[Cite as *State v. Webb*, 2015-Ohio-2287.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TEDDY A. O. WEBB

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Craig R. Baldwin, J.

Case No. CT2014-0037

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. CR2014-0147
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 10, 2015

APPEARANCES:

For Plaintiff-Appellee

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{¶1} Appellant Teddy A.O. Webb appeals his conviction and sentence entered in the Muskingum County Court of Common Pleas following a jury trial.

{¶2} Appellee is the State of Ohio.

STATEMENTS OF FACTS AND CASE

{¶3} In the late hours of February 2nd into the early hours of February 3rd of 2014, Defendant-Appellant Teddy Webb assaulted his girlfriend, Misty Smitley. (T. at 147, 150). The argument began when Appellant was going to leave with two other females who Smitley claims were drug users and prostitutes. (T. at 148). Appellant left with the women, and then returned home later that night, kicking in the door. He then began attacking Smitley. (T. at 149-150). He pulled her hair, pushed her up against a wall, hit her in the legs, bruising them, and pushed her off the bed, where she fell into a coffee or end table resulting in a black eye. (T. at 150, 189-91).

{¶4} When Smitley tried to leave the house, Appellant held her at gunpoint with a shotgun. (T. at 151-152). He fired the shotgun twice while holding her at gunpoint, with one shotgun shell striking the wall behind Smitley to her left, and the other to her right. (T. at 153, 160-161). As far as Smitley could recall Appellant then left the house, and she went to the nearby gas station and called the police. (T. at 155).

{¶5} After responding to Smitley's call, Patrolman Harris searched and secured the house. (T. at 192). He found the shotgun underneath a dresser in Smitley's room and secured it. (T. at 192-93).

{¶6} Appellant had prior domestic violence convictions and a weapon under disability conviction. He was charged with Having a Weapon while Under Disability, a

felony of the third degree, Receiving Stolen Property (firearm), a felony of the fourth degree, and Domestic Violence - with prior offense, a felony of the fourth degree.

{¶7} On July 29, 2014, a jury trial commenced in this matter. The morning after the first day of trial, a group of letters written to Appellant by Smitley while he was in jail were brought to the trial court's attention. Appellant claimed that at least one of these letters contained exculpatory evidence, however, but his defense counsel stated that he had not read through all of the letters. (T. at 283). Counsel did state that he read through some of the letters and determined that they were "chitchat" and not legally relevant to the case. *Id*. The trial court deemed it necessary to delay the trial for one day, sent the jury home, and ordered counsel to read through all the letters and present any he thought were relevant to the trial to the prosecutor. (T. at 297). No letters were presented or introduced into evidence.

{¶8} During the trial, Smitley testified that she still loves Defendant, and is going to be his wife. (T. at 174). She also stated that she wanted to recant her original story. (T. at 175).

{¶9} Counsel asked: "Isn't it true that one definition of recant is what I said earlier isn't true?" and Smitley responded: "I - I guess so. I didn't look at it necessarily that way. I just wanted to take it back. I wished that none of this never even happened." (T. at 177).

{¶10} The State followed up on redirect examination:

Q: [W]hat does recant mean to you?

A: Just take it back.

Q: Okay. Does take it back mean it didn't happen?

A: No.

Q: When you say you want to recant, you want to go back and not make the phone call?

A: I want to not make a statement *** a phone call. I don't want to go to the grand jury and I don't want to be here

Q: Does the fact that you don't want to do any of those things, does that mean that none of this happened?

A: No.

Q: Did all of this happen?

A: Yes.

Q: When I met with you and talked to you about your testimony what did I explain to you was required of you when you testified?

A: Just to tell the truth.

Q: Is that what you're doing?

A: Yes. (Tr. at 183-84, Vol. I).

{¶11} Also, during the trial a forensic expert testified about the DNA involved with the shotgun and shotgun shells. He testified that DNA could have gotten from the bed onto the shotgun, but also stated that he could not exclude Defendant's DNA from being present on the shotgun's handled areas. (T. at 245, 254, 261-262)

{¶12} Appellant took the stand and testified on his own behalf. He admitted that he has a criminal history, particularly involving firearms. He further stated that he has street-smarts and is able to obtain firearms from off the street even though he is unable to purchase them from a licensed dealer. (T. at 343-345). He also acknowledged that

people on the streets obtain firearms by stealing them. (T. at 354). However, with regard to the charges against him, Appellant denied assaulting Smitley, knowing about the gun, using the gun, shooting the gun, possessing the gun, or stealing the gun. (T. at 329-331, 341).

{¶13} Following deliberations, the jury found Appellant guilty on all three charges and he was sentenced to forty-one (41) months in prison.

{¶14} Appellant now appeals, setting forth the following assignments of error:

{¶15} "I. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

{¶16} "II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR ACQUITTAL.

{¶17} "III. APPELLANT'S CONVICTION FOR RECEIVING STOLEN PROPERTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I.

{¶18} In his First Assignment of Error, Appellant argues he was denied the effective assistance of counsel. We disagree.

{¶19} To demonstrate ineffective assistance of counsel, appellant must establish the following as set forth in *State v. Bradley,* 42 Ohio St.3d 136 (1989), paragraphs two and three of the syllabus:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2

O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

{¶20} In the case *sub judice*, Appellant argues that his trial counsel was ineffective because he failed to review, prior to trial, approximately one hundred (100) pages of correspondence from Misty Smitley to Appellant, of which Appellant claims one letter contained exculpatory evidence. (T. at 283).

