[Cite as *State v. McDowall*, 2009-Ohio-6902.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	Nos. 09AP-443 (C.P.C. No. 08CR-06-4803) and
v.	:	09AP-444 (C.P.C. No. 08CR-06-4147)
Michael J. McDowall,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 29, 2009

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Thomas A. Gjostein, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Michael J. McDowall ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas convicting him of four counts of aggravated arson in violation of R.C. 2909.02, two counts as first-degree felonies and two counts as second-degree felonies, entered upon a jury verdict finding appellant guilty of the same. Appellant also filed a notice of appeal from a judgment convicting him for possession of cocaine, in violation of R.C. 2925.11, entered pursuant to a guilty plea. This court consolidated the cases for purposes of appeal. No assignments of error or other arguments have been raised with respect to the cocaine possession conviction, as

all the assignments of error raised in appellant's brief relate to the aggravated arson convictions and the jury trial pertaining thereto. Therefore, we sua sponte unconsolidate these appeals and, pursuant to Loc.R. 9, dismiss appellant's appeal of the cocaine possession conviction, docketed as case No. 09AP-444, for failure to prosecute. Accordingly, the remainder of this decision focuses on the assignments of error and arguments raised with respect to the aggravated arson convictions, docketed as case No. 09AP-443.

{¶2} This matter arises out of two separate incidents concerning two different victims, Tom Talbott and Danny Keen, both of whom resided in an area near Greenlawn Avenue and Scioto Boulevard where a homeless camp is located. The following summary of facts surrounding each incident was adduced at trial.

{¶3} The first incident occurred on February 12, 2008. According to Mr. Talbott, on this date, he had an argument about his cat with appellant who was also staying at the homeless camp. After appellant threatened to harm Mr. Talbott's cat, there was a confrontation between the two men. However, appellant pulled out a chain with a lock on it, and Mr. Talbott decided not to engage in a fight with appellant. Later that same night, Mr. Talbott heard a noise outside his tent and then heard the click of a lighter. Mr. Talbott then observed that the door of his tent was on fire. Mr. Talbott was able to escape by cutting his way out with a knife. When he exited, Mr. Talbott saw appellant standing there with a grin on his face.

{¶4} The second incident occurred on June 17, 2008. At this time, appellant was residing in an apartment on South High Street, and Mr. Keen was staying at the homeless camp. Appellant became upset with Mr. Keen after Mr. Keen failed to timely return

appellant's bicycle. Appellant then left Mr. Keen threatening phone messages. When Mr. Keen returned to the homeless camp, he saw appellant leaving the camp area and observed that his camp was on fire.

{¶5} Appellant was indicted by a Franklin County Grand Jury on June 27, 2008, on four counts of aggravated arson. A jury trial commenced on February 18, 2009, and on February 20, 2009, the jury returned a verdict of guilty on all four counts. On April 15, 2009, appellant was sentenced to an aggregate term of ten years' incarceration and was awarded 302 days of jail-time credit. This appeal followed, and appellant brings the following three assignments of error for our review:

> ASSIGNMENT OF ERROR #1
>
> TRIAL COUNSEL WAS RENDERED INEFFECTIVE IN ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION IN THE FAILURE TO OBJECT TO CLEARLY IRRELEVANT AND PREJUDICIAL EVIDENCE.
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> ASSIGNMENT OF ERROR #2
>
> APPELLANT'S CONVICTIONS WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION AND THE CONVICTIONS WERE ALSO AGAINST THE MANI-FEST WEIGHT OF THE EVIDENCE.
>
> ASSIGNMENT OF ERROR #3
>
> THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO CONSECUTIVE TERMS BETWEEN THE FELONIES OF THE FIRST DEGREE AND THE FELONIES OF THE SECOND DEGREE, BEING ALLIED OFFENSES OF SIMILAR IMPORT, PURSUANT TO SEC. 2941.25(A) OF THE REVISED CODE.

{¶6} For ease of discussion we will address appellant's assignments of error out of order. In his second assignment of error, appellant challenges both the sufficiency and weight of the evidence pertaining to his convictions. The Supreme Court of Ohio described the role of an appellate court presented with a sufficiency-of-the-evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)

{¶7} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. Thus, a jury verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks,* supra.

