

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 : No. 12AP-342
 v. : (C.P.C. No. 10CR-09-5464)
 :
 Terry A. Marioth, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on July 11, 2013

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

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Terry A. Marioth ("defendant"), appeals from the judgment of the Franklin County Court of Common Pleas finding him guilty of one count of burglary, in violation of R.C. 2911.12, and one count of tampering with evidence, in violation of R.C. 2921.12.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On August 18, 2010, Shirley Shrader was rocking her grandchild when she looked out back and saw a boy running out the back door of her neighbor's home. (Tr. 34.) Shrader did not know the boy and yelled at him, "[h]ey boy, what are you doing? (Tr. 35.) The boy first attempted to go back into the house and then ran the other direction around the fence. (Tr. 36.) The boy did not have any property with him. (Tr. 35.)

Shrader telephoned the Obetz Police Department and gave them a description of the boy.

At trial, Shrader testified as follows:

[PROSECUTOR:] Tell the ladies and gentlemen of the jury what the person you saw looked like.

[SHRADER:] He was a neat-looking boy. He had sandy-looking hair and a T-shirt on and he didn't look like any bad bum or nothing.

[PROSECUTOR:] Do you remember now what color T-shirt you told the police he had on?

[SHRADER:] Well, I think it was red because I saw the other boy and he had a white one, and I'm pretty sure it was red.

[PROSECUTOR:] But you were sure when you saw the other person that they were wearing a different color shirt?

[SHRADER:] Yes.

[PROSECUTOR:] And you remember that distinctly now?

[SHRADER:] Uh-huh.

(Tr. 36-37.)

{¶ 3} Police Officer Robert Rigby would testify that, on the day in question, he received the following description of the boy: "male white with reddish-brown hair possibly wearing a white shirt." (Tr. 56.) Shortly thereafter, a police officer took Shrader to identify someone they had apprehended and asked her whether or not this was the boy she had seen earlier. Shrader indicated that she did not think the person they had in the cruiser was the boy she saw earlier because the boy they had in the cruiser was someone she knew, namely Christopher Blair. Shrader was certain she did not see Blair come out of the house that day. Approximately one week later, the police showed Shrader a photo array. Shrader picked out one male and indicated that she was "99 percent" certain that the person she identified in the photo array was the same person she saw exiting her neighbor's house on October 18, 2010. (Tr. 41.) The person she identified was defendant.

{¶ 4} Officer Rigby testified that when he arrived on the scene, he observed someone cutting through the back yard close to the address, 2191 Maureen Boulevard. (Tr. 57.) Officer Rigby ran to cut off the suspect but, Detective Scott Martin apprehended

him first. (Tr. 60-61.) Officer Rigby recognized the suspect as the defendant, Tony Marioth. (Tr. 62.) Officer Rigby testified that defendant was wearing a hooded sweatshirt which was unusual given that it was August and quite warm. (Tr. 63-64.) When questioned, the defendant indicated that he was "coming from a friend's house." (Tr. 64.) Officer Rigby testified that Christopher Blair lived across the street from 2191 Maureen Boulevard North. (Tr. 64.) The police released defendant at that time and went to the Blair household. There the police found Christopher Blair inside hiding in the bathroom. (Tr. 81.) The police also found several items that belonged to the victim in Christopher's room. (Tr. 109.)

{¶ 5} Detective Martin testified that when he encountered the defendant, the defendant was wearing a "black hoodie." (Tr. 92.) Detective Martin asked defendant if he knew Chris Blair and defendant responded that he had not seen Chris in ten years. (Tr. 93.) At the time he was apprehended, defendant was in the Blair's back yard. (Tr. 93.) Detective Martin proceeded to 2191 Maureen Boulevard where he attempted to recover fingerprints. Unfortunately, Detective Martin was not able to recover any quality prints. (Tr. 100-03.)

{¶ 6} Karon Mills, who lived at 2191 Maureen Boulevard, testified that, on the day in question, she received a phone call from the police. When she returned home, she noticed that several items were taken from her home including jewelry, speakers, a George Foreman grill, an electric jar opener, and a jewelry box. (Tr. 154.56.)

{¶ 7} Dennis Scott Meade, who lived at 2186 Maureen Boulevard, next door to the Blair residence, testified that he had seen a young man standing at the back of the trailer with a black sweater or sweatshirt over his shoulder. (Tr. 164-65.) Meade testified that the man was not Chris Blair, that he was not wearing a shirt, and that he threw something on the ground. (Tr. 165.) The police recovered a jewelry box belonging to Mills in the yard behind the Blair household. (Tr. 110.)

