

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Timothy Earl Hightower

Appellant

Court of Appeals Nos. L-11-1138

L-11-1139

L-11-1140

L-11-1141

L-11-1142

L-11-1143

Trial Court Nos. CR0201101186

CR0201101569

CR0201101650

CR0201103217

CR0201103123

CR0201103273

DECISION AND JUDGMENT

Decided: December 31, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael J. Loisel, Assistant Prosecuting Attorney, for appellee.

Nicole I. Khoury, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Timothy Hightower, brings this consolidated appeal from judgments of the Lucas County Court of Common Pleas, following a jury trial, which found him guilty of numerous felonies stemming from four separate incidents, and sentenced him to a total of ten years in prison. We affirm.

A. Facts and Procedural Background

{¶ 2} The Lucas County Grand Jury indicted appellant on six separate occasions, charging him with eight felonies stemming from his conduct in four separate incidents. Testimony from the four-day trial reveals the following regarding those incidents.

{¶ 3} On October 28, 2010, Toledo patrol officer Jeff Jackson observed who he was “absolutely sure” was appellant preparing to drive away from a gas station. Knowing that appellant had a suspended license, Jackson followed the car for a short distance in his marked police cruiser. While stopped at a nearby intersection, and with backup arriving, Jackson attempted to initiate a stop by turning on his emergency lights. The car Jackson was following suddenly accelerated, attempting to elude the police. Jackson followed. Jackson testified that during the chase, he observed the car run through two stop signs and three yield signs. The car made a sharp left turn into an apartment complex and went up onto the grass and sidewalk. Jackson, who was trailing further behind because he “[did not] want to kill anyone chasing another car,” found the

vehicle stopped against an apartment building. The engine was running, and the car was still in drive. The occupants of the vehicle were not located.

{¶ 4} A search of the car revealed a bank receipt and a health plan card with appellant's name on them. Appellant's fingerprints were also found on the car. Inside the trunk, officers found three bags of clothing, which were later determined to have been stolen from Hot Kicks. From this incident, appellant was charged with failure to comply, a felony of the third degree¹, and receiving stolen property, a felony of the fourth degree.

{¶ 5} The second and fourth incidents were break-ins. The second incident occurred on November 5, 2010, at Virtual PC, and the fourth incident occurred on December 3, 2010, at Navarre Carryout. Both involved appellant smashing the front window, climbing through the opening, and stealing product off the shelves. Surveillance videos of both break-ins were entered into evidence. From these incidents, appellant was charged with two counts of breaking and entering, and one count of theft, all felonies of the fifth degree.

{¶ 6} The third incident was also a break-in, this time at Elder Beerman on November 6, 2010. At approximately 5:45 a.m., appellant smashed the glass of one of the west entrance doors, climbed through the opening, went to the center of the store, and smashed a jewelry case, stealing its contents. No one was present in the store at the time.

¹ The original indictment charged appellant under R.C. 2921.331(B) and (C)(5)(a)(i), which requires that the offender was a proximate cause of serious physical harm to persons or property. Appellant was later indicted under R.C. 2921.331(B) and (C)(5)(a)(ii), which requires that the offender caused a *substantial risk* of serious physical harm to persons or property. The charge in the original indictment was dismissed.

However, the state entered as evidence daily work logs and alarm reports that showed it was common for a worker to be present at the store beginning at or shortly before 5:00 a.m. From this incident, appellant was charged with burglary, a felony of the second degree, breaking and entering, a felony of the fifth degree, and grand theft, a felony of the fourth degree.

{¶ 7} After the conclusion of the evidence, presentation of closing arguments, and reading of the jury instructions, the jury retired to deliberate. Two hours later, they returned a verdict of guilty as to all counts. Subsequently, the trial court held a sentencing hearing, and sentenced appellant to a total prison term of ten years.²

B. Assignments of Error

{¶ 8} Appellant now timely appeals, setting forth two assignments of error:

1. The Trial Court erred by denying the Defendant's Motion for Relief from Prejudicial Joinder and by allowing the use of evidence of other acts.
2. Mr. Hightower' [sic] conviction was not supported by Sufficiently Credible Evidence and was against the Manifest Weight of the Evidence.