{¶8} A manifest-weight argument is evaluated under a different standard. "The 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." *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16, citation omitted. In order for a court of appeals to reverse the judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court must disagree with the fact finder's resolution of the conflicting testimony. *Thompkins* at 387. The court, reviewing 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶9} A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553.

Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17.

{¶10} The basis for appellant's sufficiency-of-the-evidence challenge is that neither victim actually saw appellant light the homeless areas on fire. According to appellant, the "thin nature" of the circumstantial evidence presented here is such that no trier of fact could have found the essential elements of aggravated arson proven beyond a reasonable doubt. (Appellant's brief at 8.) We disagree.

{¶11} Appellant was convicted of arson in violation of R.C. 2909.02, which provides:

> (A) No person, by means of fire or explosion, shall knowingly do any of the following:
>
> (1) Create a substantial risk of serious physical harm to any person other than the offender;
>
> (2) Cause physical harm to any occupied structure;
>
> (3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure.
>
> (B)(1) Whoever violates this section is guilty of aggravated arson.
>
> (2) A violation of division (A)(1) or (3) of this section is a felony of the first degree.
>
> (3) A violation of division (A)(2) of this section is a felony of the second degree.

{¶12} Appellant is correct that the record is void of any testimony or other direct evidence that appellant started the fires. While this case turns on circumstantial evidence, the Supreme Court of Ohio has held that "[a] conviction can be sustained based on circumstantial evidence alone." *State v. Franklin* (1991), 62 Ohio St.3d 118, 124, citing *State v. Nicely* (1988), 39 Ohio St.3d 147, 154-55. In fact, circumstantial evidence may " 'be more certain, satisfying and persuasive than direct evidence.' " *State v. Ballew*, 76 Ohio St.3d 244, 249, 1996-Ohio-81, quoting *State v. Lott* (1990), 51 Ohio St.3d 160, 167, quoting *Michalic v. Cleveland Tankers, Inc*. (1960), 364 U.S. 325, 330, 81 S.Ct. 6, 11. We find that viewed in the light most favorable to the state, the circumstantial evidence presented here could convince the trier of fact of appellant's guilt beyond a reasonable doubt.

{¶13} Mr. Talbott testified appellant threatened to harm Mr. Talbott's cat because appellant alleged the cat was getting into appellant's garbage. Mr. Talbott stated "[appellant] said he was going to kill my cat." (Tr. 41.) According to Mr. Talbott, he and appellant "almost had an altercation, but he pulled out a chain with a lock on it, so [Mr. Talbott] wasn't going to fight, him, you know, with that." (Tr. 41.) That evening, Mr. Talbott "heard a little scuffle outside. [He] heard a click of a lighter. Then the tent was on fire." (Tr. 42-43.) After cutting himself out of the tent, Mr. Talbott saw "[appellant] standing there with a grin on his face walking away." (Tr. 43.) Also, it had recently snowed and Mr. Talbott said there were only two sets of footprints in the snow, one leading to his tent and the ones appellant was leaving as he walked away from the tent.

{¶14} Mr. Keen testified he and appellant occasionally drank beer together. Regarding the fire to Mr. Talbott's tent, Mr. Keen testified appellant "was bragging about

squirting lighter fluid on [Mr. Talbott's] door and setting fire to it." (Tr. 58.) On June 17, 2008, Mr. Keen described that he and appellant were drinking beer at appellant's apartment on South High Street. Mr. Keen borrowed appellant's bicycle, but was gone longer than he was supposed to have the bicycle. Therefore, appellant called Mr. Keen and left "threatening messages" on his telephone, in which appellant referred to Mr. Keen as "dogmeat and that he was going to burn [him] down." (Tr. 59.) Mr. Keen returned the bicycle to appellant's apartment, but appellant was not there. Mr. Keen testified as follows:

> So when I got back to his place he wasn't there. I left the bike and started walking back to where my camp was. When I got back almost to the camp, I seen him coming out of the woods, so I just stepped over the woods so he wouldn't see me. I didn't want no confrontation then. And then when I came back out and started heading back down, I seen the fire and smoke rolling up in there. So when I got down to the camp it was on fire, and that's when I called the police and the fire department.

(Tr. 59.)

