[Cite as *State v. Missler*, 2015-Ohio-1076.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HARDIN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 6-14-06**

v.

MICHAEL J. MISSLER, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Hardin County Common Pleas Court
Trial Court No. CRI 20142014

Judgment Affirmed

Date of Decision: March 23, 2015

APPEARANCES:

Michael B. Kelley **for Appellant**

Jason M. Miller **for Appellee**

PRESTON, J.

{¶1} Defendant-appellant, Michael J. Missler ("Missler"), appeals the April 29, 2014 judgment entry of sentence of the Hardin County Court of Common Pleas. He argues that his convictions are based on insufficient evidence and against the manifest weight of the evidence and that the trial court erred by failing to exclude evidence that Missler was on post-release control and hearsay evidence. For the reasons that follow, we affirm.

{¶2} On February 25, 2014, the Hardin County Grand Jury indicted Missler on Count One of breaking and entering in violation of R.C. 2911.13(A), a fifth-degree felony, Count Two of possessing criminal tools in violation of R.C. 2923.24(A), a fifth-degree felony, Count Three of safecracking in violation of R.C. 2911.31(A), a fourth-degree felony, and Count Four of tampering with evidence in violation of R.C. 2921.12(A)(1), a third-degree felony. (Doc. No. 2). The indictment stemmed from a January 19, 2014 incident in which Missler allegedly forcibly entered the Rich gas station store in Ada, Ohio, stole cigars and cartons of cigarettes, and pried open the cash register. (*See* Doc. No. 17).

{¶3} On March 3, 2014, Missler entered pleas of not guilty to each count in the indictment. (Doc. No. 9). The trial court held a jury trial on the indictment on April 15, 2014. (Apr. 15, 2014 Tr. at 1); (Doc. Nos. 52, 47). The jury found Missler guilty of each count in the indictment. (Apr. 15, 2014 Tr. at 322-324);

(Doc. Nos. 42, 43, 44, 45). As to Count Two, the jury made the additional finding that Missler "possess[ed] a criminal tool or tools with the intention to use it or them in the commission of a felony offense." (Doc. No. 43).

{¶4} The trial court sentenced Missler on April 23, 2014 and filed its judgment entry of sentence on April 29, 2014. (Apr. 23, 2014 Tr. at 2); (Doc. No. 52).

{¶5} On April 30, 2014, Missler filed a notice of appeal. (Doc. No. 56). He raises three assignments of error for our review.

Assignment of Error No. I

The trial court erred when it accepted the jury's guilty verdict which was clearly against the manifest weight of the evidence, and based upon insufficient evidence.

{¶6} In his first assignment of error, Missler argues that his convictions for each count of the indictment are based on insufficient evidence and against the manifest weight of the evidence. Specifically, Missler disputes the issue of identity as to his convictions, arguing that someone other than him committed the break-in at the Rich gas station store. Missler also appears to argue that he could not be convicted of possessing criminal tools in addition to the other offenses of which he was convicted.

{¶7} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at

trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1981), paragraph two of the syllabus, superseded by state constitutional amendment on other grounds as stated in *State v. Smith*, 80 Ohio St.3d 89 (1997). Accordingly, "[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." *Id.* "In deciding if the evidence was sufficient, we neither resolve evidentiary conflicts nor assess the credibility of witnesses, as both are functions reserved for the trier of fact." *State v. Jones*, 1st Dist. Hamilton Nos. C-120570 and C-120571, 2013-Ohio-4775, ¶ 33, citing *State v. Williams*, 197 Ohio App.3d 505, 2011-Ohio-6267, ¶ 25 (1st Dist.). *See also State v. Berry*, 3d Dist. Defiance No. 4-12-03, 2013-Ohio-2380, ¶ 19 ("Sufficiency of the evidence is a test of adequacy rather than credibility or weight of the evidence."), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

{¶8} On the other hand, in determining whether a conviction is against the manifest weight of the evidence, a reviewing court must examine 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.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). A reviewing court must, however, allow the trier of fact appropriate discretion on matters relating to the weight of the evidence and the credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. When applying the manifest-weight standard, "[o]nly in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Haller*, 3d Dist. Allen No. 1-11-34, 2012-Ohio-5233, ¶ 9, quoting *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 119.

{¶9} Missler was convicted of each of the four counts in the indictment. He was convicted of breaking and entering in violation of R.C. 2911.13(A), which provides: "No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony." "'Force' means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). Among other offenses, safecracking in violation of R.C. 2911.31 is a "theft offense" listed in R.C. 2913.01(K)(1).

{¶10} Missler was also convicted of possessing criminal tools in violation of R.C. 2923.24(A), which provides: "No person shall possess or have under the

person's control any substance, device, instrument, or article, with purpose to use it criminally." The statute provides three circumstances that constitute "prima-facie evidence of criminal purpose":

> (1) Possession or control of any dangerous ordnance, or the materials or parts for making dangerous ordnance, in the absence of circumstances indicating the dangerous ordnance, materials, or parts are intended for legitimate use;
>
> (2) Possession or control of any substance, device, instrument, or article designed or specially adapted for criminal use;
>
> (3) Possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating the item is intended for criminal use.

R.C. 2923.24(B). *See also State v. Anderson*, 1 Ohio App.3d 62 (1st Dist.1981), paragraph one of the syllabus.

{¶11} Missler was convicted of safecracking in violation of R.C. 2911.31(A), which provides: "No person, with purpose to commit an offense, shall knowingly enter, force an entrance into, or tamper with any vault, safe, or strongbox." "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

{¶12} Missler was convicted of tampering with evidence in violation of R.C. 2921.12(A)(1), which provides:

> No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation * * *.