² Regarding the incident at Elder Beerman, the trial court merged the breaking and entering count with the burglary count for purposes of sentencing.

II. Analysis

{¶ 9} In his first assignment of error, appellant argues that having one trial for four separate incidents with eight different counts is prejudicial because of the cumulative effect of the evidence on the jury. Appellant also separately argues that the trial court erred by admitting evidence of prior bad acts that it found tended to prove a “common plan or scheme.” We will address these arguments in turn.

A. The Trial Court Did Not Abuse its Discretion When it Denied Appellant’s Motion for Relief From Prejudicial Joinder

{¶ 10} Crim.R. 14 provides, “If it appears that a defendant or the state is prejudiced by * * * joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, * * * or provide such other relief as justice requires.” Notably, the defendant bears the burden of “affirmatively showing that his rights were prejudiced,” and that “the [trial] court abused its discretion in refusing to separate the charges for trial.” *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981), syllabus.

{¶ 11} A defendant’s claim of prejudicial joinder can be negated in two ways: (1) if evidence from one offense would be admissible for the other under Evid.R. 404(B), or (2) if the evidence of each crime joined at trial is simple and direct. *State v. Coley*, 93 Ohio St.3d 253, 259-260, 754 N.E.2d 1129 (2001), citing *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990).

{¶ 12} In this case, the trial court denied the motion for relief from prejudicial joinder, finding both that the evidence in the cases is simple and direct, and that the evidence in each case would be admissible as other acts evidence under Evid.R. 404(B).

{¶ 13} Appellant argues that the trial court abused its discretion in denying his motion because the evidence from the second, third, and fourth incidents, all of which involved theft and breaking and entering, would not be admissible in a trial for failure to comply based on the first incident. The state, on the other hand, argues that the evidence would be admissible under Evid.R. 404(B). Additionally, it argues that the trial court did not abuse its discretion because the evidence is simple and direct, and not likely to confuse the jury. We agree with the state's latter argument, and therefore do not need to reach the former.

{¶ 14} Here, the evidence of each crime was simple and direct. There was no overlapping of witnesses or exhibits for each of the incidents. Thus, the jury was not likely to be confused as to which evidence was admitted to prove which crime. Therefore, we hold that the trial court did not abuse its discretion in denying appellant's motion for relief from prejudicial joinder.

B. The Trial Court Did Not Err in Admitting Other Acts Evidence

{¶ 15} Appellant also argues that the trial court erred in admitting the testimony of Toledo Police Detective Timothy Kaminski as other acts evidence under Evid.R. 404(B).³

³ Evid.R. 404(B) provides,

{¶ 16} “The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.” *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). Thus, we apply an abuse of discretion standard. *See id.* A trial court abuses its discretion when its attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). “A review under the abuse-of-discretion standard is a deferential review. It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court’s reasoning process than by the countervailing arguments.” *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14.

{¶ 17} “Evidence of other acts is admissible if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994).

{¶ 18} Here, Kaminski testified to several break-ins that occurred in 2009 where the perpetrator smashed the window to the establishment, crawled through the resulting hole, stole merchandise, and then exited through the same hole. The trial court admitted

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

this evidence, finding that it tended to prove appellant's identity for purposes of the current charges because they all involved a common scheme or plan.

{¶ 19} Appellant argues that the evidence should not have been admitted because it did not include substantial proof that the alleged other acts were committed by appellant. We disagree. Appellant was tied to these other break-ins through Kaminski's testimony that appellant's fingerprints were found at the scene, that he was depicted on video surveillance of the break-ins, and that the stolen merchandise was found in his or his family's possession. In addition, photographs from a surveillance camera, which showed appellant breaking into one of the stores in 2009, was entered into evidence. Thus, substantial proof existed that appellant committed the other acts. Therefore, because the evidence of appellant's other acts was entered to prove his identity in the current crimes, we cannot say the trial court abused its discretion in allowing Kaminski's testimony under Evid.R. 404(B).

