

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 14AP-1015
Plaintiff-Appellee,	:	(C.P.C. No. 14CR-2248)
v.	:	
	:	(REGULAR CALENDAR)
Tracy T. Rowe,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 16, 2015

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

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Tracy T. Rowe, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of one count of burglary, in violation of R.C. 2911.12. For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} On April 30, 2014, Rowe was indicted on one count of burglary, in violation of R.C. 2911.12, a second-degree felony. The matter was tried to a jury in November 2014. The following evidence was adduced at trial.

{¶ 3} On April 21, 2014, Cassandra Denniston, returned to her residence at 385 East 16th Avenue, Columbus, Ohio, after attending classes at The Ohio State University ("OSU"). Denniston arrived at the house shortly before 4:00 p.m., and entered through the back door near the kitchen. She put down her phone and other items, and then she

noticed a stranger standing in the living room of the house, which she shares with nine roommates. Suspecting that the man was not supposed to be there, Denniston began to say something. But when the man started to "shuffle" his feet, Denniston knew he was an intruder. (Tr. 32.) The man ran to the kitchen, picked up Denniston's iPhone, and exited the house. The man ran through an alley toward the OSU campus.

{¶ 4} Denniston immediately left the house, got in her car, and went to a café a few blocks away. From the café, she called the police and opened a phone tracking program on her laptop computer. Such a program enables the owner of a GPS equipped phone to identify or track the location of the phone. Denniston returned to her house where she met Officer Jenna Arthur of the Columbus Division of Police. Denniston provided a description of the intruder to Officer Arthur. Denniston described the intruder as an African-American male, wearing a black "hoodie," a hat turned backwards, yellow tinted sunglasses, "cardigan" shorts, and sneakers. (Tr. 40.) Denniston provided the laptop, with its phone tracking program running, to Officer Arthur. Officer Arthur relayed information out by radio relating to the description provided by Denniston and the location of the phone. When Officer Arthur began tracking the phone on Denniston's laptop, the phone was at 13th Avenue and High Street. Officer Arthur observed that the phone was moving south on High Street.

{¶ 5} Officers Steven Baird and Shannon Dearwester of the Columbus Division of Police were dispatched to attempt to locate Denniston's phone. Officer Baird determined that each update regarding the phone's location was at a Central Ohio Transit Authority bus stop, likely indicating the phone was on a bus. Based on the tracking information provided by Officer Arthur, Officers Baird and Dearwester stopped a bus traveling south on High Street. Officer Baird testified that the bus had already been stopped and boarded by two other Columbus police officers approximately four or five minutes before Officers Baird and Dearwester stopped and boarded the bus. After Officers Baird and Dearwester boarded the bus, they located a man in the back of the bus generally matching the description provided by Denniston. The officers asked the man, who was later identified as Rowe, to exit the bus with them. When Rowe was removed from the bus, he was not wearing a dark "hoodie" as reported by Denniston. Rowe was carrying a backpack, which

the police searched. The officers found several phone charging cords, among other items such as clothes and headphones.

{¶ 6} According to Officer Baird's testimony, once the officers began removing Rowe from the bus, they noticed a phone under the seat where Rowe had been sitting. The phone was being "pinged" by another source, that is, it was "vibrat[ing] and flash[ing] and kind of mak[ing] a funny noise." (Tr. 85.) Officer Dearwester testified that he did not locate the phone until the officers and Rowe exited the bus. Officer Dearwester further testified he again boarded the bus to look for the phone and found it under the seat where Rowe had been sitting. The phone was emitting a sound but it was not ringing.

{¶ 7} Daniel Jensen was on the bus when the police removed Rowe. Jensen was taking the bus downtown to attend a Columbus Blue Jackets game. According to Jensen's testimony, at a stop just south of the OSU campus, a police officer boarded the bus, walked up and down the aisle, and then exited the bus. When this occurred, Rowe was on the bus, sitting near Jensen. After the first police officer boarded the bus, Rowe was "ruffling around with the [book]bag" he was carrying. (Tr. 122.) At the next bus stop, two police officers boarded the front of the bus and two boarded at the rear of the bus. At that time, the police removed Rowe from the bus, and the bus continued southbound. At the next stop, another police officer boarded the bus and asked Jensen where Rowe had been sitting. Jensen informed the police officer, who then searched under the seats in that area. The police officer found a phone under the seat adjacent to where Rowe had been sitting. During Jensen's time on the bus, he did not see anyone else sit in the area where Rowe had been sitting. Additionally, Jensen did not see Rowe in possession of the phone that was discovered under the seat.

{¶ 8} After the police removed Rowe from the bus, Officer Arthur took Denniston to the apprehension location to make an identification. At that location, Denniston identified Rowe as the man who had been in her house. Denniston was "very confident" of her identification. (Tr. 44.) Once Denniston made the identification, Rowe was handcuffed and placed in a police vehicle. At trial, Denniston again identified Rowe as the man who had been in her house.

{¶ 9} Sometime after the burglary, Denniston confirmed with her roommates that none of them had given anyone permission to be at the house on the afternoon of April 21,

2014. Additionally, Denniston learned that one of her roommates was missing a phone charger after the burglary, which the police recovered and returned to Denniston's roommate. Lastly, a couple days after the burglary, one of Denniston's roommates discovered that a basement window to the house was shattered.

{¶ 10} The jury found Rowe guilty of burglary, as charged in the indictment. The trial court sentenced Rowe to eight years in prison for the conviction. Rowe timely appeals.

