department. The department would investigate any

{¶5} At approximately 9:12 a.m., John Underwood, a member of the Credit Union arrived at the bank. As Underwood entered the parking lot, a blue Lincoln cut in front of his vehicle and pulled into a parking space at the front of a neighboring building. When Underwood left the Credit Union several minutes later, he observed the Lincoln parked in the same space.

{¶6} Ian Eliser, another client of the Credit Union, arrived shortly after Underwood at approximately 9:24 a.m. As Eliser entered the parking lot he observed three individuals exiting a blue Lincoln which had backed into a parking space at the corner of the Credit Union. According to Eliser, the driver of the vehicle, who donned a dark, hooded coat, remained in the car. When Eliser entered the bank, a robbery was in progress. Eliser was seized by his coat and ordered to the ground at gunpoint.

{¶7} One of the robbers, who was wearing a red wig, sunglasses, and a baseball cap, pressed a gun to the face of Leiza Kijowski, the branch manger, forcing her to the bank's vault. Maria Kilar, another bank employee, was ordered to lie on the floor near a safe. Fearing her assailant would shoot her, Kijowski surrendered $14,000, including $500 in bait money.[3] The perpetrators fled the Credit Union at approximately 9:26 a.m., entered the blue Lincoln, and turned onto State Route 62 traveling against traffic on the four-lane divided highway. At 9:32 a.m. the police arrived at the bank.

{¶8} Sheriff's Deputy Roger Gregory was patrolling Howland Township when he received a call from the 911 dispatcher regarding the robbery. Driving eastbound on State Route 82, the deputy observed a blue Lincoln driving west on Rout 82 near the

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unauthorized charges and reinstate any lost credit with the Credit Union. Here, appellant walked away with the affidavit which Rydarwicz characterized as "not normal."

3. Bait money is a series bills whose serial numbers have been recorded and can therefore be used to track stolen money.

junction to State Route 193. The deputy turned around in a median strip, activated his lights and siren, and commenced chasing the Lincoln.

{¶9} Owing to the inclement weather, the roads were in poor condition. The deputy testified he reached speeds ranging from 50 to 60 mph in an attempt to keep up with the Lincoln, which was weaving hazardously through traffic. At the intersection of Howland-Wilson road and Route 82, the Lincoln slowed for a traffic light. Deputy Gregory approached the car in his cruiser and was able to read and transmit the Lincoln's Pennsylvania license plate to the dispatcher. The dispatcher stated that the plate had been reported stolen.

{¶10} As the Lincoln turned south onto Howland-Wilson road, Officer Hoso from the Howland Police Department joined Deputy Gregory in an attempt to stop the Lincoln and apprehend its occupants. While the officers were in pursuit, the Lincoln began to slide. Before coming to rest, all four doors flew open whereupon Bender, Tyler, and Rivers exited the vehicle and ran into a residential area. Officer Hoso pursued these men on foot while Deputy Gregory, with his gun brandished, approached the Lincoln and ordered appellant out of the vehicle.

{¶11} Appellant was handcuffed, read his Miranda warnings and taken into custody. Appellant told FBI Agent Bonnie Rutherford that "the whole incident was not as it seemed," and he wanted to cooperate with authorities. At that point, appellant asked for an attorney and questioning ceased.

{¶12} Deputy Gregory returned to the blue Lincoln. The deputy looked inside the vehicle where he observed Ohio license plates resting on the driver's side floor next to the gas pedal. The plates were registered to Cory Funderburg, an individual who

shared appellant's address. Ultimately, the other three suspects were found in a nearby residential area and arrested.

{¶13} Detective Michael Begeot of the Hubbard Township Police Department subsequently located two white, plastic bags of money behind a large pole barn on Huntley Road in Howland Township. One bag contained $3050 and the other $10,020. The money matched the bait money taken from the Credit Union.

{¶14} Appellant now appeals assigning the following error for our review:

{¶15} "The appellant's convictions are against the manifest weight of the evidence."

{¶16} When reviewing a manifest weight of the evidence claim, an appellate court:

{¶17} "reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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, 174.

{¶18} The power to grant a new trial is within the sound discretion of the court yet should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id.

{¶19} Appellant was not a principal in the robbery but an accomplice. An accomplice to the commission of a crime has the same degree of criminal culpability as that of the principal and therefore may be prosecuted and punished accordingly. *State v. Read* (Dec. 10, 1999), 11th Dist. No. 98-L-127, 1999 Ohio App. LEXIS 5932, at 6. For purposes of trial, it is inconsequential whether appellant was actually indicted and

prosecuted for the principal offense rather than under the complicity statute.[4] Id. An accomplice is one:

{¶20} "who assists another in the accomplishment of a common design or purpose; he must be aware of, and consent to, such design and purpose ***. Additionally, participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed." (Internal quotations and citations omitted.) *State v. Davis* (Apr. 24, 1998), 11th Dist. No. 96-L-167, 1998 Ohio App. LEXIS 1761, at 11-12.

{¶21} Appellant contends that the state failed to prove he had advanced knowledge of or participated in the burglary such that he could be criminally culpable as an accomplice.

{¶22} The state presented evidence that appellant entered the bank at 8:42 a.m. on the morning in question to obtain an affidavit for his credit bureau. Teller, Michelle Rydarowicz testified appellant had a quiet demeanor and after she delivered the

4. Here appellant was charged with aggravated robbery pursuant to R.C. 2911.01(A)(1) and (C), which provide:

"(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:

"(1) Have 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;

"***

"(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree."

