[Cite as *State v. Johnson*, 2014-Ohio-1305.]

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

State of Ohio — Court of Appeals No. F-13-005

Appellee — Trial Court No. 13CR09

v.

Robert E. Johnson, III — **DECISION AND JUDGMENT**

Appellant — Decided: March 28, 2014

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney,
for appellee.

Shawn M. Jones, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Fulton County Court of Common Pleas following a trial to the bench. Appellant, Robert Johnson, III, challenges his

conviction for two counts of burglary and one count of grand theft. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} On January 23, 2013, at around 2:30 a.m., Gary Rosales awoke to an intruder on the upstairs level of his home. Rosales, who was on the first floor, called the police and informed them of the break-in. Rosales then heard the intruder trip over, or otherwise activate, one of his children's toys. Upon making the noise, the intruder fled downstairs and out of the back door. Rosales testified that he noticed a strong odor of cigarette smoke as the intruder ran out of the house and that no one who lived there was a smoker. Rosales would later discover that the intruder had taken a pair of UFC fighting gloves and $100 from his son's bedroom. The $100 was in his son's wallet, which Rosales originally believed was stolen. However, Rosales found the empty wallet discarded in a different place from where it was in his son's room.

{¶ 3} The Archbold police arrived after the intruder had fled the scene. As they were examining the house, the police noticed a set of footprints in the snow, which led away from the back door. A canine unit from the Fulton County Sheriff's Department was then requested to conduct a track of those footprints. The dog located a scent, and followed the trail. The officers noticed that the same set of footprints, which left a unique tread pattern in the snow, corresponded to the scent trail that the dog was following. Along the trail, the officers found the two UFC fighting gloves, and a small red notebook.

The officers surmised that the items had been discarded recently because they did not have any snow or frost covering them.

{¶ 4} The dog eventually led the officers to Building 7 of the East Garden Apartments. As the officers arrived at the building, the tenant of apartment 708 was coming downstairs to walk her dog. The officers asked her who just went into her apartment, and she replied, "Bobby." Shortly thereafter, appellant came downstairs and was stopped by the police. At that point, appellant was not wearing any shoes, and the bottom six inches of his pants were cold and wet. Appellant explained the condition of his pants by stating that he fell in the snow, however the officers observed that no other portion of his clothing appeared wet.

{¶ 5} Appellant was detained downstairs while an officer went up to apartment 708. Inside the apartment, several of appellant's friends were having a party, and had been smoking and drinking. The officer testified that when asked as a group, they responded that appellant had been with them the entire night, but when asked individually, appellant's friends stated that he had left the party for one to two hours. At the trial, appellant's friends testified that he had left the party several times that night, and had just returned from being gone for over an hour when the police arrived.

{¶ 6} The officer then asked for, and was granted, permission from the apartment tenant to search the apartment for shoes. During his search, the officer found a pair of white Nike tennis shoes whose soles matched the imprints in the snow. The officer left

the shoes in the apartment, and returned downstairs to ask appellant if he would voluntarily accompany them to the station to answer a few questions. Appellant agreed and went upstairs to get his shoes. He left the apartment wearing the white Nike shoes.

{¶ 7} As he was leaving, the officer informed appellant that he was going to conduct a pat-down, "Terry search," to determine if appellant had any weapons on him. Appellant then immediately emptied the contents of his pockets into one of his friend's hands. Included in the contents was a single .22 caliber hollow-point bullet, manufactured by SuperX. Appellant's friends later stated that they had seen a handful of similar bullets in their toilet after appellant left with the police, but that they had flushed them down the drain.

{¶ 8} Appellant was escorted to the police station, where he was arrested after refusing to speak with an investigator. Later in the morning on January 23, 2013, the tenants of apartment 708 contacted the police to have them pick up appellant's belongings that were still at the apartment. One of the items picked up was appellant's wallet. At the police station, an inventory of the contents of the wallet revealed several gift cards and store rewards cards to businesses such as Sally's Beauty, Christopher Banks, Books-A-Million, Scrap Booking Corner, and Coldwater Creek.

{¶ 9} On February 11, 2013, the Fulton County Grand Jury handed down a three-count indictment against appellant. Appellant entered a plea of not guilty. Thereafter, appellant moved to suppress any evidence seized after he was arrested. Appellant argued

that his warrantless arrest violated his constitutional right against unreasonable searches and seizures. The trial court held a hearing on the motion, at which the lead investigating officer, Patrolman Schroeder, testified to the events leading up to the arrest. Based on Schroeder's testimony, the trial court found that probable cause existed for appellant's arrest, and therefore denied his motion. The matter then proceeded to a bench trial on all three counts.