{¶21} Counsel admittedly only reviewed a few of the letters prior to the commencement of the trial, finding them to contain merely what he referred to as “chit-chat”. (T. at 283). Counsel only reviewed the bulk of the letters after the trial court ordered a one day recess to allow for same. This review occurred after Smitley had already testified and been cross-examined.

{¶22} Upon review, we find that while counsel’s performance in failing to read all of the letters may arguably have been deficient, we find that Appellant has failed to show prejudice or that the result of the trial would have been different. Even after examining all of the letters, counsel did not introduce any of the letters into evidence, nor did he recall Misty Smitley with regard to same.

{¶23} Smitley testified during the trial that she regretted calling the police and that she loved Appellant and planned to marry him. She stated that while she wished

that she had not reported Appellant to the police, her statements to the police were true and that she was being honest and truthful in her testimony to the jury.

{¶24} Further, Appellant argues that such letters could have been used to challenge Smitley's credibility. Appellant, however, fails to direct this Court's attention to any specific letter or any statements contained therein and further fails to explain how the letters would undermine Smitley's credibility. Instead, Appellant makes only vague assertions that counsel's "failure to introduce the contents of these letter [sic] prejudiced Mr. Webb."

{¶25} Based on the foregoing, this Court finds no evidence that counsel's late review of the voluminous correspondence in this matter had any effect on the outcome of the trial.

{¶26} We find Appellant's First Assignment of Error not well-taken and overrule same.

II., III.

{¶27} In his Second and Third Assignments of Error, Appellant argues, as to the charge of receiving stolen property, the trial court erred in denying his motion for acquittal and that his conviction was against the manifest weight of the evidence. We disagree.

{¶28} An appellate court reviews a denial of a Crim.R. 29 motion for acquittal using the same standard used to review a sufficiency of the evidence claim. *See State v. Carter* (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 1995–Ohio–104. Thus, "[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." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶29} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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 overturned and a new trial ordered." *State v. Thompkins,* supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶30} Appellant was convicted of receiving stolen property, in violation of R.C. §2913.51(A), which reads:

{¶31} "(A) 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."

{¶32} Appellant argues the State failed to prove the "knowingly" element of the offense.

{¶33} R.C. §2901.22 defines "knowingly" as follows:

{¶34} "(B) 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. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶35} The evidence presented at trial included the testimony of Patrolman Harris who stated that he found the shotgun in Appellant and Smitley's room, beneath a dresser; Smitley's testimony that she did not know where the shotgun came from and that she was not the person who brought it into their home; Appellant's own testimony that he was "street-smart" and knew how to obtain a weapon off the street and that such weapons were usually stolen.

{¶36} Appellant testified that he was innocent and that events as testified to by Ms. Smitley never happened.

{¶37} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig,* 10th Dist. Franklin No. 99AP–739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens,* 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). Indeed, the jury need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* 10th Dist. Franklin No. 02AP–604, 2003–Ohio–958, ¶ 21, *citing State v. Antill,* 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke,* 10th Dist. Franklin No. 02AP–1238, 2003–Ohio–2889, *citing State v. Caldwell,* 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist.1992).

{¶38} Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks,* supra. If the state relies on circumstantial evidence to prove an essential

element of an offense, it is not necessary for "such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *State v. Jenks,* 61 Ohio St.3d 259, 272, 574 N.E.2d 492(1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith, 80 Ohio St.3d 89, 684 N.E.2d 668(1997).* "Circumstantial evidence and direct evidence inherently possess the same probative value [.]" *Jenks,* 61 Ohio St.3d at paragraph one of the syllabus. Furthermore, "[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." *Jenks,* 61 Ohio St.3d at 272, 574 N.E.2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott,* 51 Ohio St.3d 160, 168, 555 N.E.2d 293(1990), citing *Hurt v. Charles J. Rogers Transp. Co.,* 164 Ohio St. 329, 331, 130 N.E.2d 820(1955). Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott,* 51 Ohio St.3d at 168, 555 N.E.2d 293, citing *Hurt,* 164 Ohio St. at 331, 130 N.E.2d 820.

{¶39} A fundamental premise of our criminal trial system is that "the jury is the lie detector." *United States v. Barnard,* 490 F.2d 907, 912 (9th Cir.1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men." *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76, 88, 11 S.Ct. 720, 724–725, 35 L.Ed. 371

(1891). *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266–1267(1997).

{¶40} We find that this is not an " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins,* 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *Martin,* 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury neither lost their way nor created a miscarriage of justice in convicting Appellant of receiving stolen property.

{¶41} Based upon the foregoing and the entire record in this matter, we find Appellant's conviction was not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury as a trier of fact can reach different conclusions concerning the credibility of the testimony of the witnesses. This Court will not disturb the jury's finding so long as competent evidence was present to support it. *State v. Walker,* 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The jury heard the witnesses, evaluated the evidence, and was convinced of his guilt.

{¶42} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of receiving stolen property as charged beyond a reasonable doubt.

{¶43} Appellant's Second and Third Assignments of Error are overruled.

{¶44} For the foregoing reasons, the decision of the Court of Common Pleas of Muskingum County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Baldwin, J., concur.

JWW/d 0602