[Cite as *State v. McBride*, 2011-Ohio-1490.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 10AP-585 (C.P.C. No. 09CR03-1573)
v.	:	No. 10AP-586 (C.P.C. No. 09CR04-2027)
Tamboura D. McBride,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 29, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Brian J. Rigg, for appellant.

APPEALS from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Tamboura D. McBride, appeals from judgments of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm those judgments.

Facts and Procedural History

{¶2} On March 18, 2009, a Franklin County grand jury indicted appellant with one count of burglary in violation of R.C. 2911.12 and one count of theft in violation of R.C. 2913.02. The charges arose from appellant's entrance into a dorm room on the campus of The Ohio State University on March 4, 2009. Appellant allegedly stole a laptop from one of the occupants of the room. Shortly thereafter, another grand jury

indicted appellant with two more counts of burglary and one more count of theft. These counts alleged that appellant entered buildings on the campus of The Ohio State University and stole items on February 5, 2009 and March 2, 2009. Appellant entered not guilty pleas to all of the charges and proceeded to trial. Before trial, the state moved to have the two cases tried together. Over appellant's objection, the trial court joined the cases and tried them together.

{¶3} At trial, the state presented testimony regarding each of the three charged incidents. First, Zhizchang Xie testified that he went to his office in the Math Tower on The Ohio State University campus in the evening of February 5, 2009. He arrived at his office, put down his jacket which contained his wallet, and went down the hall to the bathroom. He returned within 10 to 15 seconds and saw a person leaving his office. When Xie asked the man what he was doing, the man continued to walk away down the hallway. Xie went into his office and discovered that his wallet was missing from his jacket. Xie identified appellant as the man he saw leaving his office.

{¶4} Next, William Dazey testified that he lived in the Morrill Tower dormitory on The Ohio State University campus in 2009. On March 2, 2009, he was in his dorm room when he realized that his bag and his jacket were not where he had put them. Ohio State University Police Officer William Linton investigated the break-in and found security camera videotape of appellant in the elevators of Morrill Tower on the same day, holding a bag. Dazey testified that the bag appellant was holding appeared to be his bag.

{¶5} Katherine Rosil and Stephanie Rech each testified that they lived in the Patterson Hall dormitory on The Ohio State University campus in 2009. In the morning of March 4, 2009, Rech awoke and went to the bathroom down the hall. She left the door to their dorm room slightly open. When she returned to her room, she saw a man walk past

her with her computer. Rosil was asleep in her bed as this all occurred and did not see anything. However, Rech identified appellant as the man she saw leaving her dorm room with her computer.

{¶6} The jury found appellant guilty of two counts of theft (Rech's laptop and Xie's wallet) and two counts of burglary (Dazey's dorm room and Rech and Rosil's dorm room).[1] The trial court sentenced appellant accordingly.

{¶7} Appellant appeals and assigns the following errors:

> [1.] THE DEFENDANT WAS DENIED A RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT OVERRULED DEFENDANT'S MOTION TO HAVE SEPARATE TRIALS ON THE BURGLARY AND THEFT CASES.
>
> [2.] THE TRIAL COURT ERRED BY PERMITTING A WITNESS FOR THE STATE TO TESTIFY THE APPELLANT WAS A SUSPECT IN NUMEROUS BREAK-INS WHICH VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.
>
> [3.] THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT AND THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANT'S RULE 29 MOTION.
>
> [4.] THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

First Assignment of Error – Joinder of Indictments

{¶8} Appellant contends in his first assignment of error that the trial court improperly tried his two indictments in the same trial. We disagree.

{¶9} The law favors the joinder of multiple offenses in a single trial. *State v. Brinkley,* 105 Ohio St.3d 231, 2005-Ohio-1507, ¶28; *State v. Coley*, 93 Ohio St.3d 253, 259, 2001-Ohio-1340. Pursuant to Crim.R. 13, two indictments may be tried together if the offenses could have been joined in a single indictment. *State v. Tipton,* 10th Dist. No.

[1] The trial court dismissed the other burglary count at the state's request.

04AP-1314, 2006-Ohio-2066, ¶25. Nevertheless, a trial court may grant a severance under Crim.R. 14 if a defendant affirmatively establishes that he would be prejudiced by joinder. *State v. Lott* (1990), 51 Ohio St.3d 160, 163; *State v. Wilkins,* 12th Dist. No. CA2007-03-007, 2008-Ohio-2739, ¶13.