{¶ 10} In the first count, appellant was charged with grand theft in violation of R.C. 2913.02(A)(1), a felony of the third degree, for taking a firearm from Marvin Wyse. Wyse, who enjoys trapping animals, testified that he sometimes kept his gun in his truck with a box of ammunition and his little red notebook, in which his wife recorded where he placed his traps. Wyse remembered that sometime after the start of trapping season, he went to a neighbor's house to shoot a raccoon that had gotten into the barn. The next time Wyse went to use his gun, however, he could not find it. Wyse testified that his gun probably came up missing around November or December 2012. Notably, appellant was in prison until December 2, 2012. On January 23, 2013, Wyse reported his missing gun to the police, after he was contacted regarding his little red notebook, which was the same one found along appellant's path from Rosales's home. Finally, Wyse testified that he used ammunition similar to that found on appellant, although he also used ammunition manufactured by Federal.

{¶ 11} In the second count, appellant was charged with burglary for breaking into the home of Pamela Short. Short testified that she had her purse with her when she returned home on Friday, January 18, 2013. She further testified that she did not leave her house until Sunday, January 20, 2013, at which point she discovered that her purse was missing. Later, on Sunday, a neighbor found her billfold on the sidewalk a block and a half away. The credit cards and driver's license were still in the billfold, but Short's money, reward cards, and checks were missing. At the trial, Short testified that the reward cards found in appellant's wallet were to stores where she frequently shopped, and would have been rewards cards that she had. However, Short was unable to definitively identify those cards as her own based on her visual observation of them.

{¶ 12} Finally, in the third count, appellant was charged with burglary for breaking into Rosales's home. Rosales, the responding officers, and appellant's friends at the party testified to the events described above. In addition, appellant's prison-mate, Scott Torok, testified that appellant admitted to him that he broke into a woman's house and stole her purse, and broke into another house and stole one hundred dollars out of a wallet in an upstairs bedroom before he tripped over something that woke the homeowner up. However, a different prison-mate, Juan Gonzales, testified that Torok had read appellant's police reports and fabricated appellant's admission so that Torok could offer to testify against appellant in exchange for an earlier release.

{¶ 13} Following the presentation of the evidence and arguments of counsel, the trial court found appellant guilty of all three crimes charged. The trial court sentenced appellant to 16 months in prison on the count of grand theft, to run concurrently to two consecutive five-year terms on the counts of burglary, for a total prison term of 10 years.

B. Assignments of Error

{¶ 14} Appellant has timely appealed his conviction, asserting two assignments of error:

> I. The trial court erred by finding that police had probable cause to arrest appellant.
>
> II. The trial court erred in convicting appellant where appellee failed to prove each element of the alleged crimes beyond a reasonable doubt.

II. Analysis

A. Probable Cause

{¶ 15} In his first assignment of error, appellant argues that the trial court erred when it found that probable cause existed to arrest him, and as a result overruled his motion to suppress. The state, on the other hand, argues that probable cause did exist. Further, it argues that appellant has not identified what evidence he wishes to be suppressed. Further still, the state argues that none of the evidence was obtained as the result of an illegal arrest or search in that the evidence was either discarded, found pursuant to a consent search, voluntarily relinquished by appellant, or found during an

inventory search. However, we need not address the state's latter arguments because we agree that probable cause existed to arrest appellant.

{¶ 16} "An appellate court's review of a ruling on a motion to suppress evidence presents a mixed question of law and fact." *State v. Graves*, 173 Ohio App.3d 526, 2007-Ohio-4904, 879 N.E.2d 239, ¶ 8 (6th Dist.). "[A]n appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.* "An appellate court must then independently determine without deference to the trial court's legal conclusions whether, as a matter of law, evidence should be suppressed." *Id.*

{¶ 17} Probable cause to conduct a warrantless arrest turns upon whether, at the moment of arrest, "the facts and circumstances within [the] knowledge [of the police] and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

{¶ 18} Here, assuming for the purposes of our analysis that appellant was arrested while he was at the apartment,[1] we find that the police had sufficient facts, at the time of the arrest, to believe that appellant had committed an offense. Rosales called the police because an intruder was in his home. The police arrived and found the backdoor unlocked and ajar, with footsteps leading away from the house. A canine unit tracked a scent trail to the apartment building appellant was in. Along the way, the officers

[1] The state argues that appellant voluntarily came to the station and was not arrested until after he refused to speak with the investigator.

observed a single, unique set of footprints corresponding to the scent trail. In addition, they observed items that were recently discarded along the same path, although they did not know at the time what had been stolen from Rosales's home. Upon arrival at the apartment, the police noticed that the bottom six inches of appellant's pants were cold and wet, indicating that he had recently been outside in the snow. Finally, appellant's shoes were the only pair in the apartment that matched the pattern in the footprints leading from Rosales's home. Based upon this information, we hold that the trial court did not err when it found that the police had probable cause to arrest appellant, and therefore it did not err when it denied appellant's motion to suppress.