II. Assignment of Error

{¶ 11} Rowe assigns the following error for our review:

The trial court erred and deprived [Rowe] of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article [I], Section [10] of the Ohio Constitution by finding him guilty of burglary as that verdict was not supported by sufficient evidence and was also against the manifest weight of the evidence.

III. Discussion

{¶ 12} In his sole assignment of error, Rowe argues his conviction for burglary was not supported by sufficient evidence and was against the manifest weight of the evidence. We disagree.

A. Sufficiency of the Evidence

{¶ 13} Whether there is legally sufficient evidence to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* The relevant inquiry for an appellate court is whether the evidence presented, when viewed in a light most favorable to the state, would allow any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt. *State v. Mahone*, 10th Dist. No. 12AP-545, 2014-Ohio-1251, ¶ 38, citing *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37. "[I]n 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." *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4.

{¶ 14} To prove Rowe committed burglary as charged in the indictment, the state was required to show that Rowe, by force, stealth, or deception, trespassed in an occupied structure "that is a permanent or temporary habitation of any person 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).

{¶ 15} Viewed in a light most favorable to the state, the evidence at trial demonstrated Rowe committed burglary, as charged in the indictment. When Denniston returned home from classes at OSU, she encountered Rowe standing in her living room. Denniston shares her house with nine roommates, but none of them authorized Rowe to be in the house. When Rowe saw Denniston, he quickly exited the house stealing Denniston's phone on his way out. Rowe then fled on foot to the OSU campus and boarded a bus travelling south on High Street. Later, it was discovered that a basement window to Denniston's house had been smashed, providing Rowe a means of entrance into the house. In view of the foregoing evidence, the state established the essential elements of the crime of burglary as charged in the indictment.

B. Manifest Weight of the Evidence

{¶ 16} When presented with a manifest weight argument, an appellate court engages in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict. *State v. Salinas*, 10th Dist. No. 09AP-1201, 2010-Ohio-4738, ¶ 32, citing *Thompkins* at 387. "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." *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). Determinations of credibility and weight of the testimony are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The jury, or the trial court in a bench trial, " 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 6, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Thus, the jury may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*,

10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 17} An appellate court considering a manifest weight challenge "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." *State v. Harris*, 10th Dist. No. 13AP-770, 2014-Ohio-2501, ¶ 22, citing *Thompkins* at 387. Appellate courts should reverse a conviction as being against the manifest weight of the evidence in only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 18} Rowe challenges Denniston's identification of him because she only saw the intruder in her house for a few seconds. Rowe also argues the evidence was conflicting regarding when he boarded the bus and the circumstances surrounding the recovery of Denniston's phone. These arguments are unavailing.

{¶ 19} As the trier of fact, the jury was charged with evaluating the strength of Denniston's identification of Rowe as the person who stole her phone, based on such factors as her capacity and opportunity to observe the intruder and the interval of time between the event and the identification. To reverse on manifest weight grounds on the issue of Denniston's identification of Rowe, we would need to find that a reasonable juror could not find Denniston's testimony credible. See *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶ 10 ("it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact which accepted the testimony of such witness unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible."). The evidence did not, however, discredit Denniston's identification of Rowe. Denniston observed Rowe in her living room, at a relatively close distance, and she provided a confident in-person identification of him shortly after the burglary. Additionally, Denniston's identification of Rowe was strongly corroborated by the evidence indicating the discovery of Denniston's phone under the seat of a bus on which

Rowe had boarded shortly after the burglary. Thus, it was reasonable for the jury to believe Denniston.

{¶ 20} Rowe correctly observes the testimony at trial was inconsistent as to the circumstances relating to the discovery of the phone on the bus. The testimony of the officers indicated the phone was discovered almost immediately after Rowe was removed from the bus. But Jensen's testimony indicated after Rowe was removed from the bus, the bus continued southbound to the next stop, and the police discovered the phone at that stop. Rowe argues the evidence regarding when he boarded the bus was also inconsistent. Rowe cites the evidence indicating an officer boarded the bus, walked up and down the aisle, and then exited without locating Rowe. Rowe argues this evidence is inconsistent with other evidence indicating Rowe's presence on the bus at the time the first officer boarded the bus. These apparent inconsistencies do not, however, demonstrate the conviction was against the manifest weight of the evidence.

{¶ 21} First, regardless of whether Denniston's phone was discovered immediately after Rowe was removed from the bus, or at the next bus stop, undisputed evidence indicated that the police found the phone in close proximity to where Rowe had been sitting on the bus. Second, the officer or officers who initially boarded the bus did not testify. The jury could have reasonably determined that the police officer or officers who first boarded the bus did not see anyone matching the description of the burglar due to the number of people on the bus and because Rowe's appearance had somewhat changed. Finally, it was within the province of the jury to resolve or discount any inconsistencies in the testimony at trial, including the discrepancy regarding the discovery of the phone and why the police did not initially see Rowe on the bus. *See DeHass* "[S]uch inconsistencies do not render [a] defendant's conviction against the manifest weight * * * of the evidence." *State v. Nivens*, 10th Dist. No. 95APA09-1236 (May 28, 1996). In sum, Rowe fails to show 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.

{¶ 22} Because Rowe's conviction for burglary was supported by sufficient evidence and was not against the manifest weight of the evidence, his sole assignment of error is overruled.

IV. Conclusion

{¶ 23} Having overruled Rowe's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and SADLER, J., concur.
