[Cite as *State v. Donaldson*, 2009-Ohio-6988.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-399 (C.P.C. No. 08CR-5227)
Patrick Donaldson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 31, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Joseph D. Reed, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Patrick Donaldson, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

{¶2} On July 17, 2008, a Franklin County Grand Jury indicted appellant on one count of burglary in violation of R.C. 2911.12, a felony of the second degree. Subsequently, on February 10, 2009, appellant's jury trial commenced. The state presented five witnesses, whose testimony established the following undisputed facts.

{¶3} On July 8, 2008, Shelley Hays ("Hays") was sitting on her porch reading a book when she noticed that her neighbor's downstairs window was open and the drapes were billowing through. Approximately an hour later, Hays observed an individual stop in front of the open window, poke his head in, look around, and jump through the window into her neighbor's residence. Hays called 911 and described the individual as wearing "long denim shorts * * * [and] a white kind of athletic shirt with short sleeves, with some orange trim[.]" (Tr. 201.) At trial, Hays testified that she had seen this individual before in the neighborhood and knew that his first name was Shawn. She explained her impression was that he was either "living or stayed regularly with the woman who had rented the other side of [her neighbor's] duplex." (Tr. 202.) Hays identified appellant as the individual she saw enter her neighbor's residence through the window, and she had "no doubt" about the accuracy of her identification. (Tr. 203.)

{¶4} Officer Richard Hilsheim, a 19-year veteran with the Columbus Division of Police, was on patrol in the area when he received a dispatch indicating that a burglary was in progress. The dispatcher stated that the suspect was a "male black in an orange and white shirt with long, baggy blue jeans shorts." (Tr. 262.) When Officer Hilsheim arrived at the location, he observed an individual that matched the description standing in front of a silver Pontiac ("the vehicle") that was parked in front of the residence. Upon seeing the cruiser, the individual, later identified as appellant, began to walk away from the vehicle. Officer Hilsheim detained appellant and called for backup. Officer Hilsheim testified that at the time of appellant's detention, appellant was holding a set of car keys and, on the key ring, was the tag number of the vehicle, which turned out to be a rental car.

{¶5} When the backup unit arrived, Officer Hilsheim, along with Officer Richard D. Little, approached the residential address given by dispatch and, upon inspection, observed an open downstairs window and found the front door to be unlocked. The officers entered the residence to investigate and secure the scene. Officer Hilsheim went upstairs and, in plain view, he observed a checkbook, which appeared to belong to Shawn Sutton ("Sutton"). Using the information found in the checkbook, Officer Hilsheim contacted Sutton, who verified that he was the owner of the residence (a duplex structure). Sutton arrived at the scene within minutes of being contacted.

{¶6} The officers next notified a burglary detective, and while standing outside waiting for that detective to arrive, Officer Little noticed that there were power tools situated on the front seat of the vehicle. He then pointed the tools out to Sutton, who identified the same as belonging to him.

{¶7} Inspector James P. Francis, a ten-year veteran of the Columbus Division of Police and on assignment to the burglary squad of the Property Crimes Bureau, arrived at the scene. After speaking with the officers, Inspector Francis verified that the keys found on appellant belonged to the vehicle by starting the vehicle. He also confirmed that appellant's fingerprints were found on a CD located inside the vehicle. At trial, Inspector Francis explained that the basis for starting the vehicle and testing the CD for fingerprints was to link appellant. He explained the foregoing was necessary because the rental car agreement recovered from the vehicle was not in appellant's name.

{¶8} At the scene, as well as at trial, Sutton positively identified that the tools found on the front seat of the vehicle were his and that, at no time, had he given appellant

permission to be in possession of those tools. Sutton explained that he was in the process of rehabilitating one unit in the duplex residence, and that he had rented the other unit to Ann Williams, appellant's then girlfriend. At trial, Sutton stated that he had met, and spoken to, appellant prior to the date of the incident.

{¶9} At the close of the state's case, appellant moved for acquittal pursuant to Crim.R. 29(A), arguing that the state had failed to produce sufficient evidence on each element of the burglary charge. The trial court overruled the motion. Appellant did not testify or call any witnesses. The case was submitted to the jury, which found appellant guilty. The trial court sentenced appellant to a term of eight years' incarceration.