{¶ 19} Accordingly, appellant's first assignment of error is not well-taken.

B. Sufficiency and Manifest Weight

{¶ 20} In his second assignment of error, appellant argues that his convictions are based on insufficient evidence, and are against the manifest weight of the evidence.

{¶ 21} 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.

{¶ 22} 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.

{¶ 23} Here, appellant makes separate arguments for each conviction, which we will address in turn.

{¶ 24} In the first count, appellant was convicted of grand theft in violation of R.C. 2913.02(A)(1), which states, "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) Without the consent of the owner or person authorized to give consent." "If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft." R.C. 2913.02(B)(4).

{¶ 25} Appellant argues that the victim testified that the gun was stolen in November 2012. Thus, because appellant was not released from prison until

December 2, 2012, he could not have stolen the gun. Further, appellant argues that the gun was never found, and the state failed to present any documentation that the gun ever existed. Finally, appellant notes that one of the tenants of apartment 708 had recently been convicted for breaking into homes in the same town where the gun was allegedly stolen, and coincidentally, she is the person who found more bullets in the toilet. We are not persuaded by appellant's arguments.

{¶ 26} Here, Wyse testified that the gun was stolen sometime around November or December 2012, which would not have excluded appellant as the perpetrator. In addition, although the gun was never found, Wyse testified that it was kept in his truck with his ammunition and little red notebook. The little red notebook was found, in a different town than from where it was taken, alongside footprints matching appellant's shoes. Moreover, a bullet matching the type used by Wyse was found in appellant's pocket. Based on this evidence, we hold that a rational trier of fact could have found that the essential elements of grand theft were proven beyond a reasonable doubt. Furthermore, we do not find this to be the exceptional case where the trier of fact lost his way and created a manifest miscarriage of justice. Thus, we hold that appellant's conviction on this count is not based on insufficient evidence and is not against the manifest weight of the evidence.

{¶ 27} In the second count, appellant was charged with burglary in violation of R.C. 2911.12(A)(1), which states, "No person, by force, stealth, or deception, shall do

any of the following: (1) Trespass in an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense."

{¶ 28} Appellant argues that no one ever saw him enter or exit Short's house. In addition, appellant argues that the state failed to prove that the purse was in the home, or that Short was in the home at the time of the alleged intrusion. Appellant also notes that his wallet was in the possession of the apartment tenants for several hours after he was arrested, thereby implying that the tenants placed the cards in the wallet to frame him.

{¶ 29} Upon our review of the evidence, we find appellant's conviction is not based on insufficient evidence or against the manifest weight of the evidence. Contrary to appellant's assertions, Short testified that she brought her purse home and that she had it inside of the house, although she was uncertain as to the exact location. Short also testified that she remained in the home at all times between Friday, January 18, 2013, and Sunday, January 20, 2013, when the purse was found to be missing. Thus, the home was occupied when the purse was stolen. Finally, although appellant's theory that the cards were planted in his wallet is a possible scenario, when viewing the evidence in the light most favorable to the prosecution, we find that a reasonable person could have concluded beyond a reasonable doubt that appellant was the one who took the purse and its contents. Likewise, this is not the exceptional case where the evidence weighs heavily against his conviction. The contents of Short's purse were found in appellant's wallet. Therefore,

we hold that appellant's conviction on this count is based on sufficient evidence and is not against the manifest weight of the evidence.

{¶ 30} Finally, appellant challenges his conviction for burglary of Rosales's home. Appellant stresses that the proposed timeline of the events does not allow for the officers to have completed all of the investigatory steps they took which led them to appellant's location. Instead, appellant posits that the officers knew the result they wanted to obtain and guided the investigation towards him. We find that the evidence does not support appellant's theory.

{¶ 31} While the timeframe of the events generally were approximated, there is no indication that the officers failed to take any of the steps to which they testified. The officers arrived at Rosales's home, responding to a burglary. They noticed the back door unlocked and ajar, with a single set of footprints leading from the door. As they followed the tracking dog, the same set of footprints kept appearing. Along the way, they found items that were later determined to have been taken from Rosales's home. When the officers arrived at appellant's location, they observed that his pants were still cold and wet. Finally, they noticed that appellant's shoes exactly matched the footprints that they had been following. Therefore, we hold that appellant's conviction on this count of burglary is not based on insufficient evidence, nor is it against the manifest weight of the evidence.

{¶ 32} Accordingly, appellant's second assignment of error is not well-taken.

III. Conclusion

{¶ 33} For the foregoing reasons, the judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal 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, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE