

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

State of Ohio

Court of Appeals No. F-12-009

Appellee

Trial Court No. 11CR65

v.

Gary L. Merritt

**DECISION AND JUDGMENT**

Appellant

Decided: November 1, 2013

\* \* \* \* \*

Scott A. Haselman, Fulton County Prosecuting Attorney, and  
Paul H. Kennedy, Assistant Prosecuting Attorney, for appellee.

Chad D. Huber, for appellant.

\* \* \* \* \*

**YARBROUGH, J.**

**I. Introduction**

{¶ 1} Appellant, Gary Merritt, appeals the judgment of the Fulton County Court of Common Pleas, convicting him of breaking and entering, possessing criminal tools, and theft, and sentencing him to eleven months in prison. We affirm.

## **A. Facts and Procedural Background**

{¶ 2} The facts relevant to this appeal are undisputed. On the evening of September 23, 2010, multiple individuals entered the property of K&G Auto, a business located in Fulton County, Ohio, and removed numerous catalytic converters and other pieces of property without K&G's consent. Because various pieces of property were found missing earlier in the day, two K&G employees remained on the premises after the business closed for the day in order to keep watch over the remaining property. At some point during the night, the employees noticed a shadow moving and heard the sound of rustling nearby. They ultimately noticed two individuals moving and gave chase. One of the perpetrators, William Duncan, was caught and later arrested. However, the remaining individual escaped into the dark without being identified. A police investigation began immediately to determine the identity of the second individual.

{¶ 3} During the investigation, the police gathered DNA and fingerprint information from the automobiles that had been stripped of their catalytic converters. The police were able to distinguish those vehicles affected by the incident from those that were not affected by noticing that the thieves placed a rock on the vehicles after the catalytic converters were stripped. In addition, the police recovered a tool bag found on the property that contained tools used to commit the crimes. Inside the bag was a sweating water bottle containing cold water. The water bottle was tested and found to contain at least two sources of DNA. Upon further testing, the police were able to ascertain that Merritt was one of the sources of DNA found on the bottle. Merritt's DNA was not found anywhere else on the property.

{¶ 4} Based on the DNA test results, Merritt was indicted on June 21, 2011. He was charged with one count of breaking and entering in violation of R.C. 2911.13(B), one count of possessing criminal tools in violation of R.C. 2923.24(A), and one count of theft in violation of R.C. 2913.02(A)(1), each felonies of the fifth degree. In addition, Merritt was charged with one count of attempted theft in violation of R.C. 2923.02(A) and 2913.02(A)(1), a misdemeanor of the first degree. A bench trial ensued, after which Merritt was found guilty of all the charges. The trial court determined that the theft offenses were allied offenses of similar import and Merritt was sentenced on the felony counts to eleven months in prison for each count, to be served concurrently.

{¶ 5} Merritt's timely appeal followed.

### **B. Assignment of Error**

{¶ 6} On appeal, Merritt raises the following assignment of error:

A. THE TRIAL COURT ERRED, DEPRIVING APPELLANT OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN IT DENIED APPELLANT'S CRIM.R. 29 MOTION FOR JUDGMENT OF ACQUITTAL WHEN THE WEIGHT AND SUFFICIENCY OF THE EVIDENCE DID NOT SUPPORT CONVICTIONS ON THE COUNTS ALLEGED.

### **II. Analysis**

{¶ 7} In his sole assignment of error, Merritt argues that the trial court erroneously denied his Crim.R. 29 motion for judgment of acquittal. Within his appellate brief, he

contends that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence.

{¶ 8} We review a ruling on a Crim.R. 29(A) motion under the same standard used to determine whether the evidence was sufficient to sustain a conviction. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 40. Under the sufficiency standard, we must determine whether the evidence admitted at trial, “if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. 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, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.E.2d 560 (1979); *see also State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Therefore, “[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact.” *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997), citing *Jenks* at paragraph two of the syllabus.

{¶ 9} In the case sub judice, Merritt acknowledges that the state introduced sufficient evidence to establish each of the elements of the crimes charged. While he acknowledges that the state introduced sufficient evidence to establish that *somebody* committed the offenses charged in the indictment, he argues that the state failed to establish that he was the person responsible for such offenses. Thus, the issue we must

resolve is whether the DNA evidence found on the water bottle is sufficient to establish Merritt as the perpetrator of the crimes.

{¶ 10} In order to establish identity, the state introduced the report of Julie Cox, a forensic scientist at the Bureau of Criminal Investigations. In her report, Cox concluded that Merritt was the “major contributor” of DNA found on the lip of the water bottle recovered at the crime scene. In addition to Cox’s DNA, the water bottle also contained DNA from at least one more unknown individual.

{¶ 11} When construing the evidence in a light most favorable to the prosecution, we hold that the DNA evidence is sufficient to establish that Merritt was the perpetrator of the charged crimes. Indeed, the presence of Merritt’s DNA on the bottle establishes that he used the bottle, which was recovered at the scene of the crime within the bag of criminal tools. Thus, the trial court did not err when it denied Merritt’s Crim.R. 29 motion for acquittal.

{¶ 12} Accordingly, Merritt’s sole assignment of error is not well-taken.

### **III. Conclusion**

{¶ 13} For the foregoing reasons, the judgment of the Fulton County Court of Common Pleas is affirmed. Costs of this appeal are assessed to Merritt pursuant to App.R. 24.

Judgment affirmed.

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

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

JUDGE

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>.