{¶ 20} Accordingly, because we hold the trial court did not abuse its discretion in denying appellant's motion for relief from prejudicial joinder, or in allowing Kaminski's other acts testimony, appellant's first assignment of error is without merit.

**C. Appellant's Conviction Was Not Based on Insufficient Evidence
or Against the Manifest Weight of the Evidence**

{¶ 21} In his second assignment of error, appellant challenges the jury's finding of guilt on the charges of failure to comply and burglary as being based on insufficient evidence, and against the manifest weight of the evidence.

{¶ 22} Insufficiency and manifest weight are distinct legal theories. “In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). “The 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 23} In contrast, when reviewing a manifest weight claim,

The court, 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 reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, quoting *Thompkins* at 387.

1. Failure to Comply

{¶ 24} Stemming from the October 28, 2010 car chase incident, appellant was charged with failure to comply with the order or signal of a police officer. Appellant argues that the state failed to prove beyond a reasonable doubt that “[t]he operation of the

motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.” R.C. 2921.331(C)(5)(a)(ii). In support of his argument, appellant points to the fact that there was no testimony that appellant’s driving caused any damage to persons or property. However, the relevant inquiry is not whether serious physical harm was done, but rather whether appellant’s operation of the motor vehicle caused a *substantial risk* of serious physical harm.

{¶ 25} Here, the record is replete with evidence that appellant caused a substantial risk of serious physical harm. Jackson testified that appellant accelerated at a high rate of speed, ran two stop signs and three yield signs, and drove over the curb and onto the sidewalk. Further, Jackson testified that the car was found crashed against an apartment building with the engine still running and in drive. From this, we conclude that sufficient evidence exists to prove that appellant’s operation of the motor vehicle caused a substantial risk of serious physical harm to persons or property. Moreover, we also conclude the jury did not lose its way in so finding. Therefore, appellant’s conviction for failure to comply is not based on insufficient evidence, nor is it against the manifest weight of the evidence.

2. *Burglary*

{¶ 26} Appellant next argues that the state failed to prove all the necessary elements for the charge of burglary stemming from the incident at Elder Beerman. Specifically, appellant contends that at the time of the break-in, Elder Beerman was not

an “occupied structure.”⁴ R.C. 2909.01(C) defines “occupied structure” as “any house, building, * * * or any portion thereof, to which any of the following applies: * * * (4) At the time, any person is present or likely to be present in it.”

{¶ 27} Appellant contends that the undisputed evidence at trial was that Elder Beerman was unoccupied at the time of the break-in at 5:45 a.m. The state concedes this point, but notes that it introduced evidence of employees’ work schedules that showed that more than 60 percent of the time during a three-month period surrounding the date of the burglary, an employee was in the store at 5:45 a.m. The state argues that based on this evidence, a reasonable juror could conclude that a person was “likely to be present” in Elder Beerman, thereby satisfying the definition of “occupied structure.” We agree, and hold that the jury’s finding of guilt on the burglary charge was not based on insufficient evidence.

{¶ 28} As it relates to manifest weight, appellant argues that of the dates an employee was present at 5:45 a.m., none of them were on a Saturday—the day of the week the break-in occurred—excluding the Saturdays close to the holiday shopping season. Thus, appellant concludes there is no reason to believe that anyone likely would have been present at the time of the break-in. We think that, while the evidence could support this conclusion, the evidence could also equally support the conclusion that a person was likely to be present in Elder Beerman at the time of the break-in. Therefore,

⁴ R.C. 2911.12 defines the offense of burglary as “(A) No person, by force, stealth, or deception, shall do any of the following: * * * (3) Trespass in an occupied structure * * * with purpose to commit in the structure * * * any criminal offense.”

we cannot say that the jury clearly lost its way in finding that Elder Beerman was an occupied structure. Accordingly, appellant's conviction for burglary is not against the manifest weight of the evidence.

{¶ 29} Having found that appellant's convictions for failure to comply and burglary are supported by sufficient evidence, and are not against the manifest weight of the evidence, appellant's second assignment of error is not well-taken.

III. Conclusion

{¶ 30} For the foregoing reasons, the judgments of the Lucas County Court of Common Pleas are affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgments affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