Appellant was also charged with four counts of kidnapping pursuant to R.C. 2905.01(A)(2) and (C), which provides:

"(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

"(2) to facilitate the commission of any felony or flight thereafter;

" ***

"(C) Whoever violates this section is guilty of kidnapping, a felony of the first degree. If the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree."

Although appellant does not directly raise the argument, it bears noting that he state presented sufficient evidence to meet each element of the foregoing offenses.

affidavit, rather than signing it, appellant unexpectedly left the bank. While in the bank, two bank employees recognized him and greeted him.

{¶23} Appellant contends that entering the bank to obtain the affidavit is neither unusual nor suspicious. To be sure, when taken out of the factual context before us, appellant's actions are ostensibly benign. However, as appellant was arrested approximately one hour after his visit to the bank for driving what would ultimately be the getaway car in an armed robbery, a jury could draw the rational inference that appellant was surveying the facility to determine the number of employees and their relative positions prior to the robbery.

{¶24} Further, the Lincoln appellant was driving changed parking spaces several minutes before the robbery. Appellant argues the manner in which the Lincoln was parked is irrelevant as people back into parking spaces at the Credit Union all the time. Appellant hypothesizes:

{¶25} "It is likely that after Appellant had completed his business, one or more of his passengers decided that they too wished to conduct business at the 717 and that Appellant moved to do what the prosecution alleged – facilitate an easy exit; though not for any illicit reason."

{¶26} Evidence is relevant if it tends to prove or disprove a material issue. Here, appellant was the getaway driver in an armed robbery. The fact appellant backed into a parking place immediately prior to the commencement of the robbery is germane to the prosecution because it is circumstantially probative of whether appellant was aware of the robbery and his role therein.

{¶27} That said, appellant is correct that moving from one parking space and backing into another is not uncommon. However, appellant's construction of the facts

would require us to view the evidence in a vacuum. We cannot give the evidence its most innocuous interpretation when the surrounding facts and circumstances demonstrate otherwise. Here, appellant was the de facto getaway driver. The jury could reasonably infer that, in moving from one parking space to another, appellant prepared for the robbery by monitoring the entrance and parking the Lincoln in a manner that would facilitate a quick escape.

{¶28} At trial, appellant's defense was based upon a theory that he had no knowledge of his passenger's designs; on appeal, appellant claims he did not know his passengers possessed firearms and the hats and heavy clothing (used to disguise the robbers identity) were not unusual for a cold, snowy, winter day. Appellant argues the state failed to present persuasive evidence that he was aware that his passengers were intending to rob the Credit Union.

{¶29} Although heavy clothing is not unusual for winter activities, one of the principals donned a strange wig and sunglasses. During a winter storm, hats or earmuffs are typical headwear, not wigs. Moreover, given the description of the weather, i.e., the "worst snow storm of the year," sunglasses would tend to encumber vision rather than protect it. In any event, a wig and sunglasses can be used to conceal a person's identity.

{¶30} Moreover, Detective Begeot's testimony indicated that only seven or eight parking spaces are available at the 717 Credit Union, including one handicapped parking space. Evidence also established that the bank is located near two truck stops and a busy four-lane divided highway. With this evidence in mind, a juror could reasonably infer the principals donned their disguises, particularly the individual wearing

the wig and sunglasses, in the Lincoln in appellant's plain view to avoid detection by passing motorists and surveillance cameras.

{¶31} Appellant's awareness of the robbery can also be gleaned from the presence of the Ohio license plates found next to the gas pedal in the Lincoln. Appellant contends he had no knowledge that the plates on the Lincoln were stolen. Appellant argues the Ohio plates found by Deputy Gregory could have been shuffled from under the driver's seat into open view during the car chase. We do not disagree with appellant's hypothetical; however, at the same time, it is also plausible that the plates were in open view throughout the entire episode. The fact remains that Deputy Gregory found the plates in plain view which permits the inference that appellant was aware of their presence. Such evidence indicates appellant was aware he was driving a vehicle with stolen plates during the flight from the bank robbery. A jury could conclude that this awareness presupposes foreknowledge of a hackneyed attempt to disguise the identity of the getaway vehicle.

{¶32} The most persuasive evidence of appellant's participation in the robbery was the manner in which he fled the scene after the principal robbers re-entered the Lincoln: Appellant pulled onto Route 62 going the wrong way on a divided highway. Although police were following him with lights and sirens activated, he failed to pull over and cooperate. Appellant continued driving until he lost control on a slippery road. While still sliding, his passengers leapt from the vehicle and fled. Appellant was left in the driver's seat whereupon Deputy Gregory handcuffed him. A jury could reasonably infer that a party who is a non-participant in a crime of this sort would not encourage a police chase in a snow storm.

{¶33} Appellant contends he was surprised when his three passengers returned to the vehicle with bags of money, guns, and disguises. Appellant claims he did as his gun-bearing passengers asked: drove them away. Significantly, appellant does not positively assert that his passengers threatened him with physical harm or otherwise compelled him to participate in the armed robbery; he only asserts that he "obeyed" them.

{¶34} In sum, the evidence demonstrates that appellant assisted his passengers in the accomplishment of an armed robbery wherein various individuals were kidnapped. A reasonable factfinder could conclude, from appellant's conduct before and after the crimes, that appellant was not only aware but directly participated in the offenses in question. To reverse a conviction on a manifest weight challenge, the evidence must weigh heavily against the conviction. Under the circumstances, we do not believe the evidence militating in appellant's favor was so strong that a new trial is warranted.

{¶35} Appellant's sole assignment of error is overruled.

{¶36} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

DONALD R. FORD, P.J.,

ROBERT A. NADER, J., Ret., Eleventh Appellate District, sitting by assignment,

concur.