{¶15} James Kasser from the Columbus Division of Fire responded to the fire on June 17, 2008. When Mr. Kasser arrived, "[p]retty much all that was left was debris that was still smoldering." (Tr. 83.) Fire investigator Billy Reedus testified he was called to both the February 12, 2008 fire and the June 17, 2008 fire. Mr. Reedus testified the February 12, 2008 incident concerned a blue tent that had been set on fire, and "the only cause that was determined was this fire was intentionally set on the outside of the tent." (Tr. 94.) As for the June 17, 2008 incident, Mr. Reedus described the area as "completely destroyed." (Tr. 95.) After eliminating other causes, Mr. Reedus determined

"the fire started on the outside" and once it started it consumed the entire shanty. (Tr. 102.)

{¶16} Contrary to appellant's assertion, the evidence does more than merely place appellant in the general area of the fires. Based on the evidence and testimony of the witnesses, viewed in a light most favorable to the prosecution, a reasonable trier of fact could have found the essential elements of arson proven beyond a reasonable doubt. Therefore, we cannot conclude there is insufficient evidence to sustain appellant's convictions.

{¶17} Similarly, we cannot say the jury's verdict is against the manifest weight of the evidence. The basis for appellant's manifest-weight challenge is the "sketchy" circumstantial evidence and Mr. Keen's "incredulous testimony." (Appellant's brief at 8-9.) Appellant asserts Mr. Keen is not credible and that this is evident by his criminal background. However, the jury had the opportunity to hear the direct and extensive cross-examination of Mr. Keen, which included his prior criminal convictions, to determine his credibility. As previously stated, the weight given to the evidence and the determination of the credibility of the witnesses was within the province of the jury as trier of fact. *DeHass* at paragraph one of the syllabus. The trier of fact is free to believe or disbelieve all or any of the testimony of the witnesses. *Jackson*, supra.

{¶18} A conviction is not against the manifest weight of the evidence simply because the trier of fact chose to believe the prosecution's witnesses. *State v. Rippey*, 10th Dist. No. 04AP-960, 2005-Ohio-2639, discretionary appeal not allowed by 106 Ohio St.3d 1530, 2005-Ohio-5146. Thus, the fact the jury chose to believe the prosecution's witnesses is not a basis for reversal on manifest-weight grounds. After careful review of

the record in its entirety, we conclude there is nothing to indicate the trier of fact clearly lost its way or that any miscarriage of justice resulted. As such, we cannot say appellant's convictions are against the manifest weight of the evidence.

{¶19} Accordingly, we overrule appellant's second assignment of error.

{¶20} In his first assignment of error, appellant contends he received ineffective assistance of counsel. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064. In order to establish a claim of ineffective assistance of counsel**,** a defendant must first demonstrate that his trial counsel's performance was so deficient that it was unreasonable under prevailing professional norms. Id. 466 U.S. at 687, 104 S.Ct. at 2064. The defendant must then establish "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. 466 U.S. at 694, 104 S.Ct. at 2068.

{¶21} According to *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it

> cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. 466 U.S. at 687, 104 S.Ct. at 2064.

{¶22} "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. 466 U.S. at 689, 104 S.Ct. at 2065, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164. A verdict adverse to a criminal defendant is not of itself indicative that he received ineffective assistance of trial counsel. *State v. Hester* (1976), 45 Ohio St.2d 71, 75.

{¶23} Appellant contends his trial counsel was ineffective for failing to object to irrelevant and prejudicial evidence. Specifically, appellant challenges testimony elicited by the prosecutor from Mr. Keen regarding an alleged incident involving Shannon Presley, and directs us to the following exchange:

> Q: Now, did you ever have a confrontation with [appellant] before this event?
>
> A: Yes, sir, we did. Yes, sir, I did.
>
> Q: Did it involve another individual?
>
> A: Yes, it did.

> Q. Who was that other individual?
>
> A: Shannon Presley.
>
> Q: Can you describe that event?
>
> A: He said Shannon stoled a phone charger off of him. And we was up in our hut asleep, and I started smelling kerosene. So I went outside and caught him pouring kerosene all around the building, so we called the police then.
>
> The police came out and took the report, said there wasn't nothing they could do about it because we didn't have an address. And he admitted it, pouring it to it, but told them that he wasn't going to light it.

(Tr. 60.)

{¶24} Because no fires were actually set and no charges were filed as a result of this incident, appellant argues this testimony was not only irrelevant but also prejudicial, and, thus, his counsel was ineffective in failing to object to the same.

