[Cite as *State v. Bond*, 2011-Ohio-6828.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-403
v.	:	(C.P.C. No. 10CR-4450)
Joshua W. Bond,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 30, 2011

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard,* for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas,* for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Joshua W. Bond, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of burglary in violation of R.C. 2911.12. Because (1) the trial court did not abuse its discretion in permitting two witnesses to offer lay opinion testimony that the perpetrator in a surveillance video and related still photos was defendant, and (2) both sufficient

evidence and the manifest weight of the evidence support the trial court's judgment, we affirm.

I. Facts and Procedural History

{¶2} On September 22, 2009, at approximately 12:30 a.m., an Otterbein College student invited an acquaintance, known to her only as Nyshear, to spend time with her in her dormitory, Dunlap King Hall. The two talked and listened to music in her room until 2:00 a.m., when the campus curfew required him to leave. The student allowed Nyshear to use her cell phone to call his friend to pick him up, and she then escorted him to the student lounge area where they waited for his friend.

{¶3} The student testified that at one point Nyshear got up, left the student lounge area, and walked down the hallway to the dorm's communal kitchen. "[H]e was there for a moment, and then [she] followed him and asked him what he was looking for, why he was there," to which Nyshear responded that he was playing with the magnets on the kitchen's refrigerator. In the ensuing minutes, Nyshear walked around the dorm's shared spaces, went into the restroom, and then returned to the kitchen, while the student returned to the couch in the student lounge. Nyshear left when his friend arrived to pick him up, though the student testified she did not see the car or the friend. (Tr. 98.)

{¶4} At defendant's trial, the state submitted a surveillance videotape depicting the lobby of the dormitory on the night of September 22, 2009. Lawrence Banaszak, Director of Security for Otterbein College, explained that one security camera was in the dorm, set up to capture video pictures of individuals as they entered and exited the building. Between 2:25 a.m. and 2:58 a.m., the camera caught two individuals, one

dressed in all black and one in black and red, leaving the dorm with the student lounge's flat screen television, purchased for $549 in 2008, and some electrical equipment. Two DVD players also were taken during the burglary.

{¶5} Otterbein security notified Westerville police of the burglary, and officers responded to the scene. Although Dunlap King Hall was a "secured dormitory," so the doors to the dorm required an entrant to "swipe" a student ID card, police discovered a cut screen and an open window open immediately to the left of the main entrance. Because of the security surrounding the normal points of entry, officers ascertained that the perpetrators crawled through the window to obtain access to the building.

{¶6} In May of 2010, Westerville police released still photographs taken from the surveillance video to other law enforcement officials in an attempt to identify the perpetrators. Jodi Halleck knew defendant from 2007 to 2010 and calculated that she met with him "face to face" 26 times over the years in her capacity as his probation officer. (Tr. 104.) Halleck saw the still photos from the surveillance footage and, believing the perpetrator in all black to be defendant, contacted Detective Michael Pavolino with the Westerville police. Pavolino, whose investigation included extensively reviewing the surveillance videos, met with defendant on May 26, 2010 pursuant to the tip from Halleck and concluded defendant was one of the men in the video.

{¶7} On July 29, 2010, an indictment was filed charging defendant with one count of burglary, a felony of the second degree. Prior to trial, defendant sought to preclude Halleck's identification testimony on the grounds that her anticipated testimony

would "set Miss Halleck in the seat of the jury, to decide the ultimate issue in this case." (Tr. 4.) The trial court denied the request.

{¶8} Halleck testified she met with defendant over two dozen times, including the day before the Otterbein burglary. The state played a portion of the surveillance tape, and the trial court allowed Halleck, over defendant's objection, to identify defendant as the burglar in the photographs and security video. Halleck indicated she made the identification based upon a comparison of facial features and body build, in that the perpetrator in the video was an "African-American male, approximately six feet tall, somewhere between 220, 230 pounds. He's bearded." (Tr. 112.)

{¶9} Detective Pavolino also testified at trial. The state played the surveillance footage for Pavolino, and the trial court, over repeated defense objection, allowed Pavolino to testify he believed defendant to be the man in all black in the video. Pavolino stated he based his conclusion on defendant's "physical description, his height, his weight, his gestures, his mannerisms, the way he walked." (Tr. 67.)

{¶10} On February 10, 2011, after a three-day trial, a jury found defendant guilty of burglary as indicted. At the sentencing hearing held on April 5, 2011, the trial court sentenced defendant accordingly.

II. Assignments of Error

{¶11} On appeal, defendant assigns three errors:

FIRST ASSIGNMENT OF ERROR

> The trial court erred in permitting two witnesses to testify that still photographs and video recordings taken from a security camera contained Appellant's image, when the evidence was submitted to the jury for review. This act violated the

> Ohio Rules of Evidence and due process protections under the state and federal constitutions.
>
> **SECOND ASSIGNMENT OF ERROR**
>
> There was insufficient competent, credible evidence to support the jury's verdict, thereby, denying Appellant due process under the state and federal Constitutions.
>
> **THIRD ASSIGNMENT OF ERROR**
>
> The verdict of the jury was against the manifest weight of the evidence.

III. First Assignment of Error – Identification from Surveillance Video

{¶12} Defendant's first assignment of error contends the trial court committed reversible error when it permitted Halleck and Pavolino to identify defendant as the person visible in photographs and video footage presented to the jury. He argues the witnesses' testimony was an "improper conclusion from a lay witness and not a matter on which an expert could provide an opinion under Evid.R. 702." (Appellant's brief, 11.) The state does not suggest the testimony at issue was offered as expert opinion. Instead, the state asserts it was offered, and admissible, as lay opinion testimony.

{¶13} The transcript of the trial does not reflect that the state attempted to establish either witness as an expert. Rather, the witnesses were asked to give their personal opinions from the photographs and video regarding the identity of the perpetrator. See *State v. McKee*, 91 Ohio St.3d 292, 2001-Ohio-41 (noting lay opinion testimony differs from expert opinion testimony because lay opinion results from a process of reasoning familiar in everyday life, while expert opinion results from a process of reasoning that only specialists in the field can master); *State v. Cunningham*, 11th

Dist. No. 2007-L-034, 2008-Ohio-1127, ¶87, citing *State v. Robertson* (Nov. 23, 1994), 8th Dist. No. 66510 (pointing out "there is no general rule that interpretation of a mechanical reproduction must be made by an expert"). The issue then is whether lay testimony appropriately is admitted to identify an individual in a surveillance video of less than good quality. Defendant contends the testimony improperly was admitted because it addresses the ultimate issue for the jury's resolution.

{¶14} Ohio's Rules of Evidence grant trial courts wide latitude in allowing or controlling lay witness opinion testimony. *State v. Kehoe* (1999), 133 Ohio App.3d 591. Accordingly, this court will not disturb a trial court's decision concerning such testimony absent an abuse of discretion and some demonstration that the court's abuse of discretion "materially prejudiced the objecting party." *Urbana ex rel. Newlin v. Downing* (1989), 43 Ohio St.3d 109, 113; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶15} "[O]pinion testimony is not rendered inadmissible per se because it pertains to an ultimate issue." *State v. Berry* (June 23, 1988), 10th Dist. No. 87AP-924, citing Evid.R. 704 and *State v. Rohdes* (1986), 23 Ohio St.3d 225, 229. Such testimony, however, must be "otherwise admissible" under Evid.R. 704 per Evid.R. 701 or 702. Id. In accord with Evid.R. 701, a lay witness' opinion testimony "must be (a) rationally based on the witness' own perceptions, *and* (b) helpful to a clear understanding of the testimony or the determination of a factual issue." *Berry.* (Emphasis sic.)

{¶16} To satisfy the first requirement of Evid.R. 701, the opinion of the lay witness must be "one that a rational person would form on the basis of the observed facts." *State v. Mulkey* (1994), 98 Ohio App.3d 773, 784, quoting *Lee v. Baldwin* (1987), 35 Ohio

App.3d 47, 49. At trial, Halleck and Pavolino both were questioned extensively regarding the basis for their testimony, and both testified to forming their respective opinions based on their personal interaction with defendant.

{¶17} When the state asked Halleck to explain how she reached her conclusion, Halleck responded that her identification was "based on the numerous times I have seen [defendant] over almost a three-year span." (Tr. 109.) Although Halleck admitted defendant's beard was "[s]lightly heavier" in the video than during their last meeting on September 21, she on cross-examination explained that "[defendant's] face" in the pictures was "[w]hat * * * ma[d]e [her] so absolutely sure." (Tr. 111.)

{¶18} Likewise, Pavolino testified that, after repeatedly viewing the still photographs and video clips, he "immediately thought that [defendant] was a match" when he met him. (Tr. 67.) Although Pavolino met with defendant after Halleck told him the person in the video "is Joshua Bond," the detective asserted that Halleck's tip was simply "how I came to interview him." (Tr. 75.) Pavolino was asked at trial "what was it that made [him] go, 'Oh, yeah, this must be the same person'?" (Tr. 74.) Pavolino replied it was defendant's "physical description, his appearance," as well as "his mannerisims, the way he walked." (Tr. 67, 74.) Pressed to elaborate, the detective listed "[t]he weight, the height, the build" as pertinent factors, testified defendant's "facial features also matched," stated that "if you look at the video, he also has the same type of * * * thinning hairline in the video as compared to what he has here in court." (Tr. 75, 77.) Finally, the state asked Pavolino directly whether his identification on May 26 was "based on what

somebody else told you or on your own observations," and Pavolino responded, "[o]n my observations." (Tr. 78.)

{¶19} Pursuant to the above trial testimony, the trial court reasonably could conclude the witnesses' opinions were those that a rational person would form on the basis of the observed facts. See *Mulkey* at 784. Accordingly, the remaining issue is whether the witnesses' answers would be helpful to a clear understanding of their testimony or to the determination of a fact in issue. See *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281. Defendant argues the jury was in as good a position as the two witnesses to compare the surveillance photos and video to his appearance at trial, so the testimony in question was not helpful. Instead, he contends, the testimony was unfairly prejudicial "[b]ecause the images were not abundantly clear and in the absence of supporting evidence, the testimony of the witnesses tainted the jury process." (Appellant's brief, 11.)

{¶20} In response, the state concedes the video not only was "not particularly clear so as to be able to make out facial features" but "the footage does not clearly show [defendant's] face and captures much of him walking away from the camera." (State's brief, 5-6, citing State's Exhibit 6.) The state asserts that, due to those factors, the subject testimony was helpful. The state further contends that, in contrast to the subject witnesses' experiences with defendant, the jury was not in a good position "to make comparisons because they had not seen defendant walk or his mannerisms as he moved." (State's brief, 3.)

{¶21} The Ohio Fifth District Court of Appeals considered a similar issue and found the opinion testimony of a defendant's former football coach and his juvenile probation officer, identifying him based on surveillance footage as the perpetrator of school vandalism, was properly admitted. *State v. Reading*, 5th Dist. No. 07-CA-83, 2008-Ohio-2748. Ruling that the "jury had the opportunity to view the surveillance video as well as assess the credibility of the witnesses," the Fifth District found defendant's convictions to be supported by "sufficient, competent and credible evidence" though "there was no physical evidence connecting him to the break-in," and "[t]he only evidence presented by the State was the surveillance videos and the identification of Appellant by [the two witnesses]." Id. at ¶22, 26; see also *Cunningham*.

{¶22} Applying Fed.Evid.R. 701, substantially similar to the Ohio rule, a number of federal decisions similarly have "ruled in a variety of circumstances that such testimony" identifying a defendant from surveillance footage "may indeed be helpful to the jury and is therefore admissible in the trial court's discretion." *United States v. Jackman* (C.A.1, 1995), 48 F.3d 1, 4. The First Circuit thus found "such testimony is admissible, at least when the witness possesses sufficiently relevant familiarity with the defendant that the jury cannot also possess, and when the photographs are not either so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification. Id. at 4-5, citing *United States v. Farnsworth* (C.A.8, 1984), 729 F.2d 1158, 1160; cf. *United States v. LaPierre* (C.A.9, 1993), 998 F.2d 1460, 1465 (excluding opinion testimony by investigating police officer who identified defendant in surveillance

photograph because defendant's appearance had not changed between time of robbery and trial, and officer had never seen defendant before in person).