{¶ 8} Debbie Blair, Christopher Blair's mother, testified that the defendant had been at her house with her son that morning. (Tr. 176-78.) She also testified that she found a white T-shirt with black skulls in the shed in her back yard. (Tr. 179.) She identified the shirt as the T-shirt defendant was wearing on the morning of August 18, 2010 when he was at her home. (Tr. 179.)

{¶ 9} The jury found defendant guilty of both counts and the trial court sentenced him to 12 months on the tampering with evidence conviction and 3 years of community control on the burglary conviction, to commence after his release from incarceration.

II. ASSIGNMENTS OF ERROR

{¶ 10} Defendant appeals, assigning the following assignments of error for our review:

[I.] The judgment of the trial court is not supported by sufficient, credible evidence.

[II.] The judgment of the trial court is against the manifest weight of the evidence.

{¶ 11} Defendant's two assignments of error assert that neither sufficient evidence nor the manifest weight of the evidence support his convictions. Defendant asserts that, while there is no doubt that someone broke into Mill's residence, the State's evidence was tenuous at best and does not support the conviction.

{¶ 12} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 78; and *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶ 13} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *See Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶ 79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001); *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶ 14} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? *Id.* at ¶ 25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; see also *State v. Robinson*, 162 Ohio St. 486 (1955) (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95 (2000).

{¶ 15} "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." *Wilson* at ¶ 25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 16} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶ 10, quoting *State v. Long*, 10th Dist. No. 96APA04-511 (Feb. 6, 1997).

{¶ 17} Defendant argues that Shrader's identification testimony was weak, and that on the day of the trial, she thought she saw the person she saw the day of the incident in the courtroom. In fact, the person she saw that day in the courtroom was a stranger to

the action. Defendant also argues that the rest of the evidence is inconclusive. Defendant challenges Meade's statement that he saw someone with a dark sweater or hoodie throw something to the ground and that the failure of the police to retrieve any usable finger prints is tenuous and, as such, his convictions cannot stand.

{¶ 18} Shrader testified that she saw a person exit the back door of her neighbor's home and she provided the police with a description of that person. When she viewed a photo array a short time later, she indicated that she was 99 percent sure that defendant was the person she saw that day. Although Shrader gave differing accounts concerning the color of the T-shirt the man she saw was wearing, police officers indicated that the description of the suspect which aired over the radio indicated that the suspect was wearing a white T-shirt. Further, Shrader distinctly remembered that Chris Blair and the man she saw were wearing different colored T-shirts. Shrader testified that the boy in the cruiser and the person she saw in the Mills' backyard were wearing different colored shirts: one white and one red.

{¶ 19} Further, defendant was observed cutting through back yards near the home shortly after the burglary. Although it was quite warm out, defendant was wearing a dark hooded sweatshirt. Meade testified that he saw a man with a dark sweater or sweatshirt over his shoulder throw something to the ground near the Blair home and then walk away. Meade then saw that person talking to the police and Meade recognized him as the person he had seen throw the object. Meade informed the police that the person they had been talking to had been in the back yard and threw an object to the ground. The police recovered a jewelry box in that area and Mills identified it as being her property.

{¶ 20} Mrs. Blair testified that the defendant had been in her home that morning wearing a white T-shirt with black skulls on it. Shortly after the burglary, Mrs. Blair found that T-shirt in her back yard and identified it as the T-shirt defendant had been wearing that morning. Further, despite the fact that he had been with Chris Blair that morning, the defendant told the police that he had not seen Chris Blair in ten years.

{¶ 21} Considering the evidence as a whole, and given that the evidence was corroborated by witnesses including police officers, the State submitted evidence which was sufficient to support the jury's determination that defendant was guilty of both burglary and tampering with evidence.

{¶ 22} Further, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass*, 10 Ohio St.2d 230 (1997), paragraph one of the syllabus. While Shrader thought someone she saw in the courtroom that day was the man she saw on the afternoon of the incident, the jury found her testimony that she was 99 percent certain that the person she identified in the photo array was the person she saw the day of the incident to be credible. When Shrader's identification of defendant is combined with the evidence that he was behind Mills' home that day, was wearing a dark sweatshirt in August, was seen throwing something to the ground, and discarded the T-shirt he was wearing in an attempt to change his appearance, the evidence is sufficient and demonstrates that a reasonable juror could find the testimony to be credible. Nothing in this record demonstrates that the jury clearly lost its way creating such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Accordingly, defendant's conviction is not against the manifest weight of the evidence.

III. CONCLUSION

{¶ 23} Based on the foregoing, defendant's assignments of error are overruled. Having overruled defendant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.