{¶13} Missler does not dispute the evidence concerning the underlying elements of the four offenses of which he was convicted. Rather, Missler disputes the issue of identity as to the convictions, arguing that the newspaper-delivery man, Missler's roommate, or someone else committed the offenses. Because he disputes the issue of identity, we will address only the identity element of the offenses. *See State v. Carter*, 2d Dist. Montgomery No. 25447, 2013-Ohio-3754, ¶ 9-12 (addressing only the element of identity because the appellant did not contest the other elements of the offenses). "It is well settled that in order to support a conviction, the evidence must establish beyond a reasonable doubt the identity of the defendant as the person who actually committed the crime at issue." *State v. Johnson*, 7th Dist. Jefferson No. 13 JE 5, 2014-Ohio-1226, ¶ 27, citing *State v. Collins*, 8th Dist. Cuyahoga No. 98350, 2013-Ohio-488, ¶ 19 and *State v. Lawwill*, 12th Dist. Butler No. CA2007-01-014, 2008-Ohio-3592, ¶ 11. "[D]irect

or circumstantial evidence is sufficient to establish the identity of the accused as the person who committed the crime." *Collins* at ¶ 19, citing *Lawwill* at ¶ 11.

{¶14} At trial, the State offered the testimony of Rick Lones ("Lones"). (Apr. 15, 2014 Tr. at 8). Lones testified that at about 5:30 a.m. on January 19, 2014, while delivering newspapers to the Rich gas station store (the "store") in Ada, Ohio, he discovered that the store's front door "was broken out." (*Id.* at 9-10). Lones wears a size "[t]en and a half, eleven" shoe, but he could not recall whether he was wearing his Nike tennis shoes or his boots that day. (*Id.* at 11). According to Lones, when he discovered the broken front door, he called 911 and stayed between the gas pumps and the store. (*Id.* at 10, 12). He did not go around to the back or the side of the store, but instead "put [his] papers down out of the way" so law enforcement officials could conduct their investigation. (*Id.* at 12).

{¶15} The State also called Chantel Aukerman ("Aukerman") to testify. (*Id.* at 14). Aukerman is the manager of the Rich gas station. (*Id.*). When she met officers at the store on the morning of January 19, 2014, she observed that the glass front door was broken, glass was "everywhere," and a rock was on the floor. (*Id.* at 16, 20). Aukerman testified that approximately ten packs of cigars and six or seven cartons of Marlboro Red Label 100's cigarettes were taken from the store. (*Id.* at 32-33). Aukerman uses orange, identifying, sticker labels on every carton of cigarettes in the store. (*Id.* at 33, 37-38). Aukerman testified that the

store's surveillance video shows a person wearing "[a] black coat with its hood up," jeans, and a pair of shoes breaking the glass front door of the store, entering the store, pulling cartons of Marlboro cigarettes off of shelves, prying the cash register open, disturbing a rack of cigars, and exiting to the left out of the front door. (*Id.* at 49-53).

{¶16} According to Aukerman, still photographs taken from the surveillance video depict the person, whose hands are white, carrying what appears to be a black, tote-type bag and wearing something red across the face. (*Id.* at 55-59). Aukerman testified that the still photographs depict the person using something "along the lines of a screwdriver" to pry open the cash register drawer. (*Id.* at 59). Aukerman testified that another still photograph appears to reveal that the hooded black coat that the person is wearing is a Carhartt coat with a white stamp on the back of the hood. (*Id.* at 60). Aukerman testified that another still photograph depicts an opening between the person's coat and pants, revealing white flesh in the area above the person's buttocks, or the "[b]utt crack area." (*Id.* at 61-62).

{¶17} On cross-examination, Aukerman testified that while she believes the person in the surveillance video is male based on the movements and "body motion language," she could not identify any specific thing in the video that demonstrates the person is male. (*Id.* at 66-67). Aukerman also admitted that she

does not know that the black coat that the person is wearing in the video is a Carhartt coat, only that it looks like a Carhartt coat. (*Id.* at 68-69).

{¶18} On re-direct examination, Aukerman testified that while she is not certain the person in the surveillance video is a man, the "shape" of the person and the person's "butt" lead her to believe the person in the video is male. (*Id.* at 70). Aukerman testified that she also concluded based on the video that the person in the video is white. (*Id.* at 70-71). According to Aukerman, "Carhartts have a white stitched on tag on the back underneath of the hood," and that tag on the back of the hood of the black coat, as depicted in the still photograph of the surveillance video, led her to believe the coat is a Carhartt. (*Id.* at 71-72).

{¶19} The State called Ada Police Department patrolman Alec Cooper ("Cooper") to testify. (*Id.* at 73). Cooper testified that Lones was at the store when he arrived. (*Id.* at 74). Cooper identified photographs of a shoeprint he discovered outside the store, which was one of several like shoeprints leading down the alley behind the store. (*Id.* at 83-84). According to Cooper, the shoeprints led him to a pair of latex gloves laying in the alley, which he collected as evidence. (*Id.* at 85). Cooper testified that the Ohio Bureau of Identification and Investigation ("BCI") tested and found Missler's DNA on the inside and outside of the gloves. (*Id.* at 86). Cooper testified that on January 19, 2014,

Missler was residing with Patricia Edgington ("Edgington") in an apartment a block or so from the Rich gas station. (*Id.* at 88).

{¶20} Cooper testified that on January 27, 2014, while responding to an apartment near the one in which Missler was residing, officers received permission to search and searched Edgington and Missler's apartment. (*Id.* at 94-96). While at the apartment, Cooper observed that Missler had been smoking Black and Mild cigars, which was the same brand of cigars stolen from the store. (*Id.* at 96). Cooper testified that he went back to the apartment, received permission to search again, searched Missler's room, and "found several items that matched the video, as well as the items taken from the Rich gas station," which Cooper collected as evidence. (*Id.* at 98).

{¶21} Cooper identified a black Carhartt jacket that he found at the end of the bed in Missler's bedroom, which was separate from Edgington's bedroom. (*Id.* at 99). According to Cooper, he also found in Missler's bedroom the detachable hood of the Carhartt jacket, which bore a "white Carhartt sticker sewn onto the back of it." (*Id.* at 101-102). Cooper testified that the Carhartt jacket he found in Missler's bedroom appeared to match the jacket that the person is wearing in the store's surveillance video. (*Id.* at 101-102). Cooper also collected as evidence from Missler's bedroom a "pair of Nike running or tennis shoes," which, according to Cooper, Missler said was his only pair of shoes. (*Id.* at 102-

108, 115, 118). Cooper's opinion was that the tread of the shoes he found in Missler's bedroom matched the shoeprint he discovered outside the store. (*Id.* at 107-108). Cooper testified that he also found in Missler's bedroom a Marlboro Red Label 100's cigarette pack, a Black and Mild cigar pack, and the butt of a Black and Mild cigar, all of which were products missing from the store. (*Id.* at 108-110, 115-116). Cooper also collected as evidence from Missler's bedroom a white latex glove. (*Id.* at 102, 115). Cooper testified that after he discovered these items, Missler was interviewed at the Ada Police Department and denied involvement in the break-in at the store. (*Id.* at 120).

{¶22} Cooper testified that the person that broke into the store could be female, but judging by the jeans the person is wearing in the surveillance video, Cooper believes the person is male. (*Id.* at 121). Cooper also described the person in the video as "average size, average build," and Caucasian. (*Id.*). Cooper described Missler as "[a]verage height, average build," and Caucasian, matching the appearance of the person in the video. (*Id.* at 122). Cooper testified that he concluded based on his investigation that Missler committed the break-in at the store. (*Id.* at 126).

{¶23} On cross-examination, Cooper testified that based on his briefly watching the surveillance video on the store's monitor, he included in his report that the shoes the person is wearing in the video appear to be white with a red

stripe. (*Id.* at 131). Cooper admitted, however, that the shoes that he took as evidence from Missler's bedroom are gray or blue with no red on them. (*Id.*). Cooper admitted that the latex gloves he found in the alley were not on the Rich gas station property, but nearby, and that the break-in occurred on a "bar night," and others may have walked in the alley. (*Id.* at 132-133). Cooper also admitted that the DNA analysis of the latex gloves yielded another person's DNA in addition to Missler's. (*Id.* at 134). According to Cooper, it is not uncommon in Ada for someone to have a black Carhartt jacket and Black and Mild cigars. (*Id.* at 135, 136-137). Cooper did not find a red bandana in the apartment. (*Id.* at 135-136). Cooper admitted that based on the physical build of the person in the surveillance video, it could be "any average person in Ada." (*Id.* at 140). Cooper also acknowledged that no screwdriver was found in Edgington and Missler's apartment, nor did he find the bag used to carry cigarettes and cigars out of the store. (*Id.* at 139-140).

{¶24} On re-direct examination, Cooper testified that, after more closely reviewing the surveillance video and the still photographs from it, he concluded that the shoes are not red, but have a dark-colored sole, consistent with the shoes he collected from Missler's bedroom. (*Id.* at 140-141). According to Cooper, the monitor on which he briefly watched the surveillance video at the store was a "very small monitor." (*Id.*).

{¶25} The State called Edgington to testify. (*Id.* at 145). Edgington, who is 62 years old, testified that she got to know Missler, who is 23 years old, through a pen-pal relationship. (*Id.* at 146-147). In December 2013, Missler needed a place to stay, so Edgington allowed Missler to move into her apartment, where she had a spare bedroom for him. (*Id.*). Their relationship was not romantic. (*Id.* at 147). Edgington admitted that she was convicted of a misdemeanor offense, receiving stolen property, in the past. (*Id.* at 149-150).

{¶26} Edgington testified that the police collected from the apartment Missler's black Carhartt coat and his pair of Nike tennis shoes, which was the only pair of shoes Missler owned at the time. (*Id.* at 151). According to Edgington, after the authorities interviewed Missler and he returned to the apartment, Missler told Edgington that the police "didn't have shit on him" and that "he had robbed the gas station, the one armed bandit." (*Id.* at 153-155). Edgington testified that by "one armed bandit," Missler was referring to Aukerman, who lost an arm at a young age. (*Id.* at 154). Edgington is familiar with Aukerman. (*Id.*). According to Edgington, Missler "was mad at [Aukerman] because he had went in there to buy some beer, and his ID was messed up and she wouldn't sell him any." (*Id.* at 155). Edgington testified that Missler told her that "he hated that bitch." (*Id.*).

