[Cite as *State v. Shipley*, 2013-Ohio-4055.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-948
v.	:	(C.P.C. No. 11CR-11-5894)
Michael L. Shipley,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 19, 2013

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Tyack, Blackmore, Liston & Nigh Co., L.P.A., and *Jonathan T. Tyack*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Michael L. Shipley, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of five counts of burglary and three counts of theft. For the following reasons, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} Appellant was indicted on six counts of burglary, all second-degree felonies, in violation of R.C. 2911.12, two fourth-degree felony counts of theft, in violation of R.C. 2913.02, and two fifth-degree felony counts of theft, in violation of R.C. 2913.02. At the request of defendant-appellee, the state of Ohio, one count of burglary and one count of theft were severed from the original indictment for purposes of trial and subsequently dismissed without prejudice by the trial court. The charges arose from five different incidents, which took place on August 21 and 28, 2011 at different locations.

{¶ 3} The following evidence was adduced from the state's case-in-chief. On August 21, 2011, realtor Tom Amicon held an open house for homeowners Kelly and Sean Edgell at the location of 3945 Dinon Drive. The open house took place between 2:00 and 4:00 p.m. Amicon testified that only two individuals viewed the home, appellant and Crystal Galloway, at approximately 3:00 p.m. Appellant and Galloway entered the home, and, according to Amicon, appellant immediately engaged him in conversation, while Galloway went directly into the bedroom. Amicon testified that appellant instructed him "[d]on't look at her" because her mother had just died, and she could begin to cry at any minute. (Tr. 135.) According to Amicon, appellant explained he brought Galloway to look at houses because she was having a tough day.

{¶ 4} Amicon testified that he was concerned because appellant engaged him in unusual conversation having nothing to do with the home while Galloway was out of sight. Once Galloway came out of the bedroom, the couple made a hasty exit. The next morning, Amicon was contacted by Kelly Edgell, who informed him some of their jewelry was missing. Edgell testified approximately $600 worth of jewelry was taken. Amicon called the police and placed an alert on a realtor's website, at which time he learned another home had been "hit." (Tr.145.) Both Amicon and Edgell testified appellant and Galloway did not have permission to enter the home for the purpose of taking personal belongings from the home.

{¶ 5} Also on August 21, 2011, realtor Annette Marble held an open house for homeowners David and Tracey Griffis at the location of 4401 Kathryns Way. The open house took place between 2:00 and 4:00 p.m. Marble testified that, at approximately 3:45 p.m., as she was closing the open house, a dark truck pulled up and its occupants, Galloway and appellant, asked if they "still had the open house." (Tr. 220.) At about that same time, the homeowners arrived back at the home. Marble checked with them to see if she could show the arriving couple the home. They answered in the affirmative and left.

{¶ 6} Marble let both Galloway and appellant into the home. Marble testified the female immediately went upstairs, and appellant began discussing how Galloway's mom had just died and "not to look at her because she'll cry and she was really upset." (Tr. 224.) Marble testified that appellant stated, because of the mother's death, they could now afford a home. According to Marble, the conversation continued until appellant's

phone rang, at which point Marble thought to check on Galloway. According to Marble, as she moved toward the foyer, appellant began to ask more questions about the house, pulling her attention back into the family room. Appellant's phone rang a second time when Marble observed Galloway exit the master bedroom, closing the door behind her. Appellant and Galloway then left the premises.

{¶ 7} When the homeowners pulled up to the home, Marble, suspecting something was amiss, asked if they had anything of value in the home. Tracey Griffis testified that her husband ran up to the master bedroom and discovered their jewelry, valued at approximately $7,000, was gone. She further testified that appellant was one of the individuals she saw enter her home on August 21, 2011. Both Marble and Tracey Griffis testified appellant and Galloway did not have permission to enter the home for the purpose of taking any personal property.