{¶25} Because there was no objection, all but plain error has been waived. *State v. Nichols* (June 27, 2000), 10th Dist. No. 99AP-1090, citing *State v. Smith* (1997), 80 Ohio St.3d 89, 115, cert. denied (1998), 523 U.S. 1125, 118 S.Ct. 1811. "Plain error consists of an obvious error or defect in the trial proceedings that affects a substantial right [and] * * * reversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Lindsey*, 87 Ohio St.3d 479, 482, 2000-Ohio-465. Further, we note that " '[a] failure to object, in and of itself, does not rise to the level of ineffective assistance of counsel.' " *State v. Ryan*, 10th Dist. No. 08AP-481, 2009-Ohio-3235, ¶77, quoting *State v. Jackson*, 8th Dist. No. 86105, 2006-Ohio-174, ¶88. Ohio courts have recognized that objections tend to disrupt the flow of a trial and are often considered by the fact finder to be technical and bothersome; hence, competent counsel

may reasonably hesitate to object. Id., citing Jacobs, Ohio Evidence (1989), at iii-iv; *State v. Campbell*, 69 Ohio St.3d 38, 53, 1994-Ohio-492.

{¶26} Assuming without deciding, however, that appellant's counsel was deficient in his performance by failing to object to the challenged testimony, appellant is unable to show such error was prejudicial. This is so because even if counsel had objected and the testimony was not permitted, there is not a reasonable probability of a different outcome. As explained in our disposition of appellant's second assignment of error, the convictions are not only supported by sufficient evidence but are not against the manifest weight of the evidence, a conclusion we reached without consideration of the challenged testimony. Our review of the record reveals there is plenty of evidence that appellant was the perpetrator of these crimes without the challenged testimony; therefore, there is not a reasonable probability of a different outcome had the evidence been excluded. Because appellant cannot demonstrate that he was prejudiced by the challenged testimony, appellant has failed to demonstrate either that he received ineffective assistance of counsel or plain error. Accordingly, we overrule appellant's first assignment of error.

{¶27} In his third assignment of error, appellant contends the trial court erred in sentencing him as it did because the violations of R.C. 2909.02(A)(1) and (2) are allied offenses of similar import.

{¶28} In *State v. Cody*, 10th Dist. No. 07AP-142, 2007-Ohio-6776 ("*Cody I*"), the defendant was convicted of one count of aggravated arson in violation of R.C. 2909.02(A)(1) and one count of aggravated arson in violation of R.C. 2909.02(A)(2). The defendant argued on appeal that the trial court erred in imposing separate sentences because the two aggravated arson counts constituted allied offenses of similar import.

This court rejected the defendant's argument and held violations of R.C. 2909.02(A)(1) and (2) are not allied offenses of similar import. Our determination in *Cody I* relied upon the analysis of allied offenses set forth in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291. After *Cody I*, however, the Supreme Court of Ohio rendered a decision in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, which clarified *Rance*. Thereafter, the court accepted a discretionary appeal of *Cody I* and remanded it back to this court for consideration in light of *Cabrales*.

{¶29} In *State v. Cody*, 10th Dist. No. 07AP-142, 2009-Ohio-3082, discretionary appeal not allowed by 123 Ohio St.3d 1473, 2009-Ohio-5704 ("*Cody II*"), we stated:

> We first consider, in comparing the statutory elements in the abstract, whether the commission of aggravated arson under R.C. 2909.02(A)(1) (knowingly creating a substantial risk of serious physical harm to a person) necessarily results in the commission of aggravated arson under R.C. 2909.02(A)(2) (knowingly causing physical harm to any occupied structure), and conclude that it does not. * * *
>
> We next consider, in comparing the statutory elements in the abstract, whether the commission of aggravated arson under R.C. 2909.02(A)(2) necessarily results in the commission of aggravated arson under R.C. 2909.02(A)(1).
>
> * * *
>
> Here, in comparing the elements of the offenses in the abstract, we conclude that the offenses are not so similar that the commission of one offense will necessarily result in the commission of the other.

Id. at ¶6-9.

{¶30} Thus, pursuant to this court's holding in *Cody II*, we find no merit to appellant's third assignment of error and accordingly overrule said assignment of error.

{¶31} For the foregoing reasons, appellant's appeal of the cocaine possession conviction docketed as case No. 09AP-444 is sua sponte dismissed, appellant's three assignments of error in case No. 09AP-443 are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Case No. 09AP-444 is sua sponte dismissed;
judgment in case No. 09AP-443 affirmed.

BROWN and CONNOR, JJ., concur.

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