[Cite as *State v. Grant*, 2010-Ohio-5483.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94220

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MITCHELL GRANT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526678

BEFORE: Celebrezze, J., Gallagher, A.J., and McMonagle, J.

RELEASED AND JOURNALIZED: November 10, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Mitchell Grant, appeals his convictions for burglary, theft, and possession of criminal tools. Based on our review of the record and relevant case law, we affirm.

{¶ 2} William Gould and Bridget Ginley testified that they are both artists and reside in separate apartments located at 1400 East 30th Street in Cleveland, Ohio. On June 28, 2009, Gould was sleeping when he received a call from the police that they had recovered some stolen paintings they believed belonged to him. He checked the hallway separating his and Ginley's apartments, which he used as a gallery so individuals could view

and purchase his paintings. After confirming that paintings were missing from the hallway, Gould notified Ginley and the two were transported to 3103 Superior Avenue to identify their property.

{¶ 3} Upon arriving at the scene, Gould identified three paintings belonging to him that had been stored in the hallway between his and Ginley's apartments. According to Gould, these paintings were worth anywhere from $700 to $2,000 each. Ginley identified a two-wheel dolly that she had been storing in the hallway and testified that she paid between $50 and $100 for it.

{¶ 4} Salina Jones, owner of Daisy Printing, testified that on June 28, 2009, she received a phone call from the store's security company reporting an attempted break in that triggered the store's silent alarm. When Jones and her boyfriend, Johnny Pettigrew, arrived at the store, which is located at 3103 Superior Avenue, they saw a man in a red shirt standing outside the store with a two-wheel dolly. The man began walking down the street but was acting suspiciously. He rounded a corner and then returned without the dolly. The man was still standing on the street when the police arrived.

{¶ 5} Chrishawndra Mathews, an employee for Daisy Printing, testified that she was driving by the store around the time when the silent alarm was triggered. Mathews saw appellant standing outside the store and peering inside the store's windows. She found this activity suspicious in light of the

fact that there is no merchandise inside the store to view. She testified that appellant was wearing a red shirt and was pushing a dolly with items on it.

{¶ 6} Pettigrew testified that he was looking for boards so that he could secure the store's broken window when he found the dolly appellant was pushing. He approached the dolly because he thought he saw pieces of wood on it. He then realized that what he mistakenly thought was wood was actually some paintings. He pushed the dolly and paintings to where the police were speaking with the other witnesses.

{¶ 7} After the police arrived at Daisy Printing, appellant was still standing on the street. Jones and Pettigrew pointed out appellant as the man who was standing outside the door with the dolly when they arrived. Mathews also identified appellant as the man who had been standing outside the window, which was later found to be broken, when she drove by a few minutes before the break in. The police found a hammer laying outside of Daisy Printing and also found a pair of scissors in appellant's pocket.

{¶ 8} Appellant was indicted in a four-count indictment for one count of burglary,[1] one count of possessing criminal tools,[2] and two counts of theft.[3]

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[1]R.C. 2911.12(A)(2), a second-degree felony.

[2]R.C. 2923.24(A), a fifth-degree felony.

[3]R.C. 2913.02(A)(1). One count was a first-degree misdemeanor, the other was a fifth-degree felony.

A jury found him guilty of all counts. The trial court sentenced him to four years for burglary and nine months each on the other two felony counts. The court ordered these sentences to be run concurrently to one another. With regard to appellant's misdemeanor theft conviction, the court sentenced him to six months in the county jail, but suspended this sentence for an aggregate sentence of four years. This appeal followed wherein appellant argues that his convictions were based on insufficient evidence and were against the manifest weight of the evidence.

Law and Analysis

{¶ 9} The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. When deciding whether a conviction was based on sufficient evidence the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether 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, 273, 574 N.E.2d 492; *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 10} The United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The Court held in *Tibbs v. Florida*

(1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal. Id. at 43. Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated that "[t]he 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." Id. at 175.

{¶ 11} Appellant first argues that the state failed to prove that the hallway where the paintings and dolly were located was part of "an occupied structure or * * * a separately secured or separately occupied portion of an occupied structure" as required for a burglary conviction. The crux of appellant's argument is that the hallway was merely a storage area; it was not a part of Ginley's or Gould's living quarters, and therefore could not be considered a habitation for purposes of a burglary conviction. We disagree.

{¶ 12} R.C. 2909.01(C) defines an occupied structure as "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:

{¶ 13} "(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.

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

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

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

{¶ 17} The Legislative Service Commission's summary of R.C. 2911.12 provides that burglary is a lesser included offense of aggravated burglary and that "[e]ven without the additional elements, the offense is viewed as serious because of the higher risk of personal harm involved in maliciously breaking and entering an occupied, as opposed to an unoccupied, structure."

{¶ 18} In *State v. Johnson* (Mar. 26, 1987), Cuyahoga App. No. 51957, the defendant stole a television set from an apartment building's storage locker. The court acknowledged that the defendant had to go through the apartment's incinerator room, which was left unlocked, in order to find the television. The court relied on the fact that the incinerator room was

adjacent to four apartments, three of which were occupied, and that the tenants were personally responsible for taking their trash to the incinerator room, to find that it was not unreasonable for a jury to conclude that tenants may be in the incinerator room. The court relied on this analysis in upholding the jury's determination that the room at issue was an "occupied structure."