{¶27} Edgington testified that Missler said that he "[t]ook a rock and busted the window out with the rock." (*Id.*). According to Edgington, Missler told her

that he stole Marlboro 100's cigarettes and Black and Mild cigars. (*Id.*). Edgington testified that at Missler's suggestion, she took two of the cartons of cigarettes to sell them. (*Id.* at 156). Edgington disposed of the cartons of cigarettes, but she gave Missler 80 dollars for both cartons and told him that she sold them. (*Id.* at 156-157, 171-172). Edgington admitted that on January 29, 2014, when law enforcement officers first talked to her about this case, she was scared of what might happen to her, so she did not tell them that she took two cartons of cigarettes to sell or about Missler's "one armed bandit" statement. (*Id.* at 156-157). Edgington testified that after police interviewed her and she returned to the apartment, Missler insisted on talking about what she discussed with police. (*Id.* at 161-162). According to Edgington, Missler told her she should "keep [her] damn mouth shut." (*Id.* at 158-159).

{¶28} Edgington testified that she called Missler's "P.O.," Ben Bowers ("Bowers"), who came to the apartment and searched it, including Missler's bedroom, with Edgington's permission. (*Id.* at 163-165). Edgington testified that Bowers discovered "a carton of cigarettes, some Black and Mild cigars, and a bunch of rubber gloves" in the drop-down ceiling of Missler's bedroom. (*Id.* at 164). According to Edgington, a few days before Bowers's search, she saw Missler on his dresser, up in the exact ceiling tiles where Bowers located those items, and she told Bowers as much. (*Id.* at 165-166).

{¶29} Edgington identified a handwritten letter from Missler to her, which she received in February 2014. (*Id.* at 168-170). According to Edgington, she corresponded with Missler enough times to be familiar with his handwriting. (*Id.* at 148). The letter is unsigned, but she recognized the handwriting of the letter as Missler's. (*Id.* at 169-170). In addition, the envelope in which the letter was sent bears a handwritten return address that reads, in part, "Mike Missler #311-610."[1] (State's Ex. 54). The letter contains the following statements:

> Anything I did I did for us so we had stuff.
>
> I'm going to talk to the cops and tell them everything. Then your ass will be sitting in here right along with me. I'll tell them you helped me sell the cigerettes [sic], and to who.
>
> Don't think I'm playing. I'll tell you were involved.
>
> I can do the time can you?

(Apr. 15, 2014 Tr. at 173-174); (State's Ex. 54). Edgington acknowledged that she was told that she was not going to be charged "with trying to sell cigarettes or possessing them, or anything like that." (Apr. 15, 2014 Tr. at 175).

{¶30} Edgington testified that she received another letter from Missler informing her of additional cigarettes hidden in ceiling tiles of the hallway in the apartment. (*Id.* at 175-176). Edgington found an open carton of Marlboro 100's

[1] The remainder of the return address written on the envelope is obscured by the "State's Exhibit 54" sticker. (State's Ex. 54).

cigarettes and "a couple more packs of Black and Mild cigars," all of which she gave to Bowers. (*Id.* at 177). According to Edgington, she observed Missler sit on her apartment's living-room floor and tear the orange, identifying stickers off of four cartons of Marlboro 100's cigarettes, including the partial carton she found in the hallway ceiling. (*Id.* at 179-180).

{¶31} Edgington testified that in an interview with law enforcement officials on April 8, 2014, she turned over a red bandana that she found the day before behind the refrigerator in her kitchen while cleaning up after a jam jar fell. (*Id.* at 180-182). According to Edgington, when Ada police officers searched the home before, they found a backpack behind the refrigerator. (*Id.* at 181-183). Edgington also turned over to law enforcement officials three loose Black and Mild cigars and a package of three Black and Mild cigars, which she found in her dog-treat container. (*Id.* at 184-188).

{¶32} On cross-examination, Edgington admitted that she was convicted of receiving stolen property in April 2013, for which she spent 60 days in jail. (*Id.* at 188). Edgington admitted that in her initial interview with the police, she "told them [she] didn't know anything," but she changed her story when she spoke with law enforcement officials again in April 2014. (*Id.* at 190-191). Edgington testified that she attempted to retrieve the two cartons of cigarettes of which she disposed, but only one remained, and she gave it to her friends. (*Id.* at 191-192).

Aside from some personal items that she stored in Missler's bedroom, such as offseason clothing in a dresser, Edgington's and Missler's rooms were off limits to each other, but his door was open when she observed him in the ceiling. (*Id.* at 193-194, 197). Edgington admitted that she did not know whether the red bandana was Missler's or whether it was behind the refrigerator on the day police officers searched and found a backpack behind it. (*Id.* at 194-195). Edgington was not taking her bipolar medication in January 2014, which results in her having blackouts, but she remembers the details of the events to which she testified at trial. (*Id.* at 198-200).

{¶33} The State called Bowers to testify. (*Id.* at 209). Bowers testified that he is a state parole probation officer and that he met Missler for the first time on January 21, 2014. (*Id*. at 210). He noticed Missler was smoking Black and Mild cigars, which Bowers recalled as being one of the items stolen from the store. (*Id.* at 210-211). According to Bowers, on January 30, 2014, he and his partner "conducted a house search" at Edgington and Missler's apartment, at which time he found "a carton of cigarettes and a Crown Royal bag filled with latex gloves" in the ceiling. (*Id.* at 211-212). Bowers testified that the carton of Marlboro 100's cigarettes he found in the ceiling bore an orange tag, part of which had been torn off of the carton. (*Id.* at 214).

{¶34} On cross-examination, Bowers testified that "[t]here was tattoo equipment at [Missler's] residence" and that wearing latex gloves is preferable when tattooing people. (*Id.* at 222). Bowers admitted that he does not know how the cigarettes got in the ceiling or who removed the orange tags from the cartons of cigarettes. (*Id.* at 223). On re-direct examination, Bowers testified that when he confronted Missler about the items Bowers found in Missler's ceiling, Missler's "demeanor changed," and "[h]e appeared flustered." (*Id.* at 225-226).