{¶10} A defendant claiming error based upon the trial court's refusal to allow separate trials has the burden of affirmatively showing that his rights were prejudiced. *State v. Torres* (1981), 66 Ohio St.2d 340, 343 (citing *State v. Roberts* (1980), 62 Ohio St.2d 170, 175); *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, ¶36. Here, appellant does not allege any prejudice resulting from the joinder of his indictments.

{¶11} Even if appellant could establish prejudice in this case, that prejudice can be negated in two ways. *State v. Cameron,* 10th Dist. No. 09AP-56, 2009-Ohio-6479, ¶35 (citing *Brinkley*); *Tipton* at ¶27. First, if the state shows that evidence of one offense would be admissible at a separate trial of the other offense as "other acts" evidence under Evid.R. 404(B), then joinder of the offenses in the same trial cannot prejudice the defendant. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶50; *Brinkley* at ¶30. Second, a joinder cannot result in prejudice if the evidence of the offenses joined at trial is simple and direct, so that a jury is capable of segregating the proof required for each offense. *State v. Johnson*, 88 Ohio St.3d 95, 109, 2000-Ohio-276; *State v. Mills* (1992), 62 Ohio St.3d 357, 362. These two tests are disjunctive, so that the satisfaction of one negates a defendant's claim of prejudice without having to consider the other test. *Cameron* at ¶35 (citing *Mills*).

{¶12} Evidence is "simple and direct" if the jury is capable of segregating the proof required for each offense. Id. at ¶40. "The rule seeks to prevent juries from combining the evidence to convict the defendant, instead of carefully considering the proof offered

for each separate offense." Id. Here, the evidence of the offenses is simple and direct and is not confusing or difficult to separate. The offenses in each indictment were analytically and logically separate: burglaries and thefts which occurred in different buildings on different days. Although the offenses involved similar conduct, the offenses were separate and not so complex that the jury would have difficulty separating the proof required for each offense. *Tipton* at ¶31. Therefore, even if appellant had shown prejudice, any prejudice was negated.

{¶13} Because the trial court properly tried these indictments together, we overrule appellant's first assignment of error.

Second Assignment of Error – Exclusion of Evidence

{¶14} Appellant contends in his second assignment of error that the trial court erred by permitting Officer Linton to testify that appellant was a suspect in other thefts on The Ohio State University campus. We disagree.

{¶15} Appellant did not object to Officer Linton's testimony. Accordingly, he has forfeited all but plain error. *State v. Tibbetts*, 92 Ohio St.3d 146, 160-61, 2001-Ohio-132. Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Even if an error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. Id*; State v. Litreal,* 170 Ohio App.3d 670, 2006-Ohio-5416, ¶12. Courts are to notice plain error under Crim .R. 52(B) " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of

justice.' " *Barnes (*quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus).

{¶16} Appellant argues that the trial court should have excluded Officer Linton's testimony that appellant was a suspect in other thefts on campus because the probative value of that testimony was substantially outweighed by the danger of unfair prejudice. Evid.R. 403(A). However, it was important for the jury to understand why appellant was initially stopped by Officer Linton. Officer Linton did not state that appellant was charged in connection with the other thefts. Under these circumstances, the trial court did not err, let alone plainly err, by admitting this testimony. Therefore, we overrule appellant's second assignment of error.

Third and Fourth Assignments of Error – Sufficiency and Manifest Weight of the Evidence

{¶17} Finally, appellant contends in his third and fourth assignments of error that his convictions are not supported by sufficient evidence[2] and are against the manifest weight of the evidence. We disagree.

{¶18} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally adequate to support a verdict. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. Whether the evidence is legally sufficient to support a verdict is a question of law. Id.

{¶19} In determining whether the evidence is legally sufficient to support a conviction, " '[t]he 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. Robinson*, 124 Ohio

St.3d 76, 2009-Ohio-5937, ¶34 (quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus). A verdict will not be disturbed unless, after viewing the evidence in the 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.

{¶20} In this inquiry, appellate courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence admitted at trial supports the conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence); *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶4 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime.").

