[Cite as *State v. Galloway*, 2004-Ohio-557.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 03AP-407
v.	:	(C.P.C. No. 02CR-08-4997)
Claude Galloway, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 5, 2004

Ron O'Brien, Prosecuting Attorney, and *Heather R. Saling*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Claude Galloway, Jr. ("appellant") appeals his conviction for breaking and entering, a violation of R.C. 2911.13(B), a felony of the fifth degree. The trial court journalized appellant's conviction and sentence on March 27, 2003. For the reasons that follow, we affirm the judgment of the Franklin County Court of Common Pleas.

{¶2} On March 5, 2003, appellant waived his right to a trial by jury and was tried by the court. The evidence established that on May 10, 2002, at approximately 3:30 a.m., an Obetz police officer was dispatched to H&M Plumbing ("H&M") on a report that a burglar alarm had been activated. Upon his arrival, the police officer saw a man he later identified as appellant climb down a fence that surrounds a storage yard and run to the rear of the property. The police officer quickly went to the rear of the property and found appellant hiding in a dumpster. Appellant was arrested at the scene and charged with breaking and entering.

{¶3} Doug Houchard ("Houchard") owns H&M. At trial, Houchard described a large fenced-in area ("storage yard") that is immediately adjacent to H&M's main building. The storage yard is approximately 100 yards long and 80 yards wide. It is surrounded by a six-foot tall chain link fence with barbed wire on top. The only way to gain access to the storage yard from outside the main building is via a locked sliding gate on either end of the storage yard. Two large floodlights illuminate the lot. The company's service vans are kept in the storage yard. Each van contains between $5,000 and $7,000 worth of tools and materials.

{¶4} In addition to the fence topped with barbed wire, locked gates, and lighting, H&M uses an alarm system in its storage yard. The alarm system sends two invisible electronic beams at different heights on a parallel line through the center of the storage yard. Houchard explained that two electronic beams are used, and that they must be interrupted at the same time for the system to be triggered. When triggered, the alarm system sends a silent signal to an alarm monitoring company. The alarm monitoring company then notifies the police, Houchard, and two of his employees.

{¶5} Houchard testified that on the night in question he received a call from the alarm monitoring company informing him that there had been a break-in at H&M, and that the police had a person in custody. Houchard identified a mattock, a type of digging tool that H&M used, and stated that it would ordinarily be kept in one of the vans inside the storage yard. Houchard testified that the dumpster where appellant was hiding was located on company property. He further stated he did not know appellant and that appellant did not have permission to be on the property. Houchard attested that the building was ordinarily unoccupied at the time of the break-in.

{¶6} On cross-examination, Houchard stated he knew of only two times the alarm was activated by something other than a person. On one occasion, a snowdrift blocked the path of the electronic beams, and on another occasion, the fog was so thick the alarm was activated. He explained it would be highly unlikely for an animal or a bird to activate the alarm because the two beams had to be interrupted at the same time. Houchard acknowledged that theoretically someone could crawl underneath the lower electronic beam, which is approximately ten to fifteen inches off the ground, if he or she knew exactly where the invisible beam was.

{¶7} Houchard could not point to any signs that the fence or locks were compromised. Nor could Houchard state with certainty that the mattock he identified definitely belonged to H&M. Houchard stated there were no "no trespassing" signs posted.

{¶8} Bill Shultz ("Shultz") testified he has worked for H&M since 1988. Shultz lives seven minutes from work and has keys to the building and storage yard. He is one of the employees the alarm monitoring company calls when the alarm has been activated.

On the night in question, the alarm company called Shultz to tell him the alarm had been activated, the police had been notified, and that he would be called again if anyone was apprehended. The alarm monitoring company did make a second call to Shultz, who then went to H&M. When he arrived, Shultz checked the building and the storage yard and determined they were locked.