{¶ 8} The third incident occurred on August 28, 2011, when realtor Sandy Clapham held an open house for homeowners Ryan and Erin Arens, at the location of 6226 Kendall Ridge Boulevard. The open house occurred between 1:00 and 3:00 p.m. Clapham testified she had placed signs up around the neighborhood denoting the home had a first floor master bedroom. According to Clapham, appellant and Galloway entered the home, and appellant immediately stated "I want you to show me the basement, and she wants to see the master bedroom." (Tr. 283.) Clapham testified that she informed the couple the master bedroom was to the right, and Galloway headed directly to it. According to Clapham, appellant asked "more than twice" to see the basement. (Tr. 286.) However, Clapham testified she was afraid to go into the basement alone with appellant so she ignored the request and retreated to the kitchen, which had multiple exits and access to her cell phone. Clapham described appellant as being "in [her] face" as she retreated. (Tr. 288.)

{¶ 9} According to Clapham, appellant stated he was taking Galloway to look at homes because her mother had just died, and she was having emotional difficulties, which included bouts of crying. Appellant continued to talk about Galloway, and, at one point, Clapham attempted to move out of the kitchen. Appellant sidestepped her, placed himself in the doorway to the master bedroom, and spread his legs and arms apart. According to

Clapham, appellant completely obstructed her view into the master bedroom for "[a] few minutes." (Tr. 295.)

{¶ 10} Clapham again retreated into the kitchen and appellant followed. Clapham testified appellant continued to converse with her while Galloway headed up the stairs. After some time, Clapham stated she became "restless," and appellant went to the stairs and yelled up to Galloway. (Tr. 296.) According to Clapham, she attempted to seize on this "break," grabbed her phone and purse, and moved towards the front door to exit. (Tr. 297.) However, just as Clapham began to leave, appellant questioned her on where she was heading and followed her outside. Clapham stated, upon exiting the home, a neighbor engaged appellant in conversation. Clapham then saw appellant's vehicle, a black Dodge Ram, and memorized the license plate number because she believed something unusual was going on. Clapham then re-entered the home, while appellant was still engaged in conversation with the neighbor and wrote down the license plate number. According to Clapham, she called her office to describe what happened, sent a text to the Arens's to come home, and then called the police and provided the license plate number.

{¶ 11} Erin Arens, the homeowner, testified she returned home immediately after receiving a voicemail from the realtor and began to check the home for missing items. According to Arens, she immediately noticed watches were missing from the master bedroom, as well as prescription medicine from the master bath. A few days later, Arens noticed more items missing and testified the total value of the missing items was between $800 and $1,000. Both Clapham and Arens testified appellant and Galloway did not have permission to enter the home for the purpose of taking personal property from the home.

{¶ 12} The fourth incident also occurred on August 28, 2011. Realtor Bryan Harrison held an open house for homeowners James and Patricia Deuschle at the location of 4264 Wyandotte Woods between 2:00 and 4:00 p.m. Harrison testified the purpose of an open house is to "bring in people that might have an interest in the home." (Tr. 174.) Harrison stated before the open house began, he accessed the "Columbus Board of Realtors' MLS" website and checked the "alert" section. (Tr. 175.) Although he noticed an alert, which made him wary, he continued to prepare for the open house. Shortly after 2:00 p.m., Harrison testified appellant and Galloway arrived at the home, and he believed

they matched the description provided in the alert. According to Harrison, Galloway and appellant entered the home, and Galloway headed straight up the stairs while appellant engaged Harrison in conversation. Harrison testified appellant told him Galloway had recently lost her father and was looking to buy a house.

{¶ 13} Harrison stated none of the Deuschle's property was upstairs because those bedrooms were not in use, so he did not follow Galloway upstairs. According to Harrison, Galloway came downstairs and headed directly to the master bedroom, and this time he followed. Harrison stated he began to ask Galloway "open-ended questions" about the home, and she gave only one-word answers. (Tr. 182.) The couple then left the home, and Harrison wrote down the license plate number, a description of their vehicle, and then called the police and the Deuschle's.

{¶ 14} According to James Deuschle, after receiving a phone call from Harrison, he returned home. Deuschle checked the house and no property was missing. Both Harrison and Deuschle testified appellant and Galloway did not have permission to enter the home for the purpose of taking personal property from the home.

{¶ 15} The fifth incident, again, occurred on August 28, 2011. Realtor Lynn Elledge held an open house for homeowners Jason and Jennifer Rees at the location of 3900 Man O' War Court, between the hours of 2:00 and 4:00 p.m. According to Elledge, appellant and Galloway entered the home, and Galloway immediately went upstairs while appellant engaged him in conversation. Elledge testified that appellant told him Galloway's mother had just died and they were looking for a house for her kids. Elledge stated he asked appellant if they were buying the house together, and appellant stated "No. I work for her." (Tr. 252.)

{¶ 16} According to Elledge, because it was a small house, he became concerned when Galloway was upstairs for such a long period of time and left a note for the Rees's to check their personal belongings upstairs. Elledge received a phone call from the homeowners telling him items were missing. Elledge called his broker and the following Monday called the police.

{¶ 17} Jennifer Rees testified that, after she arrived home and read the note from her realtor telling her to check her personal belongings, she went upstairs and checked her jewelry she had hidden, only to discover it was missing. Rees testified the value of the

stolen jewelry was over $5,000. Both Elledge and Rees testified neither appellant nor Galloway had permission to enter the home for the purpose of taking personal property.

{¶ 18} Subsequent to the above events, the Columbus Police Department's Strategic Response Bureau unit began to investigate appellant and Galloway for an incident at GFS Marketplace, a grocery store. Detective Michael Yinger testified search warrants were obtained to place GPS units onto both appellant and Galloway's vehicle. This surveillance ultimately led to an incident at GFS and the arrest of appellant and Galloway. Appellee introduced, over objection, into evidence a GFS surveillance video pursuant to Evid.R. 404(B). An independent review of the video reveals that appellant and Galloway entered GFS at separate times. Appellant arrived at the back aisle of the store and placed several pairs of pants into his cart. Galloway approached and began to rummage through the items in appellant's cart. Galloway then took appellant's cart, and appellant took the empty cart. Appellant can then be seen walking back to the pants display alone. Appellant and Galloway exited GFS separately, neither carrying grocery bags nor pushing carts. Detective Yinger noted when Galloway exited the store, a "flimsy" flat purse she had taken into the store, now appeared "full." (Tr. 373.) Galloway later admitted at trial to stealing multiple pairs of "Chefwear pants." (Tr. 550.)

{¶ 19} The jury was given a limiting instruction on the use of this evidence both at the time the evidence was admitted and at the close of the evidence with the rest of the court's instructions. The court explained to the jury that "[t]his evidence is admissible to show motive, opportunity, intent, purpose, preparation, plan, absence of mistake or accident, or to show a scheme or a plan. It's like MO, modus operandi, if you've heard that before. So you can consider this evidence as proof on any one of those items" and that it could not be used as proprietary evidence. (Tr. 377.)

{¶ 20} Appellant and Galloway were subsequently arrested, and appellant submitted to questioning by Detective Brian Lacy. According to appellant's statement to Detective Lacy, he admitted transporting Galloway to open houses, but denied knowing what Galloway did in the homes. Appellant stated he did not accompany Galloway around the homes but knew she was a "booster" and had stolen in the past. He claimed Galloway never told him she was stealing items from the homes they visited. According to appellant, he knew Galloway's mother to be alive and did not tell any realtor Galloway's

mother died. When asked if he was "blocking" so Galloway could steal, appellant responded in the negative. (Tr. 440.) Detective Lacy explained that a booster is a professional shoplifter, and a blocker is someone who runs interference to allow the theft to take place undetected. (Tr. 455.)

{¶ 21} After the testimony of Detective Lacy, appellee rested. Appellant moved for a Crim.R. 29 judgment of acquittal, which the trial court denied.

{¶ 22} Appellant's defense consisted solely of the testimony of Galloway. Galloway testified at trial that she and appellant did attend open houses at all of the above properties and admitted to stealing from each property that reported a theft. However, she stated appellant was unaware of her actions. She testified her initial purpose in visiting the homes was to purchase a foreclosed property and not to steal any items from the property. Galloway also testified she was a heroin addict and she stole to support that addiction. On cross-examination, Galloway admitted appellant knew she was stealing to support her heroin habit and knew her to be a booster.

