

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-070262
	:	TRIAL NO. B-0506390
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
KELLY MCGUIRE,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant Kelly McGuire was indicted on one count of aggravated robbery with an accompanying firearm specification and one count of robbery. Following a jury trial, McGuire was acquitted of aggravated robbery. But the jury was unable to reach a verdict on the robbery count. On retrial of the robbery count, McGuire elected to have a bench trial. The parties agreed to submit the transcripts of the original trial and to conduct new closing arguments before the trial court. The trial court convicted McGuire of robbery and imposed a term of five years' imprisonment.

McGuire now appeals. He argues in his first and second assignments of error that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence, and that the trial court erred in failing to grant his motion for a judgment of acquittal under Crim.R. 29.

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

McGuire's conviction was based upon the robbery of a Franklin Savings and Loan in Forest Park, Ohio. The state presented the testimony of June Bass, a bank teller at Franklin Savings and Loan. Bass testified that, on June 8, 2005, McGuire had entered the bank and had stopped at the table containing withdrawal slips. McGuire then proceeded to Bass' counter and handed her his withdrawal slip. It read, "Fifties and One Hundreds." According to Bass, McGuire looked directly at her and stated, "You know what I want." Underneath his hands on the counter, McGuire had a small gun aimed at Bass. Bass opened her cash drawer and gave McGuire the \$50 and \$100 bills it contained. Following this exchange, McGuire left the bank, and Bass informed her co-workers that she had just been robbed. Larry Spitzmueller, the bank's vice-president of Internal Audit and Compliance, testified that \$850 had been taken from Bass' cash drawer.

Forest Park police detective Darlene Hall-Miller responded to the crime scene and investigated the robbery. Hall-Miller testified that, after releasing still photos from the bank's surveillance video, she had received a tip that implicated McGuire in the robbery. Hall-Miller had McGuire picked up and brought to the Forest Park police station for questioning. McGuire initially denied that he was the person depicted in the still photographs. But he later recanted and confessed his involvement in the robbery. According to Hall-Miller, McGuire stated that he had been drinking and smoking crack cocaine on the day of the robbery and had decided to rob a bank. McGuire told Hall-Miller that he had entered the bank, walked directly to the counter, and stated, "Bitch, give me the money." McGuire admitted placing a gun underneath his hands, but denied passing a note to the bank teller. During his confession, McGuire further stated that he believed he had received approximately \$500 from the robbery.

McGuire testified on his own behalf. He denied any involvement in the bank robbery and stated that he had only confessed because Detective Hall-Miller had told him that his mother had identified him after seeing the still photographs from the

robbery. According to McGuire, Hall-Miller had further told him that it would be in his best interest to cooperate.

McGuire was convicted of robbery under R.C. 2911.02(A)(2), which provides that “[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall \* \* \* [i]nflct, attempt to inflct, or threaten to inflct physical harm on another.” The evidence presented at trial established that McGuire had been identified as the robber of Franklin Savings and Loan. It further established that McGuire had passed a note demanding money to the bank teller, had placed a small gun underneath his hands on the counter, and had aimed the barrel of the gun at the teller. Following our review of the record, we conclude that McGuire’s conviction was supported by sufficient evidence<sup>2</sup> and that the trial court did not err in failing to grant his Crim.R. 29 motion for an acquittal.<sup>3</sup>

We further conclude that McGuire’s conviction was not against the manifest weight of the evidence.<sup>4</sup> The details of the bank robbery provided by Bass differed from the details that McGuire had included in his confession to Detective Hall-Miller. But the trial court was in the best position to judge the credibility of the witnesses. It was able to personally view the witnesses’ demeanor as they testified, and it had heard Detective Hall-Miller’s testimony that McGuire had told her that he had been drinking and smoking crack cocaine prior to the robbery. This is not the rare case in which the trier of fact lost its way and created a manifest miscarriage of justice. McGuire’s first and second assignments of error are overruled.

In his third assignment of error, McGuire argues that the trial court erred in failing to make a guilty finding on the lesser included-offense of theft. During closing arguments, McGuire’s counsel had asked the trial court to find McGuire guilty of theft

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<sup>2</sup> *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

<sup>3</sup> *State v. Jordan*, 167 Ohio App.3d 157, 2006-Ohio-2759, 854 N.E.2d 520, ¶149.

<sup>4</sup> *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

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rather than robbery. But we have already determined that McGuire's robbery conviction was amply supported by both the sufficiency and the weight of the evidence, and we cannot conclude that the trial court erred by failing to find him guilty of theft rather than robbery. Accordingly, McGuire's third assignment of error is overruled.

The judgment of the trial court is, therefore, affirmed.

A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**SUNDERMANN, P.J., HENDON and CUNNINGHAM, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on May 21, 2008

per order of the Court \_\_\_\_\_.

Presiding Judge