{¶9} Shortly thereafter, the sheriff department's K-9 unit arrived. Shultz used his keys to let the officers and search dogs into the premises. The entire storage yard was then searched, but no one else was found. Shultz determined that no one had actually gained entrance into the main building. On cross-examination, Shultz acknowledged that he did not know whether the lights that illuminate the storage yard were actually working that night. Shultz also testified he was not aware of any physical evidence, such as a broken lock or door, of a forced break-in.

{¶10} Obetz Police Officer Andy Gamblin ("Gamblin") was working on patrol on the night in question. About 3:30 a.m. he was dispatched to H&M because an alarm had been set off. Gamblin testified he arrived at the scene within a minute. When Gamblin pulled up in his cruiser, the first thing he saw was a person in dark clothing climb down off the fence surrounding the storage yard, leave the fenced area and run towards the rear of the property. He testified that his view of this person was a "straight shot" and that nothing blocked his vision. (Tr. at 67.)

{¶11} Gamblin testified he then drove his cruiser towards the rear of the property, exited the cruiser, and began to look for the person he saw moments earlier. Noticing that there were many places to hide, Gamblin focused his attention on two nearby dumpsters and yelled, "I know you are in there. Come out. Put your hands up." (Tr. at

68.) At that point, appellant stood up from a dumpster with his hands up and said, "Okay. You got me, but I am not going down alone. There is someone inside the fence still." Id. Gamblin then handcuffed appellant and placed him in a cruiser.

{¶12} At this point, other police officers arrived at the scene, having also been dispatched by the sheriff's department. Gamblin learned that a person with a key to the premises was on the way, so with the other officers he formed a perimeter around the storage yard to be sure that if another person were inside he would be apprehended. Once Shultz arrived with the keys, Gamblin and the other officers searched the premises. They did not find anyone inside.

{¶13} On cross-examination, Gamblin was asked whether his view of appellant could have been blocked by the vans inside the storage yard or by glare from his windshield. Gamblin insisted he had a clear view of appellant and that the light from the high beams of his headlights was more than sufficient. Gamblin repeatedly stated he was absolutely positive appellant was the person he saw climbing the fence and later found in a dumpster. Gamblin acknowledged that as far as he knew nothing was actually taken from H&M.

{¶14} Sabrina Woodson ("Woodson") was called as a witness by appellant's counsel. Woodson testified that she had been at a party all day at which appellant was also present. Woodson asked appellant for a ride home. Appellant agreed to do so, but said he first had to pick a friend up at work. Woodson stated she and appellant were driving around when, at some point, she fell asleep. Woodson stated she was unaware of what transpired between the time she fell asleep and when the police woke her up in appellant's van in the parking lot of H&M Plumbing.

{¶15} Appellant testified in his own behalf. He stated that he pulled behind H&M after getting gas nearby. Appellant stated he was relaxed, Woodson was asleep, and "the next thing I knew, I seen the headlights." (Tr. at 96.) Appellant said he got out of his van instinctively and hid in a dumpster because he didn't have a driver's license. Appellant said he never climbed the fence or went into the storage yard. He added that he didn't think he could have climbed over a six-foot tall fence topped with barbed wire without being injured because he had been drinking alcohol. Appellant explained that when he told the officer there was someone else over the fence he was not paying attention and he must have been referring to the officer himself. Appellant swore he did not intend to break into H&M and that he was not the person the officer saw when he arrived.

{¶16} Appellant averred he did not know he was parked at a business and said he did not see a "no trespassing" sign. Appellant acknowledged stating to Gamblin that he "was not going down alone" and that someone was still inside the fence. The parties stipulated to appellant's prior criminal convictions, which include theft offenses.

{¶17} After the parties submitted their exhibits and made their closing arguments, the trial court ruled the evidence showed appellant trespassed onto another's property and intended to commit a felony, specifically theft, thereby violating R.C. 2911.13(B). Accordingly, the trial court found appellant guilty and sentenced him to six months' incarceration.

{¶18} Appellant sets forth a single assignment of error:

> Appellant's conviction was not supported by the evidence in that the state failed to prove the intention to commit a felony element of the offense of breaking and entering.

> Furthermore, the court erred in overruling appellant's motion for acquittal pursuant to Criminal Rule 29 and conviction was against the manifest weight of the evidence.

{¶19} Appellant's sole assignment of error actually raises three distinct legal issues. First, appellant challenges the sufficiency of the evidence and claims appellee failed to prove an essential element of the offense of breaking and entering, namely, that appellant's trespass was made with the purpose to commit a felony. Second, appellant states the trial court erred by not granting his motion for an acquittal pursuant to Crim.R. 29. Third, appellant contends his conviction was against the manifest weight of the evidence.

{¶20} When an appellate court reviews whether the evidence presented at trial was, as a matter of law, sufficient to support a guilty verdict, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781; *State v. Williams*, 99 Ohio St.3d 493, 501, 2003-Ohio-4396. A sufficiency of the evidence analysis does not permit an appellate court to weigh the evidence, since its weight and credibility are questions for the finder of fact. *State v. Martin* (1983), 20 Ohio App.3d 172, 175; *State v. Hill* (1996), 75 Ohio St.3d 195, 205.

{¶21} Thus, our analysis on the sufficiency of the evidence is limited to whether the evidence presented, if believed by any rational finder of fact, would permit it to find all the essential elements of the offense beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Additionally, an appellate court must view the evidence in the light most favorable to the prosecution. Id.

{¶22} The Supreme Court of Ohio has set forth the standard of proof required when intent is an element of a crime:

> "* * *The intent of an accused person dwells in his mind. Not being ascertainable by the exercise of any or all of the senses, it can never be proved by the direct testimony of a third person, and it need not be. It must be gathered from the surrounding facts and circumstances under proper instructions from the court." *In re Washington* (1998), 81 Ohio St. 3d 337, 340, 691 N.E.2d 285, quoting *State v. Huffman* (1936), 131 Ohio St. 27, 5 O.O. 325, 1 N.E.2d 313, paragraph four of the syllabus.

See, also, *State v. Ranson*, Franklin App. No. 01AP-1049, 2002-Ohio-2398.

{¶23} One would be hard-pressed to find direct evidence, other than an accused person's own admission, to demonstrate his intent or purpose. *State v. Hillman* (Feb. 22, 2001), Franklin App. No. 00AP-729. Since circumstantial evidence and direct evidence have the same probative value, appellant's purpose and intent can be proven through circumstantial evidence alone. See, e.g., *State v. Waddell* (Aug. 15, 2000), Franklin App. No. 99AP-1130; *Jenks*, at 273.

{¶24} "The 'purpose to commit a felony' element in R.C. 2911.13(B) * * * may be formed while the trespass is in progress, and the plan need not be fashioned prior to the trespass." *State v. Jones* (1981), 2 Ohio App.3d 20, syllabus; *State v. White* (Dec. 9, 1999), Franklin App. No. 99AP-32. Thus, appellant need not have intended to take anything from H&M before he drove his van onto its premises without permission.

{¶25} When a person is apprehended within a structure that he forcibly entered, it is reasonable to infer that he did so with the intent to commit a theft offense, in the absence of circumstances giving rise to a different inference. *State v. Levingston* (1995), 106 Ohio App.3d 433, 436. A finder of fact is not required to accept a competing

inference of innocence if the same circumstances could also permit it to infer guilt beyond a reasonable doubt. *Jenks,* supra.

{¶26} In this case, the finder of fact heard testimony that appellant was seen at 3:30 a.m. climbing down a six-foot fence topped with barbed wire, behind which were approximately twelve vans containing valuable equipment and materials. This testimony, when viewed in the light most favorable to appellee, would permit a finder of fact to infer that appellant's actions demonstrated the intent to commit a theft offense. Because there is some evidence upon which a finder of fact could determine that appellant acted with intent to commit a felony, his claim that the evidence presented at trial is insufficient as a matter of law is not well taken.