{¶ 23} The jury returned verdicts finding appellant guilty of five counts of burglary and three counts of theft. Subsequently, appellant was sentenced to a total of 12 years in prison. This appeal followed.

II. ASSIGNMENT OF ERROR

{¶ 24} Appellant brings the following three assignments of error for our review:

> I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE.
>
> II. THE TRIAL COURT ERRED IN ADMITTING "OTHER ACTS" EVIDENCE RELATING TO A SEPARATE AND DISTINCT CRIMINAL CONVICTION, THUS DENYING DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS.
>
> III. DEFENDANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. DISCUSSION

A. First Assignment of Error

{¶ 25} In his first assignment of error, appellant contends the trial court erred in denying his Crim.R. 29 motion for acquittal. We disagree.

{¶ 26} A Crim.R. 29(A) motion for acquittal tests the sufficiency of the evidence. *State v. Reddy,* 10th Dist. No. 09AP-868, 2010-Ohio-3892, ¶ 12, *citing State v. Knipp,* 4th Dist. No. 06CA641, 2006-Ohio-4704, ¶ 11. We thus review the trial court's denial of appellant's motion for acquittal using the same standard applicable to a sufficiency of the evidence review. *Id.*, citing *State v. Darrington,* 10th Dist. No. 06AP-160, 2006-Ohio-5042, ¶ 15.

{¶ 27} Sufficiency of the evidence is a legal standard that tests whether the evidence is legally adequate to support a verdict. *State v. Thompkins,* 78 Ohio St.3d 380, 386 (1997). Whether the evidence is legally sufficient to support a verdict is a question of law, not fact. *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. Robinson,* 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks,* 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. A 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,* 90 Ohio St.3d 460, 484 (2001).

{¶ 28} In a sufficiency of the evidence inquiry, appellate courts do not assess whether the prosecution's evidence is to be believed but, whether, if believed, the evidence 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").

{¶ 29} Appellant's sufficiency argument is twofold. First, appellant asserts that *State v. Barksdale*, 2 Ohio St.3d 126 (1983), controls our decision regarding the sufficiency of the burglary convictions and, second, that there was insufficient evidence to support appellant's theft convictions. We address the former argument first.

{¶ 30} Appellant was convicted of five counts of burglary as defined in R.C. 2911.12(A), which states:

> No person, by * * * deception, shall do any of the following: (1) [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.

{¶ 31} The focus of appellant's sufficiency argument is the "trespass" element of burglary. Defining trespass, R.C. 2911.21 states: "(A) No person, without *privilege* to do so, shall do any of the following: (1) [k]nowingly enter or remain on the land or premises of another." (Emphasis added.) Appellant contends the jury could not have found he trespassed on the premises because he possessed a privilege to be on the premises. "Privilege" is defined in R.C. 2901.01(A)(12) as "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity."

{¶ 32} In support of his argument that his burglary convictions cannot stand because he had a privilege to be on the property, appellant relies on *Barksdale*. The defendant in *Barksdale* entered a car lot when it was closed and broke into a vehicle. The defendant was convicted of breaking and entering, pursuant to R.C. 2911.13(B), of which trespass is a necessary element. The appellate court reversed defendant's conviction, and, in affirming the reversal, the Supreme Court of Ohio held that the felonious intent of the defendant to break into cars located on a property generally open to the public could not constitute a trespass because he had a privilege to be on the particular property. Relying on *Barksdale,* appellant argues his presence at the open houses was privileged because the houses were open to the public.

{¶ 33} We find *Barksdale* distinguishable from the instant case. First, *Barksdale* involves a public car lot and not a private home. Second, the case did not involve facts involving deceit, and, as such, the issue before the court was not the same as that presented here.

