[Cite as *State v. Hawkins*, 2003-Ohio-4934.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81646

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
FREDERICK HAWKINS	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION:	September 18, 2003
CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-422418
JUDGMENT:	AFFIRMED.
DATE OF JOURNALIZATION:	_____

APPEARANCES:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor SALEH S. AWADALLAH, Assistant RUFUS WARR, Assistant 1200 Ontario Street Cleveland, Ohio 44113
For Defendant-Appellant:	MICHAEL T. FISHER 55 Public Square Suite 1010 Cleveland, Ohio 44113-1901

ANTHONY O. CALABRESE, JR., J.:

{¶1} Defendant-appellant, Frederick Hawkins ("appellant"), appeals from the trial court's conviction. The trial court found appellant guilty of vandalism and breaking and entering, but not guilty of possession of criminal tools. Appellant is now appealing from the trial court's conviction.

I.

{¶2} On March 15, 2002, at approximately 5:30 a.m., there was a break-in at Norman's Beverage and Deli located at 9021 St. Clair Avenue in Cleveland, Ohio. Norman's Beverage and Deli is in a brick building with two storefronts on the ground level; one storefront directly faces St. Clair Avenue and the other does not. Although they are located in the same building, there are two separate addresses and entrances for each storefront. In addition to the two storefronts, the building in question has seven apartments on the second floor. Apartment numbers one, two, three, and four face East 91st Street and have an East 91st Street address. Apartment numbers five, six, and seven face St. Clair Avenue and were vacant at the time.

II.

{¶3} Appellant's first assignment of error states: "The trial court erred in denying appellant's motion for acquittal when the state failed to present sufficient evidence."

{¶4} With respect to sufficiency of the evidence, "'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *Black's Law Dictionary* (6 Ed.1990) 1433. See, also, Crim.R. 29(A), "motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction." 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. Robinson* (1955), 162 Ohio St. 486. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45.

{¶5} Appellant claims that the building was not occupied and the $500 minimum was not met; these claims are inaccurate. In the case sub judice, the state did successfully demonstrate that there was serious *physical harm to an occupied* structure. Prior testimony established that Ruth Brothers was in the structure at the time of the commission of the crime. Furthermore, the testimony, evidence, and photos all demonstrated that the building damage required a considerable amount of money to repair and required a substantial amount of effort from the owner. The repairs totaled over $1,000, well over the $500 felony minimum that appellant mentions. The repairs are itemized and discussed in detail in appellant's third assignment of error.

{¶6} Appellant's first assignment of error is denied.

III.

{¶7} Appellant's second assignment of error states the following: "Appellant's convictions are against the manifest weight of the evidence."

{¶8} Upon application of the standards enunciated in *Tibbs v. Florida* (1982), 457 U.S. 31, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated:

> **"There being sufficient evidence to support the conviction as a matter of law, we next consider the claim that the judgment was against the manifest weight of the evidence. Here, the test is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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."

{¶9} Moreover, it is important to note that the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. Therefore, we must accord due deference to those determinations made by the trier of fact.

{¶10} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the fact finder's resolution of the conflicting testimony. *Tibbs v. Florida* (1982), 457 U.S. 31, 42. See, also, *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶11} The testimonies given by Ruth Brothers, Robert Montgomery, and Sabri Allan, and the state's photographic exhibits all substantiate the extent of the damage, as well as the conviction. The evidence and testimony presented does indeed support the trial court's ruling. This case is not an exceptional case in which the evidence weighs heavily against the conviction.

{¶12} Appellant's second assignment of error is denied.

IV.

{¶13} Appellant's third assignment of error claims that "the trial court erred by admitting into evidence the state's exhibits #10, #11, #12, and #14, which were not properly authenticated."

{¶14} Evid.R. 901(A) states that all evidence must be properly authenticated before it is admissible into evidence. Authentication lays the foundation for admissibility by connecting the particular evidence sought to be introduced to the issues or persons involved in the trial. Exhibits are properly authenticated when there is evidence sufficient to support finding that the matter in question is what the proponent claims. Authenticity is normally demonstrated by extrinsic evidence, unless the evidence is self-authenticating, as provided in Evid.R. 902.

{¶15} Evid.R. 901(B)(1) provides that evidence is properly authenticated or identified with "testimony that a matter is what it is claimed to be." Pursuant to Evid.R. 901(A), admissibility of evidence depends upon proper authentication. An item of evidence is properly authenticated if there is sufficient evidence to support a finding that the item is what the proponent claims. The proponent has the burden to show that it is reasonably certain that no alteration, substitution, or tampering of the item occurred. *State v. Moore* (1973), 47 Ohio App.2d 181, 183.

{¶16} Evid.R. 901(A) requires only that a proponent of a document produce "*** evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(B) provides that an exhibit could be authenticated by testimony of a witness with knowledge "*** that a matter is what it is claimed to be."