{¶23} Similarly, in *United States v. Allen* (C.A.4, 1986), 787 F.2d 933, 936, vacated on other grounds (1987), 479 U.S. 1077, 107 S.Ct. 1271, the Fourth Circuit decided a police officer and a parole officer familiar with the defendants were "especially helpful" in identifying defendants in bank surveillance photographs where the photographs depicted only parts of the robbers' faces. The court reasoned that "[t]hese witnesses had interacted with defendants in a way the jury could not, and in natural settings that gave them a greater appreciation of defendants' normal appearance. Thus, their testimony provided the jury with the opinion of those whose exposure was not limited to three days in a sterile courtroom setting." Id. at 936. See also *United States v. Dixon* (C.A.6, 2005), 413 F.3d 540, 545 (noting lay opinion identification testimony is more likely to be admissible when the surveillance photograph of the suspect is of poor or grainy quality, or when it shows only a partial view of the subject); *Farnsworth* at 1160 (determining a "witness's opinion concerning the identity of a person depicted in a surveillance photograph is admissible if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury").

{¶24} Given those parameters and the limited nature of the footage the surveillance camera captured, the trial court did not abuse its discretion in permitting both witnesses to offer their opinions about the identity of the perpetrator in the surveillance video, as they had a greater opportunity than the jury to perceive defendant from a variety

of angles and distances and under different circumstances. Unlike the jury, they were familiar with defendant's carriage and posture. Halleck, for example, testified she saw defendant the day before the burglary and was familiar with how defendant looked at the time. Although Pavolino did not meet defendant until some months after the burglary, he was able to interact with defendant and observe him outside of the courtroom setting. See, e.g., *Farnsworth*; *Jackman* at 5 (noting "[f]amiliarity with the defendant's appearance at the time the crime was committed would be relevant" as "would * * * general familiarity with the defendant's appearance acquired over a period of time and in a variety of contexts").

{¶25} Because the trial court did not abuse its discretion in admitting the identification testimony of Halleck and Pavolino under Evid.R. 701, defendant's first assignment of error is overruled.

IV. Second and Third Assignments of Error – Sufficiency and Manifest Weight

{¶26} Defendant's second and third assignments of error are interrelated and thus we address them jointly. In them, defendant contends the state presented insufficient evidence, and the manifest weight of the evidence does not support the jury's verdict. The only issue defendant disputes is the identity of the perpetrator.

{¶27} Sufficiency of the evidence is the legal standard applied to determine 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. 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. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, 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 that the trier of fact reached. *Jenks* at 273; *State v. Tyson,* 10th Dist. No. 10AP-830, 2011-Ohio-4981, ¶16, citing *Jenks* at paragraph two of the syllabus (noting that in a sufficiency inquiry, an appellate court does not assess whether the prosecution's evidence is to be believed, but whether, if believed, the evidence admitted at trial supports the conviction).

{¶28} Defendant was convicted of burglary in violation of R.C. 2911.12, which provides that "[n]o person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense." After offering evidence of the probable means of illegal entry, the state presented evidence depicting two men carrying a television and some other equipment out of the building at around 2:00 a.m. According to the Otterbein student, who previously invited one of the men into the dormitory, she had seen her guest out, he had no authorization to be in the building, and she never gave the other man in the video permission to be in the dorm. The testimony of the Otterbein registrar established that defendant had never been enrolled at the college and thus did not have permission to be on the premises. The testimony of Halleck and Pavolino identified defendant as the person in the video dressed in all black. Their testimony is sufficient evidence to prove defendant was the perpetrator.

{¶29} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387. 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. Id. When confronted with a challenge to the manifest weight of the evidence, an appellate court may not merely substitute its judgment for that of the trier of fact but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the 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.

{¶30} In an effort to counter the state's evidence, defendant, through cross-examination, extracted evidence that Pavolino was unsuccessful in his attempt to obtain a suspect through fingerprints lifted from the area of the broken screen and window frame, and Pavolino acknowledged he found no "DNA or anything like that scientific" implicating defendant or even placing him in the building at any point. The detective also admitted at trial to his inability to identify Nyshear, depicted with the Otterbein student in the surveillance video.

{¶31} The jurors had the opportunity to review the video and still photographs for themselves, they heard the testimony of Halleck and Pavolino identifying defendant as one of the men in the footage, and they knew the state had no scientific evidence linking defendant to the crime. The case largely turned on the testimony of Halleck and Pavolino,

and the jury had the primary responsibility for determining their credibility. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury resolved those issues against defendant, and we cannot say the jury clearly lost its way and created a manifest miscarriage of justice in doing so. Defendant's conviction is not against the manifest weight of the evidence.

{¶32} Defendant's second and third assignments of error are overruled.

V. Disposition

{¶33} Having overruled defendant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and TYACK, JJ., concur.

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