{¶27} At the close of appellee's case, appellant moved for a judgment of acquittal, pursuant to Crim.R. 29(A). When such a motion is made, the court construes the evidence in the light most favorable to the prosecution and "shall order the entry of judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." The trial court overruled appellant's motion. As set forth above, there is evidence in the record that, if believed, could support each and every element of the crime with which appellant is charged. Accordingly, his claim that the trial court erred by not granting his motion for acquittal pursuant to Crim.R. 29(A) is also not well taken.

{¶28} Appellant contends his conviction is against the manifest weight of the evidence. "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. * * * Weight is not a question of mathematics, but depends on its *effect in inducing belief*.' " *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. (Emphasis sic.) (Citations

omitted.) Thus, our emphasis is on the force and persuasiveness of the evidence presented.

{¶29} When reviewing the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences based thereon, consider the credibility of witnesses, and determine whether the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We review the record from the viewpoint of a "thirteenth juror." However, our ability to weigh the evidence and consider the credibility of witnesses is limited, since we must be mindful that the trier of fact was in the best position to evaluate the demeanor and credibility of witnesses and determine the weight to be accorded to the evidence. *State v. DeHaas* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus; *State v. Covington*, Franklin App. No. 02AP-245, 2002-Ohio-7037. Accordingly, an appellate court will not reverse a conviction as being against the manifest weight of the evidence if the record contains substantial, credible evidence upon which the trier of fact has based its verdict. *State v. Nicely* (1988), 39 Ohio St.3d 147, paragraph two of the syllabus.

{¶30} In *Levingston*, supra, the defendant was charged with breaking and entering a school and an adjacent concession stand. The defendant admitted to breaking into both structures. However, the defendant denied entering the concession stand and he also denied intending to steal anything from either structure. No evidence was presented to establish that anything was taken from either the concession stand or the school.

{¶31} When he was apprehended, the defendant explained he broke into the school because he was looking for a place to sleep and to keep warm. At trial, the defendant claimed he broke in because he was upset and he was looking for a place to think over his problems. The court of appeals held that the jury "could reasonably reject both of Levingston's proffered explanations as not credible, and infer, instead, that he entered both structures with the purpose of committing a theft offense." *Levingston*, supra, 116 Ohio App.3d at 437.

{¶32} Appellant contends a "near[ly] complete failure to consider whether there was a purpose to commit a felony theft offense suggests the trier of fact lost its way." (Appellant's brief at 13.) In evaluating the credibility of the witnesses, the finder of fact could choose to believe Gamblin's testimony over that of appellant. The court heard testimony that appellant was seen on H&M's property at 3:30 a.m., approximately one minute after a burglar alarm was activated. The police responded quickly to the alarm. Appellant was seen climbing down a fence and running away from the scene. Appellant was found moments later in the same area hiding in a dumpster. Trespassing at 3:30 a.m. into an area that contains valuable property and is secured by a six-foot tall barbed-wire-topped fence reasonably permits an inference that the trespass was undertaken with the intent to commit a theft offense, especially in the absence of circumstances to the contrary. *Levingston*, supra.

{¶33} The fact that the police arrived quickly and that appellant was apprehended before he actually removed property from the premises changes neither appellant's actions nor the inferences that may be properly drawn from them. To be found guilty of

violating R.C. 2911.13(B), one need only enter another's property without permission and purposely commit an act that constitutes a felony.

{¶34} Accordingly, we find that substantial and credible evidence presented at trial supported appellant's conviction of a violation of R.C. 2911.13(B). There is no indication the finder of fact clearly lost his way and thereby created such an injustice that the conviction must be reversed. Appellant's assertion that his conviction is against the manifest weight of the evidence is not well taken.

{¶35} Therefore, for the reasons set forth above, appellant's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and BROWN, JJ., concur.

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