{¶17} Appellant complains that the repair receipts for the damage to the building were not properly authenticated. "Authenticity" is simply a requirement that an article of evidence must be proved to be what on its face it purports to be. That is generally satisfied by witness identification. The extrinsic evidence requirement is waived by Evid.R. 902 for articles that are defined therein as "self-authenticating." Division seven (7) of that rule

includes “inscriptions, signs, tags, or labels purporting to *have been affixed in the course of business and indicating ownership, control, or origin*.” (Emphasis added.)

{¶18} State's exhibits 10, 11, 12, and 14 are receipts for various repairs undertaken to repair the damage done to the property. State’s exhibit 10 is a receipt from Comet Glass. This document is a form receipt with information regarding the repairs done to the glass for the door at 9015 St. Clair Avenue. State’s exhibit 11 is a $475 receipt for repairing the ceiling and the door on St. Clair Avenue, and state’s exhibit 12 is a receipt for $45 to repair the safety alarm, test the circuit, and install a button. State’s exhibit 14 is a $425 receipt to replace the key switch.

{¶19} The various receipts corroborate the amount of money spent to repair various items that were damaged. State’s exhibit 10 is a printed form that bears the glass company's name and address. That printed material constitutes an “inscription” for purposes of Evid.R. 902(7), “Trade Inscriptions and the Like,” which renders it self-authenticating. This receipt and the other receipts in question were also admissible based on the testimony of the individuals involved.[1]

[1]See Tr. p.130. Mr. Awadallah: “Your Honor, the State’s Exhibits 10, 11, 12, 14 and 15 are copies of invoices which the witnesses themselves testified were an accurate representation and did testify they were actually copies of invoices. We had a witness who actually tried to find more invoices but was unable to find them; brought in, in terms of exhibits and for evidence sake, the best that they were able to find. I think what Mr. Condosta’s argument should go to - - should go to the weight of the evidence, not the admissibility of these particular items. *They were all testified to, all backed by testimony and explanation under oath, subject to cross examination and it could have easily been brought up and the witnesses questioned as to authenticity of those items at the time they actually testified.* The Court: Thank you very much. 10, 11, 12, 14 and 15 are in over defense objection.” (Emphasis added.)

{¶20} The owner of the property, Robert Montgomery, testified that, after receiving the telephone call regarding the break-in, he went to the building and observed that someone had broken through the front door of Norman's Beverage and Deli. The front door was broken, the glass was broken, and the outside wall was lying on the ground. Inside the building at the rear of the vacant storefront adjoining Norman's, Mr. Montgomery observed that the ceiling tiles were broken, a glass top was broken, and the glass was broken out of the front door to the vacant store. Mr. Montgomery testified that he received a receipt from Comet Glass regarding the repair of the ceiling tile, two doors and the glass counter; the receipt was for $475.

{¶21} Sabri Allan testified that the button was damaged as a result of the siren being ripped from the outside of the building at the time of the breaking and entering. He further testified that the cost of replacing the button switch was $45. Mr. Allan testified that he repaired a lock on the back door himself and the replacement cost was at least $15. In addition, there was a cigarette rack that was pulled off of the wall which cost approximately $100 to repair. Moreover, state's exhibit 14 substantiates that $425 was paid to Dave Shutters for replacement of the key switch. The damage to the business property totaled at least $1000, well in excess of the $500 minimum value for a felony theft conviction.

{¶22} In addition to the testimony mentioned above, additional evidence, such as state's exhibits one through three, and state's exhibits five through nine, further support the extent and nature of the damage.

{¶23} Appellant's third assignment of error is not well taken and therefore denied.

Judgment affirmed.

_____
ANTHONY O. CALABRESE, JR.
JUDGE

ANN DYKE, J., CONCURS;

ANNE L. KILBANE, P.J., CONCURS IN JUDGMENT ONLY IN PART AND DISSENTS IN PART (SEE ATTACHED SEPARATE CONCURRING AND DISSENTING OPINION.)

ANNE L. KILBANE, P.J., CONCURRING IN JUDGMENT ONLY IN PART AND DISSENTING IN PART:

{¶24} On this appeal from a conviction entered after a bench trial before Judge Brian J. Corrigan, I concur in judgment only in part and dissent in part. I disagree with the majority's unexplained finding that Frederick Hawkins committed vandalism in an occupied structure and, therefore, respectfully dissent from the finding of guilt on that count. I also disagree with the majority's suggestion that the property damage can be used to justify the conviction for theft but, nonetheless concur in the judgment affirming that conviction because there was independent evidence showing the theft of cigarettes, cigars, and other items with a value exceeding $500.

