[Cite as *State v. Lowry*, 2014-Ohio-5852.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA12
v.	:	DECISION AND
JACK D. LOWRY, JR.,	:	JUDGMENT ENTRY
Defendant-Appellant.	:	RELEASED 12/29/2014

APPEARANCES:

Jeremiah J. Spires, Lancaster, Ohio, for Appellant.

Judy C. Wolford, Pickaway County Prosecuting Attorney, and Heather MJ Armstrong, Pickaway County Assistant Prosecuting Attorney, Circleville, Ohio, for Appellee.

Hoover, J.

{¶ 1} Defendant-appellant, Jack D. Lowry, Jr., appeals his conviction in the Pickaway County Common Pleas Court after a jury found him guilty of one count of burglary and one count of theft. On appeal, Lowry contends that the trial court erred by denying his Crim.R. 29 motion for acquittal of the burglary charge. Upon review, we find that the trial transcript contains evidence from which any rational trier of fact could have found the essential elements of burglary proven beyond a reasonable doubt. As such the trial court did not err in failing to grant the Crim.R. 29 motion for acquittal. Accordingly, we overrule Lowry's sole assignment of error and affirm the judgment of the trial court.

I. FACTS

{¶ 2} A Pickaway County grand jury indicted Lowry and charged him with one count of burglary, a felony of the second degree in violation of R.C. 2911.12(A)(2), and one count of

theft, a felony of the fifth degree in violation of R.C. 2913.02(A)(1). At his arraignment, Lowry entered a plea of not guilty to both counts of the indictment. Shortly thereafter, Lowry was found to be indigent and counsel was appointed to represent him. Because of a defect in the indictment, the felony theft charge was ultimately amended to a first-degree misdemeanor theft charge.

{¶ 3} The state presented the testimony of Regan "Gene" List, Detective John Strawser, and Deputy Tracy Andrews at trial. List testified that in 2012, he, his wife, and his son lived at 16172 U.S. Route 23, Ashville, Ohio, in Pickaway County. On August 28, 2012, List left his house at approximately 11:00 AM to run some errands. Although he was the only member of the family at the home that day, he did not lock the doors because he did not except to be gone for very long. When he returned two hours later, at approximately 1:00 PM, he found that drawers and cabinet doors had been opened and that items of personal property were missing from the home. List immediately contacted the Pickaway County Sheriff's Office.

{¶ 4} List testified that Deputy Tracy Andrews reported to the home. List guided Deputy Andrews through the house and noted the items that were missing. Deputy Andrews then completed a report. After Deputy Andrews left the residence, List located a receipt on the floor of his living room. The receipt was a Speedy Rewards receipt dated August 28, 2012. The receipt indicated that it was from Speedway Store #9249, located at 3974 Cleveland Avenue, Columbus, Ohio. The time of the transaction documented on the receipt was 6:27 AM. List immediately noticed that handwritten on the back of the receipt was his home address and a couple of other addresses. List informed the sheriff's office of the receipt and Deputy Andrews returned to the house and collected the receipt. List also testified that he is not a Speedy Rewards member.

{¶ 5} Deputy Andrews testified that he reported to the List residence on the day of the incident. Deputy Andrews noted that there were no signs of forced entry. Like List, Deputy

Andrews indicated that he made a report of the items that were missing from the residence, left the residence, and later returned after List had found the receipt on the floor of his living room. Deputy Andrews did not dust for fingerprints or attempt to collect DNA while at the residence.

{¶ 6} Detective Strawser testified that he was assigned to the case in August 2012. His first action was to call the Speedy store listed on the receipt. The Speedy store was able to turn over video of the transaction documented on the receipt. A review of the video provided that three individuals were present at the time of the transaction, one female and two males. Detective Strawser was also able to determine that the Speedy Rewards number listed on the receipt belonged to Hazel Marie McComis. Through further investigation, Detective Strawser learned that Lowry and McComis were acquaintances. Detective Strawser then ran Lowry's BMV image and was able to determine that one of the men in the video was Lowry. Detective Strawser located McComis and Lowry on August 31, 2012, and asked that they come to the sheriff's office for questioning.

{¶ 7} During his interview with McComis, Detective Strawser obtained consent to search her vehicle. Found in the trunk of the vehicle were numerous items including a wallet containing an expired hunting license belonging to List, jewelry, and a Circleville Herald dated August 28, 2012. List later verified that the wallet and jewelry belonged to himself and his family. Also located in the trunk was a receipt dated 6:50 PM, August 28, 2012. The receipt contained the name David Fitch, and indicated that ten-karat gold, sterling silver, and costume jewelry had been scrapped or sold. The receipt does not list the name of a store or otherwise indicate where it originated.

{¶ 8} Detective Strawser also testified regarding his interview with Lowry. According to Detective Strawser, Lowry denied any involvement in the burglary, but admitted that he did

drive McComis's vehicle on occasion. On the day of the burglary, Lowry told Detective Strawser that McComis drove her son and him to Circleville to drop her son off at school and subsequently went to school herself. Lowry did not indicate that anyone else accessed the vehicle on August 28, 2012. At the conclusion of the interview, Lowry told Detective Strawser that he would contact him at a later date regarding any individuals he believed to be involved; however, Detective Strawser never heard from Lowry again.

{¶ 9} Finally, Detective Strawser testified that there are no neighbors near the List residence, and that the residence is located along the highway. He also testified that there were no items from which to extract DNA; that no fingerprints were taken off the Speedy Rewards receipt because List and others had touched it; and that he could not do handwriting analysis of the receipt because it did not contain enough characters to properly conduct analysis. Detective Strawser also did not locate or attempt to contact David Fitch.

{¶ 10} At the conclusion of the state's case-in-chief, Lowry moved for a Crim.R. 29 judgment of acquittal on the basis that the state had failed to prove that he was present at the scene of the burglary and theft. The trial court denied the motion and the defense rested. After closing arguments and instructions, the jury returned guilty verdicts on both counts. Sentencing was continued so that the Adult Parole Authority could complete a presentence investigation and report. Ultimately, the trial court found that Count II, the misdemeanor theft offense, merged into Count I, the burglary offense. Lowry was then sentenced to six years of incarceration on the burglary conviction. This appeal followed.

II. ASSIGNMENT OF ERROR

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

Assignment of Error:

THE TRIAL COURT ERRED WHEN IT OVERRULED THE DEFENSE MOTION UNDER CRIMINAL RULE 29(A) AT THE CLOSE OF THE PROSECUTION'S AND DEFENSE CASE IN VIEW OF THE INSUFFICIENCY OF THE PROSECUTION'S EVIDENCE.

III. LAW AND ANALYSIS

{¶ 12} Lowry contends that the trial court erred by failing to grant his Crim.R. 29 motion for acquittal. After presentation of the state's case, defense counsel moved to dismiss the case.[1] Lowry argued that no evidence was presented that placed him at the scene of the burglary. The state argued that it had presented sufficient circumstantial evidence proving that Lowry was responsible for the burglary. The trial court denied the Crim.R. 29 motion and let the charge go to the jury. On appeal, Lowry again argues that there was no direct evidence of his presence at the home and there was insufficient evidence that identified him as the perpetrator of the offense. We disagree.

{¶ 13} "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace,* 109 Ohio St.3d 255, 2006–Ohio–2417, 847 N.E.2d 386, ¶ 37. "When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt." *State v. Davis,* 4th Dist. Ross No. 12CA3336, 2013–Ohio–1504, ¶ 12, citing *State v. Thompkins,* 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *Id.* citing *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jenks,* 61 Ohio St.3d 259, 273, 574

[1] While it is unclear from the trial transcript whether Lowry sought a dismissal of both the burglary charge and theft charge under Crim.R. 29, on appeal, he only argues in support of dismissal of the burglary charge.

N.E.2d 492 (1991), superseded by constitutional amendment on other grounds. Furthermore, a reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins* at 390 (Cook, J., concurring).

{¶ 14} "Therefore, when we review a sufficiency of the evidence claim in a criminal case, we review the evidence in a light most favorable to the prosecution." *State v. Warren*, 4th Dist. Ross No. 12CA3324, 2013–Ohio–3542, ¶ 15, citing *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. Grant*, 67 Ohio St.3d 465, 477, 620 N.E.2d 50 (1993). "A reviewing court will not overturn a conviction on a sufficiency of the evidence claim unless reasonable minds could not reach the conclusion the trier of fact did." *Id.*, citing *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 749 N.E .2d 226 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E .2d 749 (2001).

{¶ 15} Lowry was convicted of burglary, in violation of R.C. 2911.12(A)(2), which reads:

> No person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure or in a separately secured or separately occupied portion of 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[.]

In essence, Lowry contends that the state failed to prove the element that he trespassed into the List home, i.e., that he was the perpetrator of the offense.

{¶ 16} Contrary to Lowry's argument, we believe that the trial transcript contains evidence from which any rational trier of fact could have found the essential elements of the

burglary proven beyond a reasonable doubt. Specifically, in regards to Lowry's actual presence in the List home, the trial court heard evidence about the Speedy Rewards receipt, dated the same day as the burglary, found in the List home. The trial court also heard testimony from Detective Strawser linking the receipt to Lowry, who was present when the transaction was completed at the Speedy store in Columbus. The trial court also heard testimony that Lowry was present in Pickaway County on the date of the incident, and had sole access to the vehicle in which stolen property from the List residence was recovered just three days after the burglary. From these facts, viewed in a light most favorable to the prosecution, we believe that a rational trier of fact could have inferred that Lowry was the perpetrator of the burglary.

{¶ 17} We further note that "direct evidence is not required to support a conviction; a fact may be proved by circumstantial evidence as well as by direct evidence." *State v. Simon*, 6th Dist. Huron No. H-04-026, 2005-Ohio-3208, ¶ 13. "In a criminal prosecution the corpus delicti may be established by circumstantial evidence where the inference of the happening of the criminal act complained of is the only probable or natural explanation of the proven facts and circumstances." *State v. Nevius*, 147 Ohio St. 263, 71 N.E.2d 258 (1947), paragraph five of the syllabus. And "[i]t has long been the law of this state that, where a burglary has been committed and property stolen as a party of the criminal act, the fact of the subsequent possession is some indication that the possessor was the taker, and therefore the doer of the whole crime." *State v. Brennan*, 85 Ohio App. 175, 177-178, 88 N.E.2d 281 (9th Dist.1949); *see also Simon* at ¶ 13 ("The logical extension of [the *Nevius*] rule supports the rationale of established Ohio law that possession of stolen goods can establish that the possessor not only stole the goods, but that he also broke and entered[2] into the place from whence the goods were stolen."). These principles,

[2] The *Simon* case dealt with a defendant accused of breaking and entering. Nonetheless, we believe the rationale of the case is applicable to the case sub judice.

coupled with the facts and circumstances of the case, provided the trial court with a sufficient basis to deny Lowry's Crim.R. 29 motion for acquittal.

{¶ 18} Finally, Lowry contends that the trial evidence could equally support the conclusion that McComis or Fitch was responsible for the burglary. However, "[w]hen the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus, 574 N.E.2d 492. Moreover, when reviewing whether a trial court properly denied a Crim.R. 29 motion, we may not weigh the evidence. *State v. Brewer*, 4th Dist. Meigs No. 11CA6, 2013-Ohio-309, ¶ 11. "Instead, the sufficiency-of-the-evidence test ' "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." ' " *Id*., quoting *State v. Smith*, 4th Dist. Pickaway No. 06CA7, 2007–Ohio–502, ¶ 34, quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Thus, determination of competing theories of the case should be decided by the trier of fact, not by a court when reviewing the sufficiency of the evidence.

IV. CONCLUSION

{¶ 19} In sum, we find that there was sufficient evidence on each element of the burglary charge, including the element of whether Lowry trespassed into the List home and was the perpetrator of the offense, to allow it to go to the jury. As such, we find the trial court did not err by denying Lowry's Crim.R. 29 motion for acquittal. We affirm the judgment of the trial court and overrule Lowry's sole assignment of error.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J.: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

By:_____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.