{¶35} The State called Ted Manasian ("Manasian") of BCI to testify. (*Id.* at 227). Manasian testified that the shoeprint left outside of the store, which officers photographed, could have been made by the Nike shoe found in Missler's bedroom "or by some other shoe with the same tread design and characteristics." (*Id.* at 241-242). Manasian could not form an opinion regarding the tread size or size of the shoeprint. (*Id.* at 247). On cross-examination, Manasian admitted that he could not say that only Missler's shoe made the shoeprint. (*Id.* at 249). Manasian explained, "There are other shoes out there that have the same tread pattern that could have made that impression." (*Id.* at 251). Manasian also testified that a logo appearing on the bottom of Missler's shoe is not present in the shoeprint found outside the store. (*Id.* at 250).

{¶36} Finally, the State called Katherine Hall ("Hall") of BCI to testify. (*Id.* at 252). Hall testified that the DNA profile from the inside of the latex glove

found outside the store was consistent with Missler. (*Id.* at 260). She also testified that while more than one person contributed to the DNA profile from the outside of the latex glove, the stronger DNA profile was consistent with Missler. (*Id.* at 258). Hall testified that there was not enough information to make any conclusions regarding the other "partial minor DNA profile." (*Id.*). According to Hall, she concluded that the expected frequency of occurrence of the DNA profile on the inside and outside of the glove is "one in one hundred eighty four quintillion five hundred quadrillion," or one in 184,500,000,000,000,000,000, unrelated individuals. (*Id.* at 262-263). In other words, she would have to test the DNA sample of that many individuals before finding another person with the same DNA profile. (*Id.* at 263). On cross-examination, Hall admitted that on the inside and outside of the latex glove, there was DNA that was not Missler's. (*Id.* at 264). On re-direct examination, Hall testified that she is certain Missler's DNA was on the inside and outside of the glove. (*Id.* at 266).

{¶37} We first review the sufficiency of the evidence of identity supporting Missler's convictions. *State v. Velez*, 3d Dist. Putnam No. 12-13-10, 2014-Ohio-1788, ¶ 68, citing *State v. Wimmer*, 3d Dist. Marion No. 9-98-46, 1999 WL 355190, *1 (Mar. 26, 1999). A person with a build matching Missler's and wearing a red bandana and a black Carhartt coat with a white tag on the back of the hood can be seen in the surveillance video throwing a rock through the glass

front door of the store, prying into the cash register with some device, and stealing several items from the store. The tread of the only pair of shoes that Missler owned at the time matched a shoeprint found outside the store. His DNA was found on the inside and outside of a latex glove found in the alley behind the store. Law enforcement officials found items stolen from the store hidden at Missler's residence, including in the ceiling of his bedroom. Also in Missler's residence, law enforcement officials found a black Carhartt coat, whose hood had a white tag on the back of it, and additional latex gloves. Missler admitted to Edgington that he was the one who broke into the store, and Edgington observed Missler removing the orange identifying stickers from the cartons of cigarettes. Finally, Missler sent a handwritten note to Edgington, in which he made statements suggesting that he broke into the store. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that Missler was the person who committed the offenses at issue.

{¶38} We next address Missler's argument that his convictions are against the manifest weight of the evidence. Missler did not offer any evidence at trial and relies in his manifest-weight argument on the cross-examinations of the State's witnesses and purported weaknesses in the State's evidence. Missler argues that Lones may have committed the break-in at the store. However, Lones testified that he was simply delivering newspapers as usual that morning. The

portion of the surveillance video in which Lones appears is consistent with his testimony concerning the steps he took when he discovered the broken glass front door of the store. Missler also argues that Lones wears a size 10-and-a-half Nike shoe; however, no evidence was presented concerning Lones's Nike shoes or their tread, and Lones was not even sure whether he was wearing his Nike shoes that morning.

{¶39} Missler makes additional footwear-related arguments. Missler downplays Manasian's testimony that the tread on Missler's only pair of shoes matched the shoeprint photographed outside the store, focusing instead on Manasian's unsurprising testimony that someone else with a pair of shoes with the same tread could have made the shoeprint. Missler also relies on Cooper's statement in his police report that the person in the surveillance video appeared to be wearing shoes that were white with a red stripe; however, as Cooper explained, that conclusion was based on his briefly watching the surveillance video on the small monitor at the store.

{¶40} Missler argues that Edgington may have broken into the store or given to Missler the items stolen from the store. Missler argues that "the intruder may have been female." (Appellant's Brief at 8). The intruder also may have been male, however. Missler also relies on Bowers's testimony that Missler is of a "slender build," whereas the person in the surveillance video was described as

having an "average" build. Cooper, however, characterized Missler as having an "[a]verage height, average build," which he said matches the appearance of the person in the surveillance video.

{¶41} Missler also argues that Edgington knew the location of the stolen items found by law enforcement officials in the apartment. This is unsurprising given that it was Edgington's apartment in which Missler was residing and given Edgington's admission that she initially agreed to sell stolen merchandise. In addition, Missler argues that Edgington contradicted her own testimony concerning her level of access to Missler's bedroom. Missler points out, for example, that Edgington testified at one point that Missler's bedroom was "off limits" to her, but testified at another point that she stored items in Missler's bedroom. We do not view that testimony as contradictory, as Edgington merely testified that she stored some items, such as offseason clothing, in the dresser, which she owned, that was in Missler's bedroom.