{¶10} Appellant appeals and assigns the following error:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT FAILED TO DIRECT A VERCIDT [SIC] OF ACQUITTAL IN FAVOR OF THE DEFENDANT-APPELLANT WHEN THE CONVICTION WAS BASED UPON INSUFFICIENT EVIDENCE.

{¶11} In his lone assignment of error, appellant argues that the trial court erred by overruling his Crim.R. 29 motion of acquittal on the burglary charge. Although not specifically stated as such, a review of the sum and substance of appellant's argument reveals that he is actually challenging his conviction as being against the manifest weight of the evidence. Therefore, we shall consider his conviction under both standards of review.

{¶12} When a trial court's Crim.R. 29 ruling is questioned on appeal, the reviewing court is asked to determine whether the state's evidence, if believed, was sufficient to establish beyond a reasonable doubt that appellant was guilty. *State v. Hauenstein* (1997), 121 Ohio App.3d 511. Sufficiency of the evidence is the legal

standard applied to determine whether the case should have gone to the jury. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In other words, sufficiency tests the adequacy of the evidence and asks whether the evidence introduced at trial is legally sufficient as a matter of law to support a verdict. Id. "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." *State v. Jenks* (1991), 61 Ohio St.3d 259, syllabus paragraph two, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781. The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks* at 273. If the court determines that the evidence is insufficient as a matter of law, a judgment of acquittal must be entered for the defendant. See *Thompkins* at 387.

{¶13} Comparatively, when presented with a manifest-weight claim in a criminal matter, an appellate court engages in a limited weighing of the evidence to determine whether the fact finder's verdict is supported by sufficient competent, credible evidence to permit reasonable minds to find guilt beyond a reasonable doubt. Id.; *State v. Group,* 98 Ohio St.3d 248, 2002-Ohio-7247, ¶77. "[S]ufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, ¶25, citing *Thompkins* at 386-87. When presented with a manifest-weight claim, "a reviewing court asks whose evidence is more persuasive – the state's or the defendant's?" *Wilson* at ¶25. " 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of

the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' " Id., quoting *Thompkins,* at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 2218.

{¶14} 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 trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. 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. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶74.

{¶15} In this case, appellant was convicted on one count of burglary, in violation of R.C. 2911.12(A)(1), which provides:

> (A) No person, by force, stealth, or deception, shall do any of the following:
>
> (1) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense[.]

{¶16} On appeal, appellant challenges both the weight of the evidence supporting his conviction and the sufficiency of that evidence. Specifically, appellant contends that the state failed to produce any forensic evidence that conclusively linked appellant to the tools found inside the vehicle, nor did the state produce any evidence, aside from Sutton's testimony, that definitively established that Sutton owned the tools. Appellant also takes issue with the accuracy of Hays' identification of him as being the individual that entered the residence through the window, and further asserts that Sutton's testimony "was suspect due to his anger at Appellant for spreading rumors" about him. (Appellant's brief at 5.)

{¶17} Appellant challenges his conviction by raising issues related to witness credibility and deficiencies with the evidence. Such challenges, however, are not relevant to appellant's sufficiency-of-the-evidence claim. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79. Appellant raises no other arguments to support his sufficiency-of-the-evidence claim, and we find that the state's evidence supports appellant's burglary conviction. Thus, we conclude that appellant's conviction is based on sufficient evidence**.**

{¶18} We likewise find appellant's conviction is not against the manifest weight of the evidence. At trial, Hays identified appellant as the individual that entered the residence through the window and who was subsequently apprehended by the police. And, regarding her identification, Hays testified that there was "no doubt" in her mind. (Tr. 203.) The jury also heard, and was free to believe, Inspector Francis, who testified regarding the evidence that linked appellant to the vehicle in which the tools were found. As for the ownership of those tools, Sutton testified that he was "100 percent positive"

that those were his tools and was able to produce a receipt for one of them. (Tr. 233.) Sutton also answered questions from defense counsel regarding the rumors that appellant allegedly spread about Sutton, and, thus, the issue was put before the jury, whose province it was to determine Sutton's credibility and what weight to assign it. Based upon the record, we cannot conclude that the jury lost its way and created such a manifest miscarriage of justice that appellant's conviction for burglary must be reversed and a new trial ordered.

{¶19} In summary, we conclude that appellant's burglary conviction is based on sufficient evidence and is not against the manifest weight of the evidence. Accordingly, we overrule appellant's single assignment of error and hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.

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