{¶ 19} Appellant correctly asserts that the hallway between Ginley's and Gould's apartments was not technically part of their living quarters. Nonetheless, the hallway was not open to the public. Gould and Ginley both testified that in order to get into the hallway, an individual would have needed a key or would have had to break in somehow. The evidence showed that appellant broke the glass to the building's back door and somehow jimmied the lock to the hallway's fire door.

{¶ 20} Finally, R.C. 2911.12 requires the offender to trespass "in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person[.]" The hallway at issue was certainly a separately secured portion of an occupied structure, and the structure was the permanent habitation of both Gould and Ginley. As such, the jury did not unreasonably conclude that appellant violated R.C. 2911.12(A)(2). See, also, *State v. Williams*, Cuyahoga App. No. 92668, 2009-Ohio-6826, ¶14 (the fact that a house was

unoccupied for four months is irrelevant in determining whether it was an occupied structure); *State v. Charley*, Cuyahoga App. No. 82994, 2004-Ohio-3463, ¶68-72 (structure is still occupied despite the fact that prior owner was in a nursing home and the daughter was having the house restored in order to complete a sale); *State v. Sharp*, Cuyahoga App. No. 86827, 2006-Ohio-3158, ¶13 ("Both *Green* and *Cantin* addressed whether a structure could be considered an 'occupied structure' when it was not presently occupied for purposes of habitation. The courts resolved that a structure's status as an 'occupied structure' depends more on the residential purpose of the dwelling rather than the presence or absence of an occupant. It does not, as defendant, argues, preclude a finding that the common area of an occupied structure is part of a habitation.").[4]

{¶ 21} Appellant next contends that the lay testimony of Gould was insufficient to establish the value of the paintings in order to elevate his theft conviction from a first-degree misdemeanor to a fifth-degree felony. We disagree.

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[4]We recognize that the *Sharp* court went on to say, "assuming without deciding that there could be some distinction carved out for common areas, there is competent, credible evidence that defendant entered the premises through the window of one of the apartment units." The *Sharp* court was very careful to leave open the question of whether a common area should be treated different for purposes of determining whether something is an "occupied structure." Nonetheless, we find that the hallway in this case falls within the definition of an "occupied structure" and that, pursuant to this court's holding in *Johnson*, appellant could be convicted of burglary.

{¶ 22} In *State v. Lockhart* (1996), 115 Ohio App.3d 370, 374, 685 N.E.2d 564, the court upheld the defendant's conviction based on the victim's testimony that the value of the stolen property was in excess of $300, the necessary amount at the time *Lockhart* was decided. See, also, *State v. Bartolomeo*, Franklin App. No. 08AP-969, 2009-Ohio-3086, ¶25 (finding that the victim's testimony that the appellant stole $250, that her cell phone was worth $499, and that her cell phone case was worth $60, were sufficient evidence to establish value); *State v. Green*, Union App. No. 14-2000-26, 2001-Ohio-2197 (holding that the victim's testimony that property was worth $600 was sufficient to support a felony theft charge). We find Gould's testimony that the paintings were worth anywhere from $700 to $2,000 each, depending on the painting, was sufficient to prove the value was more than $500 but less than $5,000 as required for appellant's felony theft conviction.

{¶ 23} Appellant also makes a blanket argument that his convictions are based on insufficient evidence and are against the manifest weight of the evidence because there were no witnesses who actually saw him break into either building or take anything.

{¶ 24} Mathews testified that she was driving by Daisy Printing at the time the silent alarm was being triggered and that she saw appellant, who was wearing a red shirt and had a two-wheel dolly, standing outside the window. She even turned around to look at appellant as she drove by

because she found his behavior to be peculiar. Pettigrew and Jones both testified that appellant was standing right in front of the store's door when they arrived, which was approximately seven to ten minutes after the security company called and reported the break in. They saw appellant, who was wearing a red shirt and had a two-wheel dolly. Appellant walked away from the store, rounded the corner, and came back without the dolly. When Pettigrew discovered the dolly later that evening, he realized that it had paintings on it. Finally, the police found a hammer near the store and a pair of scissors in appellant's pocket.

{¶ 25} This evidence, which was obviously believed by the jury, was sufficient to find appellant guilty of burglary, theft, and possessing criminal tools. We also note that none of the witnesses' testimony differed in any significant fashion. Appellant's convictions were not based on insufficient evidence, nor were they against the manifest weight of the evidence.

Conclusion

{¶ 26} The hallway at issue was an "occupied structure" for purposes of appellant's burglary conviction. Also, the victim's testimony that the paintings were worth $700 to $2,000 was sufficient to support a felony theft conviction. Finally, we have reviewed the transcript in its entirety and have determined that appellant's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, A.J., and
CHRISTINE T. McMONAGLE, J., CONCUR