{¶42} Missler argues that Edgington may have taken a pair of his latex gloves, which he used as a tattoo artist, and robbed the store, or someone may have taken a pair of his latex gloves from the trash and dropped them in the alley. The shoeprints from the store led Cooper to the latex gloves, and they contained a major DNA profile consistent with Missler and another partial minor DNA profile that was not suitable for comparison purposes. While it is true, as Missler points

out, that law enforcement officers did not find at Edgington and Missler's residence any pry tool or the tote bag, officers did find several other items linking Missler to the break-in. Missler also questions Edgington's production of the red bandana, which she said she found behind the refrigerator after officers looked there and found a backpack but no bandana. Once again, the jury was free to believe or disbelieve Edgington's testimony.

{¶43} Missler argues that the letter identified by Edgington as being from Missler was "conveniently not signed." (Appellant's Brief at 8). However, Edgington testified that she got to know Missler through a pen-pal relationship and that she saw enough letters from him that she is familiar with his handwriting. "Evid.R. 901(B)(2) permits non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation." *State v. Cooper*, 8th Dist. Cuyahoga No. 86437, 2006-Ohio-817, ¶ 11.

{¶44} Finally, Missler argues that Edgington admitted that she was recently convicted of receiving stolen property and that she "lied so many times regarding this case that she is not a credible witness." (Appellant's Brief at 8). While there were some issues with Edgington's credibility, "[t]he jury, as the trier of facts, 'may believe or disbelieve any witness or accept part of what a witness says and reject the rest.'" *State v. Daley*, 3d Dist. Seneca No. 13-13-26, 2014-Ohio-2128, ¶ 68, quoting *State v. Antill*, 176 Ohio St. 61, 67 (1964). "'A verdict is not against

the manifest weight of the evidence because the [jury] chose to believe the State's witnesses rather than the defendant's version of the events.'" *State v. Bean*, 9th Dist. Summit No. 26852, 2014-Ohio-908, ¶ 15, quoting *State v. Martinez*, 9th Dist. Wayne No. 12CA0054, 2013-Ohio-3189, ¶ 16.

{¶45} In sum, Missler's arguments concerning the evidence are unpersuasive, especially compared to the weighty evidence against him discussed above. Therefore, we cannot conclude that the jury clearly lost its way and created such a manifest miscarriage of justice that Missler's convictions must be reversed and a new trial ordered.

{¶46} In addition to disputing that he was the person who committed the offenses, Missler appears to argue under his first assignment of error that he could not be convicted of possessing criminal tools in addition to the other offenses of which he was convicted. Missler apparently believes that the instruments on which the State based the possessing-criminal-tools count—the rock used to break the glass front door, the tool used to pry into the cash register, the tote bag used to carry stolen merchandise, the gloves used to conceal fingerprints, or the bandana used to cover the face—were "merely incidental" to the other offenses. (Appellant's Brief at 10). However, Missler fails to suggest which element or elements of the offense the State failed to prove. Nor does Missler address the three circumstances under R.C. 2923.24(B) that constitute "prima-facie evidence

of criminal purpose." At any rate, Missler's use of instruments were not "merely incidental" to the other offenses. For example, the person in the surveillance video can be seen using a screwdriver or some other pry tool for a criminal purpose—namely, to force entry into the cash register. The video also shows the person using a rock for a criminal purpose—namely, to break the front glass door of the store. For these reasons, we reject Missler's argument.

{¶47} Missler's first assignment of error is overruled.

Assignment of Error No. II

> **The trial court abused its discretion and committed plain error by failing exclude [sic] evidence that Appellant was currently on post release control, as that evidence was not relevant or necessary, and its probative value was substantially outweighed by the danger of unfair prejudice.**

{¶48} In his second assignment of error, Missler argues that the trial court "abused its discretion and committed plain error" by allowing the admission of Bowers's testimony that he was familiar with Missler in his "official capacity" as "a state parole probation officer for the State of Ohio" and by allowing the admission of Edgington's testimony that Bowers was Missler's "P.O." This testimony, Missler argues, was irrelevant and prejudicial because it "tips off the jury that [Missler] has a prior felony history." (Appellant's Brief at 12).

{¶49} Notwithstanding Missler's suggestion that an abuse-of-discretion standard might apply to this assignment of error, because Missler failed to object

to Bowers's or Edgington's testimony at trial, he waived all but plain error. *State v. Brooks*, 3d Dist. Defiance No. 4-08-09, 2008-Ohio-6188, ¶ 12, citing *State v. Welch*, 3d Dist. Wyandot No. 16-06-02, 2006-Ohio-6684, ¶ 16. "In order to have plain error under Crim.R. 52(B), there must be an error, the error must be an 'obvious' defect in the trial proceedings, and the error must have affected 'substantial rights.'" *State v. Stewart*, 3d Dist. Wyandot No. 16-08-11, 2008-Ohio-5823, ¶ 7. Plain error does not exist unless "it can be said that 'but for the error, the outcome of the trial would clearly have been otherwise.'" *State v. Bump*, 3d Dist. Logan No. 8-12-04, 2013-Ohio-1006, ¶ 67, quoting *State v. Biros*, 78 Ohio St.3d 426, 431 (1997). "Plain error is to be used 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *Id.*, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002).

{¶50} Evid.R. 401 addresses what evidence is "relevant" and provides, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under Evid.R. 403(A), "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." *Velez*, 2014-Ohio-1788, at ¶ 122. Another rule of evidence, Evid.R. 404(B), generally prohibits the admission of "[e]vidence of

other crimes, wrongs, or acts * * * to prove the character of a person in order to show action in conformity therewith."