{¶ 34} Rather, we find this court's decision in *In re Meachem*, 10th Dist. No. 01AP-1122, 2002-Ohio-2243, instructive on the issue of whether appellant had a privilege to be on the property such that he could not have committed a trespass and, therefore, not committed a burglary. The defendant in *Meachem*, pursued by police officers, sought refuge in a nearby home and used deception to gain entry. In *Meachem*, we stated, "pursuant to R.C. 2911.12(C), '[i]t is no defense to a charge under this section that the offender was authorized to enter or remain on the land or premises involved, when such authorization was secured by deception.' " *Id*. at ¶ 17. We further stated:

> "Deception" means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

Id. at ¶ 18, citing R.C. 2913.01(A). "In order to be guilty of a criminal trespass through deception, a defendant must be aware either that a false impression is created or perpetuated or, knowing that the victim holds a false impression, withholds or prevents the victim from obtaining information to the contrary." *Id*. at ¶ 19, citing *Mayfield Hts. v. Riddle,* 108 Ohio App.3d, 341-42 (8th Dist.1995); *see also In Re J.M.*, 7th Dist. No. 12 JE 3, 2012-Ohio-5283.

{¶ 35} The evidence presented permits the jury to infer that appellant had the requisite intent to aid and abet Galloway's thefts and feigned interest in the home to gain access. The state introduced appellant's statement to Detective Lacey, which revealed appellant was aware, at the time of the open houses, that Galloway was a professional shoplifter or booster. Appellant stated to Detective Lacey, "[s]he steals stuff every now and then, I'm sure." (Tr. 438). Additionally, each realtor and homeowner testified if they were told appellant and Galloway had the intent to steal they would not have granted appellant access to the home. Finally, a jury could infer video evidence of the GFS incident shows appellant aiding Galloway in a theft a month after the open houses in a manner consistent with appellant's behavior at the open houses.

{¶ 36} The element of deception is satisfied by knowingly withholding information. As we previously held in *Meachem*, privilege cannot provide an exception to trespass

when gained via deception. Therefore, based on this evidence, we find a reasonable jury could infer that appellant had the intent upon entering the homes to commit a criminal offense and gained access to the homes through exercising deceit.

{¶ 37} The state also presented evidence that appellant's deceit continued once he was in each home. At the 3945 Dinon Drive open house, Amicon testified appellant stated he was taking Galloway to look at houses because her mom had recently passed, and she was having a tough day. Clapham, who showed 6226 Kendall Ridge Boulevard, testified to an identical experience. According to Clapham, appellant said Galloway was having a tough day due to her mom's recent passing, so he was taking her to look at homes. Clapham also testified that appellant requested to view the basement numerous times, while Galloway stole from the master bedroom.

{¶ 38} While showing the 4401 Kathryns Way property, Marble testified appellant told her they could now afford to buy a house because Galloway's mother had just passed away. Harrison testified to a nearly identical experience as Amicon and Clapham while showing the 4264 Wyandotte Woods property; the only difference being appellant stated Galloway's father allegedly passed away, not her mother. Finally, Elledge, the realtor who showed the 3900 Man O' War Court property, testified appellant informed him that Galloway's mom had just passed, and they were looking for a house for the kids. According to Galloway, her mother is still alive.

{¶ 39} At each open house, appellant would continually engage the realtors in conversation of a personal nature so that attention was taken off Galloway. At the 6226 Kendall Ridge Boulevard open house, Clapham testified appellant went a step further than just engaging in verbal distraction by physically placing his person in a doorway to obstruct her view.

{¶ 40} When viewing the evidence in a light most favorable to the state, a reasonable jury could conclude appellant deceived the realtors by both withholding information and feigning interest in the homes such that he committed a trespass. Accordingly, we find appellant's convictions of burglary to be supported by legally sufficient evidence.

{¶ 41} Appellant also argues there is insufficient evidence to support his theft convictions. The crux of appellant's argument is that the record is devoid of evidence

linking appellant to the items stolen by Galloway and that Galloway was solely responsible for the thefts. We disagree.

{¶ 42} As is pertinent here, R.C. 2913.02(A) provides "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over * * * the property * * * (1) [w]ithout the consent of the owner or person authorized to give consent." The state premised appellant's guilt on the theft counts as an aider and abettor to theft, and the trial court instructed the jury therein.