{¶21} Appellant first argues that the state did not present sufficient evidence to demonstrate that he used stealth or deception to gain access to an occupied structure, an element of the offense of burglary. We disagree.

{¶22} In order to find appellant guilty of burglary in this case, the state had to prove that by force, stealth, or deception, he trespassed in an occupied structure when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense. R.C. 2911.12(A)(2).

{¶23} While the term "stealth" is not defined in the revised code, this court has defined that term to include "any secret, sly or clandestine act to avoid discovery and to

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[2] Although appellant couches his third assignment of error as a challenge to the trial court's denial of his Crim.R. 29 motion, the standard of review for that decision is the same as our review of the sufficiency of the evidence. *State v. Johnson*, 10th Dist. No. 08AP-652, 2009-Ohio-3383, fn. 1.

gain entrance into or to remain within a residence of another without permission." *State v. Lane* (1976), 50 Ohio App.2d 41, 47; *State v. Wallace*, 10th Dist. No. 08AP-2, 2008-Ohio-5260, ¶43. Other courts have adopted this same definition. *State v. Dowell*, 166 Ohio App.3d 773, 2006-Ohio-2296, ¶16; *State v. Stone* (Nov. 10, 1999), 5th Dist. No. 1999AP030012.

{¶24} Each of the victims of appellant's burglaries, Dazey, Rech, and Rosil, testified that a person had to use an Ohio State University identification card to gain access to the campus buildings. Appellant was not a student, faculty member, or staff member of the college. Nor was there any evidence that appellant was the guest of someone with legal access. Therefore, appellant was not authorized to enter the buildings in question. Rosil and Dazey testified that it is possible for someone without an identification card to closely follow someone with an identification card to get into a campus building. Viewing this evidence in a light most favorable to the state, it was reasonable to conclude that appellant gained entrance to these buildings by using someone else's identification card or by following someone who used their identification card to open the door. This conduct fits squarely within this court's definition of stealth. Accordingly, the state presented sufficient evidence, when viewed in the light most favorable to the state, for reasonable minds to conclude that appellant trespassed by stealth.

{¶25} Next, appellant argues that the state's evidence was not sufficient to find him guilty of the theft of Xie's wallet because Xie did not see appellant actually take the wallet. We disagree.

{¶26} Appellant is correct that the state's case in this regard is entirely circumstantial. However, "[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). Circumstantial evidence possesses the same probative value as direct evidence. *State v. Sowell*, 10th Dist. No. 06AP-443, 2008-Ohio-3285, ¶89. 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 *Lott*, supra, at 167).

{¶27} While Xie did not see appellant actually take his wallet, he testified that his wallet was in his jacket pocket when he left his office. He returned to his office 10 to 15 seconds later and saw appellant walking out of his office. Seconds later, Xie looked in his jacket and discovered his wallet was missing. This evidence, although circumstantial, is sufficient for reasonable minds to conclude that appellant took Xie's wallet. See *State v. Scimone*, 8th Dist. No. 94339, 2011-Ohio-75, ¶14 (theft conviction supported by sufficient circumstantial evidence in the absence of any direct eyewitness evidence).

{¶28} Appellant's convictions are supported by sufficient evidence.

{¶29} Appellant also contends that his convictions were against the manifest weight of the evidence. Again, we disagree.

{¶30} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *Thompkins* at 387. Although there may be sufficient evidence to support a judgment, a court may nevertheless conclude that a judgment is against the manifest weight of the evidence. Id.

{¶31} When presented with a challenge to the manifest weight of the evidence, an appellate court may not merely substitute its view for that of the trier of fact, but must

review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, 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. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.; *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶12.

{¶32} Appellant simply incorporates the same arguments he made in his sufficiency assignment of error to argue that his convictions are against the manifest weight of the evidence. Based on a review of the record, we find that the jury did not clearly lose its way so as to create a manifest miscarriage of justice. The circumstantial evidence implicating appellant in these crimes was substantial and the victims positively identified appellant. This is not the exceptional case in which the evidence weighs heavily against the convictions. Accordingly, appellant's convictions are not against the manifest weight of the evidence.

{¶33} Because appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence, we overrule appellant's third and fourth assignments of error.

{¶34} Having overruled appellant's four assignments of error, we affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

BROWN and SADLER, JJ., concur.