{¶25} Hawkins was discovered inside Norman's Beverage and Deli at 9021 St. Clair Avenue in Cleveland after a break-in. He

was charged with two counts of vandalism,[2] one count of breaking and entering,[3] and one count of theft.[4] The first count of vandalism alleged that he had "knowingly cause[d] serious physical harm to an occupied structure" under R.C. 2909.05, the damage allegedly being done to the address at 9015 St. Clair Avenue, although both this address and 9021 St. Clair Avenue are located in a single building. The second count of vandalism alleged damage, in the amount of $500 or more, to business property owned by Sabri Allan, the proprietor of Norman's Beverage and Deli.[5] The breaking and entering count, which charged an entry into an unoccupied structure, concerned the address at 9021 St. Clair Avenue. Because there were occupied apartments on the second floor of the building, the count concerning 9015 St. Clair Avenue was charged as vandalism of an occupied structure,[6] even though the apartments have a separate entrance and address, 788 East 91st Street.

{¶26} R.C. 2909.01(C) states:

> **"'Occupied structure' means any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:**

---

[2]R.C. 2909.05.

[3]R.C. 2911.13.

[4]R.C. 2913.02.

[5]R.C. 2909.05(B)(1)(a).

[6]R.C. 2909.05(A).

(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

(4) At the time, any person is present or likely to be present in it."

{¶27} There is no argument that anyone was likely to be present at 9015 St. Clair Avenue when the offense was committed; not only was it early in the morning, the commercial space located in that portion of the building had no tenant at the time. Instead, the "occupied" nature of the structure is supported only by the presence of upstairs apartments with people inside, even though those apartments have a separate address and separate entrances. Such reasoning cannot sustain a finding that the portion of the building at 9015 St. Clair Avenue was occupied because the phrase "any portion thereof" does not allow a person's presence in a separate part of a building to render the entire structure "occupied."

{¶28} In addition to the narrow and strict interpretation of criminal statutes against the State,[7] statutes are construed to

[7]R.C. 2901.04; *State v. Carroll* (1980), 62 Ohio St.2d 313, 315, 16 O.O.3d 359, 405 N.E.2d 305.

give meaning to all their terms.[8] Therefore, we will adopt a construction that renders part of a statute meaningless or superfluous only if no other reasonable construction is possible.[9] The phrase "any portion thereof" becomes superfluous if one considers an entire structure occupied based upon a person's presence in any separate portion of it. The apartments at 788 East 91st Street constitute a "portion" of the structure at the corner of that street and St. Clair Avenue; while that portion of the building qualifies as an "occupied structure," the remaining portion cannot qualify as occupied based upon people's presence in the second-story apartments.

{¶29} If an entire building qualified as an occupied structure even when only part of it was used as a dwelling, there would be no need for any reference to a "portion" of a structure. In order to give meaning to the phrase "any portion thereof," one must determine whether the circumstances of R.C. 2909.01(C)(1), (2), (3), or (4) apply to the entirety of a structure or only to a portion of it. In this case only a portion of the building is used as a dwelling or is adapted for habitation; therefore, the entire building cannot qualify as an occupied structure under R.C. 2909.01(C)(1), (2), or (3).

---

[8]R.C. 1.47(B); *Moore v. State Auto. Mut. Ins. Co.*, 88 Ohio St.3d 27, 32, 2000-Ohio-264, 723 N.E.2d 97.

[9]See Id., at 31-32.

{¶30} R.C. 2909.01(C)(4) also does not apply to the entire building, because people were present or likely to be present only in a portion of it. None of the tenants of 788 East 91st Street had access to the commercial spaces located at 9015 St. Clair Avenue and, therefore, the "present or likely to be present" part of the definition applied only to a portion of the building, and not to its entirety. Because the circumstances of R.C. 2909.01(C) applied only to a portion of the building, only that portion can qualify as an occupied structure.

{¶31} I also disagree with the majority's apparent suggestion that the destruction of property can be used to determine value for a charged theft offense. I agree that the State presented sufficient admissible evidence concerning the value of property destroyed, which was relevant to the vandalism charges. However, this evidence is not admissible to support a theft charge. Nevertheless, the State did present evidence that over $500 worth of goods, including cigarettes, cigars, and alcohol, was stolen from the store at 9021 St. Clair Avenue. Therefore, although I disagree with the majority's reasoning, I concur in the result affirming the theft conviction.

{¶32} Finally, I note that the judge failed to notify Hawkins, at the sentencing hearing, that post-release control was part of his sentence. Therefore, imposition of post-release

control in the journal entry is ineffective.[10] Furthermore, the judge's attempt to impose post-release control "for the maximum period allowed" is unlawful. Hawkins' convictions subjected him to discretionary post-release control only,[11] and the decision of whether and what term to impose is for the parole board, not the judge.[12]

{¶33} Because the State failed to show that the storefront at 9015 St. Clair Avenue was an occupied structure, I would reverse the vandalism conviction related to that address. I concur in judgment only with respect to the remaining counts, though I note that Hawkins' sentence does not include post-release control.

---

[10]Crim.R. 43(A); *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, 733 N.E.2d 1103, paragraph two of the syllabus.

[11]R.C. 2967.28(C).

[12]Id.; *State v. Brown*, Cuyahoga App. No. 80725, 2002-Ohio-5468, at ¶24.