[Cite as *Underwood v. State*, 2009-Ohio-3960.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- SHAWN UNDERWOOD Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P.J. Hon. John W. Wise, J. Hon. Julie A. Edwards, J. Case No. 2009CA0008 O P I N I O N
CHARACTER OF PROCEEDING	Appeal from the Court of Common Pleas, Case No. 08CR00674
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 7, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MARISTA A. FLAHERTY 20 South Second Street 4th Floor Newark, OH 43055	ERIN J. MCENANEY 21 West Church Street Suite 201 Newark, OH 43055

Farmer, P.J.

{¶1} On October 6, 2008, the Licking County Grand Jury indicted appellant, Shawn Underwood, on one count of receiving stolen property in violation of R.C. 2913.51.

{¶2} On January 22, 2009, appellant requested a continuance of the jury trial scheduled for January 27, 2009. By judgment entry filed January 23, 2009, the trial court denied the request.

{¶3} A jury trial commenced on January 27, 2009. The jury found appellant guilty as charged. By judgment entry filed January 28, 2009, the trial court sentenced appellant to one year in prison.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT COMMITTED HARMFUL ERROR AND ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S REQUEST FOR A CONTINUANCE OF THE JURY TRIAL HEREIN."

II

{¶6} "THE CONVICTION OF THE DEFENDANT-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED BELOW."

I

{¶7} Appellant claims the trial court erred in denying his request for a continuance. We disagree.

{¶8} The grant or denial of a continuance rests in the trial court's sound discretion. *State v. Unger* (1981), 67 Ohio St.2d 65. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶9} In the week prior to the commencement of the trial, appellant requested a continuance in order to conduct further investigation regarding the co-defendant, Michael Haas, who was incarcerated, and to arrange for Mr. Hass's transportation from prison to the courthouse for trial. See, Motion for Continuance filed January 22, 2009. By judgment entry filed January 23, 2009, the trial court denied the motion, finding the case "was set for trial almost two months after the pretrial, giving both parties ample opportunity to conduct whatever discovery investigation or preparation necessary."

{¶10} On the morning of trial, defense counsel further explained the need for a continuance as follows:

{¶11} "In an effort to get the co-defendant here, I personally completed a subpoena of my own, took it to the jail last night, Franklin County main jail and served it on the deputy there at the window in an effort to get the co-defendant here for testimony.

{¶12} "The deputy, after about 20 minutes or so, 30 minutes, informed me that they would accept the subpoena, but that they would not transport the co-defendant for it. So, at that point I was out of ideas.

{¶13} "So, I would just like to bring that matter to the Court's attention, Your Honor, concerning the - - my perceived need to have the co-defendant here for testimony and my efforts in that regard to get him here." T. at 60-61.

{¶14} The trial court again denied the request, finding the following:

{¶15} "Well, I would indicate I suppose that, you know, the jury has been sworn. I'm not going to continue the case at this point. Today is Tuesday, January 27, 2009. The case has been set for today since October the 29th, so there's been ample opportunity to subpoena anybody necessary, and I believe probably Mr. Haas has been in the jail in Franklin County that entire time is my guess, so he's been at the same spot and the knowledge of his - - what he can testify to should have been within the knowledge of the co-defendant at all times also, so there doesn't seem to be any last-minute rush or necessity or anything like that to me. Frankly I'm not aware of any method that you can obtain his presence out of a locked facility like that at any rate and that was the reason that the continuance motion was denied." T. at 61-62.

{¶16} A proffer of Mr. Haas's testimony was not made. Appellant has not demonstrated on the record any resulting prejudice from the denial of his request.

{¶17} Upon review, we find the trial court did not abuse its discretion in denying appellant's request for a continuance.

{¶18} Assignment of Error I is denied.

II

{¶19} Appellant claims the verdict was against the manifest weight of the evidence. We disagree.

{¶20} On review for manifest weight, a reviewing court is to 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 jury 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. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶21} We note "circumstantial evidence" may be more certain, satisfying and persuasive than direct evidence. *State v. Richey,* 64 Ohio St.3d 353, 363, 1992-Ohio-44. Circumstantial evidence is to be given the same weight and deference as direct evidence. *State v. Jenks* (1991), 61 Ohio St.3d 259.

{¶22} Appellant was convicted of receiving stolen property in violation of R.C. 2913.51(A) which states, "No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense."

{¶23} Appellant argues from the undisputed facts, there is no evidence to establish that he knew the stolen automobile parts in question, a tire, a spare tire, and tire rod assembly parts, were stolen or that he assisted Mr. Haas in repairing the Haas vehicle with the stolen items.

{¶24} From our review of the record, this is a classic case of circumstantial evidence leading to one single inference that the jury was entitled to make.

{¶25} As appellant concedes, the direct evidence establishes that on September 26, 2008 at around 8:30 p.m., Joyce Haas was driving her Chevy Suburban when she struck a curb or berm. T. at 109, 112. As a result, the vehicle sustained a flat tire and tie rod assembly damage. T. at 110. Ms. Haas parked the vehicle in a Big Lots parking lot. T. at 110. Ms. Haas observed appellant and her husband pull the tire from the vehicle, and then she went home. T. at 112-113.

{¶26} While on shift later that evening, Heath Police Officer Bradley Fisher observed the vehicle parked in the Big Lots parking lot, missing a tire. T. at 87. Heath Police Patrolman Michael Banks observed the vehicle at 1:30 a.m. up on a jack with the tire off, but no one around the vehicle. T. at 98, 100. While on his way home from his shift at around 3:15 a.m., Officer Fisher observed two individuals working on the vehicle. T. at 87.

{¶27} The same evening, Heath Police Patrolman Mark Emde also observed the vehicle in the Big Lots parking lot missing a tire. T. at 150-151. When he patrolled the area again later, the vehicle was gone, but the flat tire and rim were still in the parking lot. T. at 151-152. While on patrol, Patrolman Emde had observed a similar vehicle at Heath Gemini. Patrolman Emde returned to Heath Gemini and discovered the vehicle in question had been placed up on a jack and the driver's side window had been broken out. T. at 152. This vehicle belonged to Harlan Harmon.

{¶28} Patrolman Emde located the Haas vehicle with appellant and Mr. Haas sleeping inside. T. at 155-156. They were "pretty dirty. Their hands were covered with what appeared to be grease or clothing had grease on them." T. at 156. One of the tires on the Haas vehicle did not match the other three but did match the tires on the

Harmon vehicle. T. at 154. Parts of the tie rod assembly on the Haas vehicle were different than the rest i.e, cleaner, abrasion free. T. at 160. Patrolman Emde found a spare tire from the Harmon vehicle in the Haas vehicle. T. at 156.

{¶29} On the morning of September 27, 2008, Harlan Harmon was informed that someone had broken into his Chevy Suburban parked at Heath Gemini. T. at 133-134. He observed his vehicle jacked up on a portable floor jack, the window was broken out, a tire was missing, the spare tire was missing, and the tie rod assembly had parts missing. T. at 134-135. Heath Gemini was located a quarter to a half a mile from the Big Lots parking lot. T. at 152.

{¶30} These facts lead to an inference that at a minimum, appellant assisted in the mounting of the stolen tire and tie rod assembly parts and stayed with the stolen items. We find no mistake by the jury in reaching this single inference.

{¶31} Upon review, we find the jury did not lose its way, and do not find a manifest miscarriage of justice.

{¶32} Assignment of Error II is denied.

{¶33} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Edwards, J. concur.

Sheila G. Farmer

s/ John W. Wise

s/ Julie A. Edwards

JUDGES

SGF/jbp 0723

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
SHAWN UNDERWOOD	:	
Defendant-Appellant	:	CASE NO. 2009CA0008

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio is affirmed. Costs to appellant.

Sheila G. Farmer

s/ John W. Wise

s/ Julie A. Edwards

JUDGES