{¶51} Missler argues that the following testimony by Bowers was not relevant and was unfairly prejudicial:

[State's Counsel]: How are you employed sir?

[Bowers]: I am a state parole probation officer for the State of Ohio.

[State's Counsel]: Okay. And in your official capacity did you have an occasion to know Mr. Michael Missler?

[Bowers]: I did.

[State's Counsel]: On or about January 21st of 2014, did you have an occasion to have contact with Mr. Missler about some paperwork?

[Bowers]: Yes ma'am, I did.

[State's Counsel]: Did you make any observations of him at that time?

[Bowers]: Yes ma'am, I did.

[State's Counsel]: What were those?

[Bowers]: It was my first meeting with him. I observed a white male, slender build. I noticed during our

initial interview that he was smoking Black and Mild cigars.

(Apr. 15, 2014 Tr. at 210).

{¶52} Missler makes similar arguments concerning the following testimony by Edgington:

[State's Counsel]: What did you do ma'am?

[Edgington]: I went down to the tree [sic] station and called Michael's P.O.

[State's Counsel]: Did you call an individual by the name of Ben Bowers?

[Edgington]: Yes.

[State's Counsel]: Did he end up coming to your apartment?

[Edgington]: Yeah.

(Apr. 15, 2014 Tr. at 163).

{¶53} It was not error for the trial court to allow this testimony by Bowers and Edgington. First, the Supreme Court of Ohio held in *State v. Cowans* "that a parole officer may testify in the guilt phase of trial without violating [Evid.R. 404(B)] if the parole officer's status as a parole officer is inextricably linked to the state's presentation of its case * * *." *State v. Anderson*, 7th Dist. Mahoning 03MA252, 2006-Ohio-4618, ¶ 73, citing *State v. Cowans*, 87 Ohio St.3d 68, 78

(1999). Bowers's role as a parole officer was inextricably linked with the State's presentation of its case because Edgington knew Bowers was Missler's "P.O.," Edgington contacted Bowers, and Bowers conducted a search of Edgington and Missler's apartment. *See Cowans* at 78.

{¶54} Second, Bowers's testimony that he was a state parole probation officer and that he knew Missler was relevant to the case. Under Evid.R. 602, which requires that a witness have "personal knowledge of the matter" to which he testifies, it was necessary for the State to establish Bowers's involvement in the case and his lawful search of the apartment. *See State v. Douglas*, 3d Dist. Marion No. 9-07-58, 2008-Ohio-3232, ¶ 41. *See also Cowans* at 78; *State v. Rupp*, 7th Dist. Mahoning No. 05 MA 166, 2007-Ohio-1561, ¶ 70. Similarly, Edgington's testimony that she called Bowers was relevant to establish her knowledge of and consent to Bowers's search of the apartment.

{¶55} Finally, Missler suggests that Bowers "testified that he was [Missler's] post release control officer, that [Missler] was currently on post release control, and that he was familiar with [Missler] in that capacity." (Appellant's Brief at 12). This is a mischaracterization of Bowers's testimony. Bowers did not testify that he was Missler's post-release-control officer or that Missler was currently on post-release control. Rather, he testified simply that he knew Missler in his "official capacity" and contacted him about "some paperwork," which could

have just as well implied that he knew Missler as a colleague or other professional acquaintance. And when Edgington testified simply that she called Missler's "P.O.," the State's counsel did not ask her to explain what she meant by "P.O.," nor did counsel ask additional questions concerning why Missler had a "P.O." For these reasons, the danger of unfair prejudice did not substantially outweigh the probative value of Bowers's and Edgington's testimony.

{¶56} We conclude that that the trial court did not commit error, let alone plain error, when it allowed this testimony of Bowers and Edgington.

{¶57} Missler's second assignment of error is overruled.

Assignment of Error No. III

The trial court erred when it failed to exclude hearsay over Appellant's objection, the hearsay was not harmless error, and the court's error affected Appellant's rights to due process and a fair trial.

{¶58} In his third assignment of error, Missler argues that the trial court erred in allowing hearsay evidence. First, over Missler's hearsay objection, the trial court allowed Cooper to testify that Sergeant Deckling ("Deckling") of the Ada Police Department told Cooper that while they were at the apartment the first time, Deckling observed a red bandana laying in Missler's room:

[State's Counsel]: And following that, did officers communicate about this on-going investigation and make

inquiries about property that might have been observed for this case?

[Cooper]: They did. While we were there I observed Michael had been smoking Black and Mild cigars, which was, you know, what was taken from the Rich gas station. So I made a comment to Sergeant Deckling who was the other officer working about this, and I asked him did you happen to see a red bandana or anything else of clothing matters to this case, thinking about the Rich station. He said as a matter of fact

[Missler's Counsel]: Objection. Hearsay.

[Trial Court]: Well it's a portion of his investigation, so I think he can go ahead and testify.

[State's Counsel]: Sir, can you continue?

[Cooper]: He said as a matter of fact, I believe I did see a red bandana laying in Michael's room. I printed off the picture of the shoe print and took it with us. We went back to Michael's and

> Patricia's apartment. Again, we were given permission to search the apartment.

(Apr. 15, 2014 Tr. at 96-97).