{¶ 43} Complicity is defined in R.C. 2923.03(A) as "[n]o person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: * * * (2) [a]id or abet another in committing the offense." " 'To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal.' " *State v. Horton*, 10th Dist. No. 03AP-665, 2005-Ohio-458, ¶ 25, quoting *State v. Johnson*, 93 Ohio St.3d 240, 245-46 (2001), syllabus.

{¶ 44} As previously explained above, five different realtors testified to the actions of appellant in acting as a blocker for Galloway. Although Galloway's testimony and appellant's statements to Detective Lacey indicate appellant was not the one to directly take the items from the homes, the evidence outlined above is sufficient to support a theft conviction based on complicity.

{¶ 45} Appellant's testimony to police elicited that he knew Galloway to be a "booster," and the realtors outlined many instances, as noted above, where appellant acted to conceal the activities of Galloway, including appellant's acts of closely following or blocking the path of the realtors when they attempted to move from the area.

{¶ 46} Viewing the evidence in a light most favorable to the state, we conclude appellant's theft convictions are supported by legally sufficient evidence.

{¶ 47} Accordingly, we overrule appellant's first assignment of error.

B. Third Assignment of Error

{¶ 48} For ease of discussion, we address appellant's remaining two assignments of error in the reverse. In his third assignment of error, appellant argues his burglary and

theft convictions are against the manifest weight of the evidence. Because competent and compelling evidence was presented satisfying the statutory requirements of burglary and theft, we disagree.

{¶ 49} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a "thirteenth juror." Under this standard of review, the appellate court weighs the evidence in order to determine whether 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." *Thompkins* at 387. However, in engaging in this weighing, the appellate court must bear in mind the factfinder's superior, first-hand perspective in judging the demeanor and credibility of witnesses. *See State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The power to reverse on manifest-weight grounds should only be used in exceptional circumstances when "the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶ 50} A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was offered at trial. *State v. Campbell*, 10th Dist. No. 07AP-1001, 2008-Ohio-4831. The trier of fact is in the best position to take into account the inconsistencies in the evidence, as well as the demeanor and manner of the witnesses, and to determine which witnesses are more credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503. Consequently, although appellate courts must sit as a "thirteenth juror" when considering a manifest-weight argument, it must also give a great deference to the trier of fact's determination on the credibility of the witnesses. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037.

{¶ 51} Appellant presented the testimony of Galloway. Galloway testified she has previous convictions for theft and forgery. According to Galloway, appellant had no knowledge she was stealing from the homes and was not actively distracting the realtors in order to make her thefts easier. Further, she testified it was not their intent to steal going into the open houses, yet admits to stealing and pawning the stolen items. Galloway also stated appellant knew she was a heroin addict and that she stole to support that habit. As trier of fact, the jury was free to believe or disbelieve all or any of the testimony presented. *State v. Matthews*, 10th Dist. No. 11AP-532, 2012-Ohio-1154, ¶ 46, citing *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257. The jury could have rejected

Galloway's testimony as untruthful or unlikely when contrasted with the evidence presented by the state.

{¶ 52} As discussed above, the state presented the evidence of five realtors, all with strikingly similar testimony regarding their dealings with appellant. According to the realtors, appellant stated he was bringing Galloway to look at houses because she was upset over the death of a relative. They further testified appellant drew their attention away from Galloway by either the use of conversation or by physically placing himself in their lines of sight, obstructing their view of Galloway.

{¶ 53} A conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony. *State v. Anderson*, 10th Dist. No. 10AP-302, 2010-Ohio-5561, ¶ 19. The jury is in the best position to determine the credibility of each witness by taking into account inconsistencies, as well as witnesses' manner and demeanor. The state presented competent and compelling evidence satisfying the statutory requirements of burglary and theft outlined above. We cannot conclude this record presents a scenario where the jury clearly lost its way.

{¶ 54} Accordingly, we conclude appellant's convictions are not against the manifest weight of the evidence and overrule appellant's third assignment of error.

C. Second Assignment of Error

{¶ 55} In his second assignment of error, appellant contends the trial court erred in admitting evidence of "other acts" under Evid.R. 404(B) and that this evidence was unduly prejudicial under Evid.R. 403. We disagree.

{¶ 56} We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 62, citing *State v. Issa*, 93 Ohio St.3d 49, 64 (2001). Thus, our inquiry is limited to determining whether the trial court acted unreasonably, arbitrarily or unconscionably in deciding the evidentiary issues. *Id.*, citing *State v. Barnes*, 94 Ohio St.3d 21, 23 (2002).

{¶ 57} Appellant challenges evidence relating to his conviction of unauthorized use of property arising out of an incident at a GFS store that occurred approximately one month after the incidents at issue here. According to appellant, such evidence is inadmissible under Evid.R. 404(B) because the evidence is not probative of motive, knowledge or absence of mistake since the GFS incident occurred after the incidents in

question and resulted in a conviction of unauthorized use of property and not burglary. Additionally, appellant asserts the evidence should not have been admitted because it is unduly prejudicial under Evid.R. 403.

{¶ 58} Appellee asserts that the GFS incident was relevant to establish a common plan or scheme and/or to contradict appellant's statement that he was unaware Galloway was stealing from the homes. The state notes that both appellant and Galloway were involved in each instance and that each involved similarities. Finally, the state argues that the evidence was presented for the proper purpose of establishing a common plan or scheme and not for the improper purpose of proving appellant's character in order to show conformity thereto.

{¶ 59} Under Evid.R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove" a defendant's character as to criminal propensity. "It may, however, be admissible [to show] motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." However, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. The application of Evid.R. 404(B) applies equally to subsequent, as well as contemporaneous, acts and is not limited in time to prior acts. R.C. 2945.59; *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, ¶ 15-16.

{¶ 60} The surveillance video shows interactions between Galloway and appellant consistent with the actions appellant took at the open houses as a blocker. The evidence admitted related to appellant's and Galloway's modus operandi and was properly admitted for the purpose of establishing motive or to show a scheme or plan or absence of mistake or accident. As the Supreme Court stated, " 'it provides a behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, can be used to identify the defendant as the perpetrator.' " *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶ 104, quoting *State v. Lowe*, 69 Ohio St.3d 527, 531 (1994).

{¶ 61} "However, even if other acts evidence is determined to be relevant to a permissible purpose under either Evid. R. 404(B) * * *, it must still be excluded under Evid. R. 403(A), 'if its probative value is substantially outweighed by the danger of unfair

prejudice, of confusion of the issues, or of misleading the jury.' " *State v. Hurt*, 10th Dist. No. 95APA06-786 (Mar. 29, 1996), quoting Evid.R. 403(A). "In reaching a decision involving admissibility under Evid. R. 403(A), a trial court must engage in a balancing test to ascertain whether the probative value of the offered evidence outweighs its prejudicial effect." *State v. Steele*, 10th Dist. No. 95APA01-124 (Sept. 21, 1995). In order for the evidence to be deemed inadmissible, its probative value must be minimal and its prejudicial effect great. *State v. Morales*, 32 Ohio St.3d 252, 258 (1987). Furthermore, relevant evidence which is challenged as having probative value that is substantially outweighed by its prejudicial effects "should be viewed in a light most favorable to the proponent of the evidence, maximizing its probative value and minimizing any prejudicial effect" to the party opposing its admission. *Hurt*, quoting *State v. Maurer*, 15 Ohio St.3d 239, 265 (1984).

{¶ 62} The trial court twice instructed the jury that the evidence was not to be considered for propensity purposes. "[A] jury is presumed to follow instructions of the court, so a limiting instruction is presumed to be followed." *State v. Faris*, 10th Dist. No. 93APA08-1211 (Mar. 24, 1994), citing *Lakeside v. Oregon*, 435 U.S. 333 (1978). We find that the evidence of the GFS incident was admitted for the proper purpose of showing either motive, opportunity, intent, purpose, preparation, plan, absence of mistake or accident, or to show a scheme or a plan and that said probative value is not sufficiently outweighed by prejudicial effect.

{¶ 63} Accordingly, the trial court did not abuse its discretion in admitting such evidence, and appellant's second assignment of error is overruled.

IV. CONCLUSION

{¶ 64} Having overruled appellant's three assignments of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.
