

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

State of Ohio, :
 :
 Plaintiff-Appellee, : Case No. 06CA26
 :
 v. :
 :
 Nikki Lewis, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. : **Released 5/4/07**

APPEARANCES:

Samantha J. Fields, Ironton, Ohio, for Appellant.

J. B. Collier, Jr., Lawrence County Prosecuting Attorney, and W. Mack Anderson, Assistant Lawrence County Prosecuting Attorney, Ironton, Ohio, for Appellee.

Harsha, J.

{¶1} Nikki Lewis appeals from her convictions for complicity to aggravated robbery and failure to comply with the order or signal of a police officer. First, Lewis contends the verdict of complicity to aggravated robbery is against the manifest weight of the evidence. She points to her own testimony that she did not know that her two male companions were going to commit the robbery and that she was coerced to drive the get-away vehicle under fear for her life. The state presented evidence that Lewis “cased” out the establishment just before it was robbed, drove the robbers away from the scene at a high rate of speed, and fled her vehicle and attempted to prevent the police from apprehending her when they stopped her vehicle after the robbery. These facts support the conviction. Moreover, when there are competing versions of the

events, we leave the issue of the witnesses' credibility to the trier of fact. Lewis' conviction is not against the manifest weight of the evidence.

{¶2} Next, Lewis contends she received ineffective assistance of counsel because her attorney failed to emphasize to the jury that the state had the burden of proving her guilty beyond a reasonable doubt. Here, the evidence against Lewis was overwhelming. The court instructed the jury that the state had to prove its case beyond a reasonable doubt, and defense counsel argued that the state did not prove its case beyond a reasonable doubt. Counsel also argued the case against Lewis was "thin". Lewis has failed to prove her counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness. Overruling both assignments of error, we affirm the judgment of conviction.

I. Facts

{¶3} A grand jury indicted Lewis on one count of complicity to aggravated robbery, with a firearm specification, in violation of R.C. 2923.03(A)(2), 2911.01(A)(1) and 2941.145, for aiding and abetting Thomas Allen in robbing the B & L Game Room of Proctorville, Ohio with a firearm. The grand jury also indicted Lewis on one count of failure to comply with the order or signal of a police officer, in violation of R.C. 2921.331(B)(C)(5)(a)(ii), for eluding or fleeing police when an officer signaled her to stop the motor vehicle she was driving after the robbery. After Lewis pleaded not guilty, the matter proceeded to a jury trial which produced the following evidence.

{¶4} The owner and a customer of the B & L Game Room testified that Nikki Lewis came to the game room around 9:00 PM on April 5, 2006; she inquired whether her father was there and left when told he was not. Approximately five minutes later, a man with a handgun entered the game room, pointed the gun at the owner and customer, and demanded money. A man, identified as Johnny Belcher, accompanied the gunman but waited outside the door. Although the man with the gun wore a blue and white bandana over the lower half of his face, the owner of the game room recognized him as Lewis' boyfriend, Thomas Allen, who had been into the game room with Lewis on several previous occasions. The owner gave the robber her purse, which had money bags containing \$2700 from the business. The robber ran out the door, and the customer looked out the door and saw a red minivan leaving the scene at a high rate of speed. The owner immediately reported the incident to the police.

{¶5} Shortly after hearing the radio dispatch concerning the robbery, a sheriff's deputy saw a female, subsequently identified as Lewis, driving a vehicle that matched a description of the getaway vehicle; the deputy activated the lights and siren on his patrol car and pursued the vehicle about four or five miles into West Virginia at speeds of up to 80 MPH. The deputy testified that the red minivan eventually stopped and three people, including Lewis, got out and "took off running". According to the deputy, Lewis ran from the vehicle, climbed over a fence, ran down an alley, and threw a trashcan down in front of him to block his attempts to apprehend her. The deputy testified that when he finally tackled

Lewis two blocks from where the red minivan stopped, she told him she had been kidnapped.

{¶6} An investigating officer testified he interviewed Lewis at the jail the day after the robbery. She told him she had gone to the game room looking for her father, and she did not respond when he suggested that she had been “casing the joint”. The officer stated that Lewis did not tell him that anyone had forced her at gunpoint to run from the police.

{¶7} In her defense, Lewis testified that she had driven her van to the game room with Belcher and her boyfriend Allen to look for her father. She denied “casing out the joint”. Lewis testified that when she got back into her van after finding that her father was not there, Allen and Belcher told her that they had to go to the bathroom. She stated they got out of the car, returned two or three minutes later, and when they told her “Let’s go”, she drove away at a normal rate of speed. Lewis denied knowing of Allen’s and Belcher’s plan to rob the game room, and denied knowing that either of them had a gun. Lewis testified that she first learned of the robbery when the police car pulled in behind her van, at which point Allen pulled out his gun and told her not to pull over because he had just robbed the game room. She stated that she was scared that Allen was going to shoot her and that he forced her to drive her car and to get out and run when she stopped the car. Lewis denied throwing a trash can at the officer as he ran after her, and she contended the chase was half a block, not two blocks, and that she stopped on her own. She denied seeing a blue and

white bandana that evening, even though one was sitting on the front passenger seat of her van when the police impounded it.

{¶8} Thomas Allen, the "boyfriend", who had already pleaded guilty in connection with the robbery, testified on Lewis' behalf and generally confirmed her version of the events.

II. Assignments of Error

{¶9} The jury found Lewis guilty as charged, and the trial court imposed a sentence on her totaling eight years imprisonment for the offenses. Lewis appeals her convictions, asserting:

1. THE JURY'S VERDICT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.
2. INEFFECTIVE ASSISTANCE OF COUNSEL PREJUDICED THE DEFENSE.

III. Manifest Weight of the Evidence

{¶10} In her first assignment of error, Lewis contends the verdict of complicity to aggravated robbery is against the manifest weight of the evidence. In doing so, she relies upon her own testimony that she did not know that her two male companions were going to commit the robbery and that she was coerced to drive the get-away vehicle under fear for her life.

{¶11} Our function when reviewing the weight of the evidence is to determine whether the greater amount of the credible evidence supports the verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 387. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses,

and determine whether 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. *Id.*, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We will order a new trial only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶100, citing *Martin*, at 175. We will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy* (1998), 84 Ohio St.3d 180, 193-194; *State v. Eley* (1978), 56 Ohio St.2d 169, syllabus.

{¶12} The weight to be given evidence, and the credibility to be afforded testimony, are issues to be determined by the trier of fact. *State v. Dye* (1998), 82 Ohio St.3d 323, 329; *State v. Frazier* (1995), 73 Ohio St.3d 323, 339. The fact finder “is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of proffered testimony.” *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶13} To support a conviction for complicity pursuant to R.C. 2923.03(A)(2), the evidence must show that Lewis “supported, assisted, encouraged, cooperated with, advised, or incited the principal[s] in the commission of the crime [aggravated robbery], and that [she] shared the criminal intent of the principal[s, which] may be inferred from the circumstances surrounding the crime.” *State v. Johnson*, 93 Ohio St.3d 240, syllabus.

“Participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.” *Johnson*, at 245, quoting *State v. Pruett* (1971), 28 Ohio App.2d 29, 34.

{¶14} R.C. 2911.01(A)(1), which defines aggravated robbery, states: “No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, 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[.]”

{¶15} Lewis’ conviction for complicity to aggravated robbery is not against the manifest weight of the evidence. The state presented evidence from which the jury could easily conclude that Lewis supported, assisted, encouraged, or cooperated with Allen and Belcher (the principals) and shared their intent to rob the game room. The record indicates Lewis: “cased out” the game room for Allen and Belcher before the robbery; drove the getaway car after Allen and Belcher committed the robbery; attempted to elude the police during their pursuit of her vehicle after the robbery; fled her vehicle and attempted to prevent the police from apprehending her; and failed to answer questions in her interview with the police the day after the robbery. We leave the issue of the witnesses’ credibility to the trier of fact; accordingly, they were free to discredit Lewis’ testimony that she did not know that Allen and Belcher were going to commit the robbery and that she was coerced to drive the get-away vehicle under fear for her life. When there is evidence to support both versions of events, we allow the jury to decide

which one is more believable. Accordingly, we overrule Lewis' first assignment of error.

IV. Ineffective Assistance of Counsel

{¶16} In her second assignment of error, Lewis contends defense counsel rendered ineffective assistance of counsel by failing to emphasize to the jury that the state had the burden of proving her guilty beyond a reasonable doubt.

{¶17} The Sixth Amendment to the United States Constitution and Section 10, Article I, of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean that a criminal defendant is entitled to the "reasonably effective assistance" of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In order to prevail on a claim of ineffective assistance of counsel, Lewis must show (1) her counsel's performance was deficient in that it fell below an objective standard of reasonable representation, and (2) the deficient performance prejudiced her defense so as to deprive the defendant of a fair trial. *State v. Smith* (2000), 89 Ohio St.3d 323, 327, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. To establish prejudice, the defendant must show that there exists a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different. *State v. White* (1998), 82 Ohio St.3d 16, 23; *Bradley*, at paragraph three of the syllabus. Failure to establish either element is fatal to the claim. *Strickland*;

Bradley. Our review of an ineffective assistance of counsel claim is de novo. See, *Bradley* at 142-143.

{¶18} When considering whether trial counsel's representation amounts to a deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*

{¶19} In closing argument, Lewis' defense counsel argued the evidence was "very, very thin" that she knew about the robbery before Allen and Belcher robbed the game room. Based upon the evidence, counsel contended, Lewis "clearly was not casing the joint" and did not find out about the robbery until after it happened. Counsel asserted that Lewis acted under duress and out of fear for her life when she failed to stop her vehicle after the deputy's signal. Defense counsel suggested that the reason Lewis did not tell the investigating officer, who conducted his interview of her at jail, that she acted out of coercion and fear for her life was because "we all know that things could happen in jails to people that incriminate other people" and Lewis did not want "to incriminate anybody else until she talked with her lawyer." In summation, defense counsel argued: "There's no way that the State can legitimately say that they proved the case beyond a reasonable doubt" and "Nikki Lewis is not guilty of either of the offenses that she's charged with." This performance does not fall below an objective standard of reasonableness.

{¶20} Lewis has not demonstrated that defense counsel's performance was deficient. The evidence against Lewis was overwhelming, the court instructed the jury that the state had to prove its case beyond a reasonable doubt, and defense counsel argued that the evidence against Lewis was "thin" and that the state did not prove its case beyond a reasonable doubt. Because she has not satisfied the first prong of the analysis, we need not address the second one. Lewis' second assignment of error is overruled.

{¶21} Having found both of the assignments of error to be meritless, we affirm the judgment of conviction.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

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