{¶59} Second, after Missler's objection apparently to the uncertainty in Edgington's response to the State's counsel's question, the trial court instructed Edgington to testify to the best of her recollection concerning a threat Missler allegedly made against her:

> [State's Counsel]: Did [Missler] ever make any statements to you about what you should or should not tell law enforcement?
>
> [Edgington]: I just should keep my mouth shut, you know, to be quiet.
>
> [State's Counsel]: Are those words he said, or did you just assume that?
>
> [Edgington]: Pardon me?
>
> [State's Counsel]: Did he actually say those words to you?
>
> [Edgington]: Not like that, you know.
>
> [State's Counsel]: Tell us what Michael Missler said to you that gave you that impression.

[Edgington]:	More or less it's you don't know anything, it's best to
[Missler's Counsel]:	Objection as to more or less Your Honor.
[Edgington]:	keep your mouth shut.
[Trial Court]:	Answer to the best of your recollection ma'am.
[Edgington]:	Okay. I just probably should keep my damn mouth shut.

(*Id.* at 158-159).

{¶60} We apply separate standards of review to Missler's challenges to Cooper's and Edgington's testimony. Missler objected on the ground of hearsay to the hearsay testimony offered by Cooper. (*Id.* at 97). Therefore, we review the trial court's admission of the testimony for an abuse of discretion. *Bump*, 2013-Ohio-1006, at ¶ 61, citing *State v. Heft*, 3d Dist. Logan No. 8-09-08, 2009-Ohio-5908, ¶ 62. "A trial court will be found to have abused its discretion when its decision is contrary to law, unreasonable, not supported by the evidence, or grossly unsound." *State v. Swihart*, 3d Dist. Union No. 14-12-25, 2013-Ohio-4645, ¶ 44, citing *State v. Boles*, 2d Dist. Montgomery No. 23037, 2010-Ohio-278, ¶ 16-18. Under Evid.R. 103(A) and Crim.R. 52(A), we disregard as harmless the admission of improper hearsay evidence unless a substantial right of the party is affected. *State v. Richcreek*, 196 Ohio App.3d 505,

2011-Ohio-4686, ¶ 31 (6th Dist.), citing *State v. Sorrels*, 71 Ohio App.3d 162, 165 (1991); *Bump* at ¶ 65. "Substantial rights are not affected 'where the remaining evidence constitutes overwhelming proof of a defendant's guilt * * *.'" *Bump* at ¶ 65, quoting *State v. Jones*, 3d Dist. Van Wert No. 15-11-16, 2012-Ohio-5334, ¶ 34, citing *State v. Murphy*, 91 Ohio St.3d 516, 555 (2001).

{¶61} Unlike his objection to Cooper's testimony, Missler's objection to Edgington's testimony was not on the ground of hearsay but rather to Edgington's qualifying her testimony with the phrase "more or less." (Apr. 15, 2014 Tr. at 159). "'When a party makes a specific objection to the admission of evidence on one ground, he waives all other objections on appeal.'" *State v. Hogan*, 5th Dist. Richland No. 09-CA-33, 2009-Ohio-4728, ¶ 61, quoting *State v. Nichols*, 7th Dist. Jefferson No. 07 JE 50, 2009-Ohio-1027, ¶ 15. *See also State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 129. Therefore, we apply to the admission of this testimony the same plain-error standard of review that we applied to Missler's second assignment of error. *See State v. Risner*, 3d Dist. Logan No. 8-12-02, 2012-Ohio-5954, ¶ 22, citing *State v. Dixon*, 3d Dist. Logan No. 8-02-43, 2003-Ohio-2550, ¶ 21.

{¶62} Regarding Cooper's testimony concerning Deckling's out-of-court statement, even assuming that testimony was improper hearsay evidence and that the trial court abused its discretion by allowing its admission over Missler's

objection, it was harmless error because no substantial right of Missler's was affected. In our analysis of Missler's first assignment of error above, we detailed the overwhelming evidence of guilt against Missler. Disregarding all bandana-related evidence, including Cooper's testimony concerning Deckling's out-of-court statement, the evidence against Missler was still overwhelming. Because the evidence of guilt against him was overwhelming, no substantial right of Missler's was affected. *Bump* at ¶ 65. Therefore, we reject Missler's arguments concerning Cooper's testimony.

{¶63} Regarding Edgington's testimony concerning threats Missler made against her, Missler argues that "threats against those not expected to testify are not admissible" and that "[n]o evidence was presented at trial that, at the time of the threat, [Missler] expected Pat Edgington to be called as a witness at a future trial against him." (Appellant's Brief at 14). Missler disregards Evid.R. 801(D)(2)(a), which "provides that a statement is not hearsay if it is offered against a party and is the party's own statement." *State v. Junod*, 3d Dist. Auglaize No. 2-09-03, 2009-Ohio-2817, ¶ 27. This applies to a party's threatening statements offered against that party. *See State v. Jackson*, 10th Dist. Franklin No. 02AP-867, 2003-Ohio-6183, ¶ 79. Moreover, "[u]nder Ohio law, 'evidence of threats or intimidation of witnesses reflects a consciousness of guilt and is admissible as admission by conduct.'" *State v. Exum*, 10th Dist. Franklin No.

05AP-894, 2007-Ohio-2648, ¶ 23, quoting *State v. Soke*, 105 Ohio App.3d 226, 250 (8th Dist.1995). Edgington testified to threatening statements Missler made to her, and Edgington's testimony was offered against Missler. It reflects Missler's consciousness of guilt. For these reasons, it was not error, let alone plain error, for the trial court to allow the admission of Edgington's testimony concerning Missler's threats.

{¶64} Missler's third assignment of error is overruled.

{¶65} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

ROGERS, P.J. and WILLAMOWSKI, J., concur.

/jlr