[Cite as *State v. Gibbs*, 2011-Ohio-76.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94349

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARRILL GIBBS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516594

BEFORE: Stewart, P.J., Celebrezze, J., and Jones, J.

RELEASED AND JOURNALIZED: January 13, 2011

ATTORNEY FOR APPELLANT

Susan J. Moran
55 Public Square, Suite 1616
Cleveland, OH 44113-1901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: T. Allan Regas
Assistant County Prosecutor
The Justice Center
1200 Ontario Street, 8th Floor
Cleveland, OH 44113

MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Darrill Gibbs, appeals his conviction and sentence for attempted burglary following a jury trial in the Cuyahoga County Court of Common Pleas. For the reasons set forth below, we affirm in part, reverse in part and remand for resentencing.

{¶ 2} The Cuyahoga County Grand Jury indicted appellant on one count of attempted burglary in violation of R.C. 2911.12(A)(2), a felony of the third degree, and one count of attempted burglary in violation of R.C. 2911.12(A)(4), a felony of the fifth degree. The charges arose out of an

incident in which the police were called to the home of Maurice Smith and found appellant standing on Smith's sunroof peering into an opened window on the second floor. Appellant entered a plea of not guilty and the matter proceeded to a jury trial.

{¶ 3} The following facts were established at trial. Smith has lived in his Glynn Road home in East Cleveland for more than 15 years. On Monday, September 15, 2008, he had a day off from work. When he woke up around 9:00 a.m., he noticed a red truck parked in his driveway and saw a man walking around his property. Smith initially thought the man might be there to do some work on his neighbor's house, but as Smith watched, the man walked up and down Smith's driveway at the rear of his house and looked in Smith's kitchen window. Smith heard tapping noises and rattling of windows from the rear of his house. Smith then saw the man pick up a park bench from his yard and lean it up against his house, next to the sunroof. Smith called the East Cleveland Police Department and told them that there was a man trying to break into his house. Two officers responded and found appellant standing on the sunroof in the back of the house looking into the open, but screened, second floor bathroom window. Appellant told the police that he was looking for "Little Moe," and that Little Moe was hard to wake up so he often went up to the roof to wake him up. The police retrieved a pair of work gloves from the sunroof awning, which appellant said

were his. The police arrested appellant and took him to the East Cleveland jail.

{¶ 4} The next day, after being given his *Miranda* rights, appellant gave an oral statement to Detective Bolton. According to Bolton, appellant said he went to the house to collect a $1,000 gambling debt from Maurice Thorton, also known as Little Moe. Appellant said he called Thorton from his brother's cell phone and Thorton told him to come to his house, which was located "four houses away from the big white one" on Glynn Road. Appellant said he rang the doorbell and knocked on the door but no one answered. He began to suspect that he had been sent on a false mission. He became upset and cut the phone wires. He climbed on the sunroof and tried to contact someone inside the house. Then the police arrived and arrested him.

{¶ 5} The jury found appellant guilty of both counts of attempted burglary. The trial court sentenced appellant to concurrent prison terms of four years on the first count and 12 months on the second count. Appellant timely appeals raising three assignments of error for our review. Appellant argues that there is insufficient evidence in the record to support the convictions and that they are against the manifest weight of the state's evidence. He also asserts that it was error for the trial court to sentence him separately for the two offenses.

{¶ 6} In his first assignment of error, appellant contends that the trial court erred in denying his Crim.R. 29 motion for acquittal because there was insufficient evidence to convict him of attempted burglary. Crim.R. 29(A) governs motions for acquittal and provides for a judgment of acquittal "if the evidence is insufficient to sustain a conviction * * *."

{¶ 7} When reviewing the sufficiency of the evidence to support a criminal conviction, this court examines the evidence admitted at trial to determine whether such evidence, 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* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 8} R.C. 2923.02(A) defines "attempt" broadly as "conduct that, if successful, would constitute or result in the offense." The Ohio Supreme Court has stated that a "criminal attempt" is when one purposely does anything which constitutes a "substantial step in a course of conduct planned to culminate in the commission of the crime." *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, 781 N.E.2d 980, at ¶101, citing *State v. Woods* (1976), 48 Ohio St.2d 127, 357 N.E.2d 1059, paragraph one of the syllabus.

{¶ 9} The attempted underlying crime for which appellant was convicted is burglary, as set forth in R.C. 2911.12(A)(4). This statute provides that no person, "by force, stealth, or deception," shall "trespass in a permanent or temporary habitation of any person when any person * * * is present or likely to be present." Appellant was also convicted of the more serious offense of attempted burglary under R.C. 2911.12(A)(2), which carries the additional element that appellant attempted to trespass "with purpose to commit in the habitation any criminal offense[.]"

{¶ 10} Appellant first contends that the state failed to prove that he acted with "force, stealth, or deception" and, therefore, failed to prove all the elements of the crime. He argues that it was 9:30 in the morning, he parked in the driveway, and he openly walked up and down the driveway. He also maintains that there was no evidence that he tried to remove the window screen or enter the house. He argues that the state's evidence only establishes that he climbed up on the sunroof of the house in broad daylight and was seen peering into a window.

{¶ 11} Ohio courts have defined "stealth" as "any secret, sly or clandestine act to avoid discovery and to gain entrance into or to remain within a residence of another without permission." *State v. Sims*, 8th Dist. No. 84090, 2005-Ohio-1978, quoting *State v. Ward* (1993), 85 Ohio App.3d 537, 540, 620 N.E.2d 168.

{¶ 12} According to Smith, who was inside the house at the time, appellant did not go to the front of the house. He did not knock on the door or ring the doorbell. Instead, he went to the rear of the house, rattled the downstairs windows, and peered inside the house. He placed a bench against the house and used it to climb onto the second-floor sunroof directly below an open window. He brought work gloves with him onto the sunroof. When the police surprised him, he was standing near an open screened window. This evidence, construed in a light most favorable to the state, is sufficient to establish that appellant used stealth to attempt to trespass in Smith's house.

{¶ 13} Appellant next argues that the evidence was insufficient to support his conviction because the state failed to present evidence that he intended to commit a theft offense in Smith's home. Appellant contends that there is no evidence that he attempted to take any items from the house or had any intention of doing so.

{¶ 14} "The intent of an accused person dwells in his mind. Not being ascertainable by the exercise of any or all of the senses, it can never be proved by the direct testimony of a third person, and it need not be. It must be gathered from the surrounding facts and circumstances under proper instructions from the court." *State v. Johnson* (1978), 56 Ohio St.2d 35, 38,

381 N.E.2d 637; *State v. Huffman* (1936), 131 Ohio St. 27, 1 N.E.2d 313, paragraph four of the syllabus.

{¶ 15} A jury is permitted to infer a defendant's intent from all the facts and circumstances of the case. Id. Here, the state's evidence, if believed, was sufficient to give rise to an inference that appellant attempted to enter Smith's home intending to commit a theft offense, but was prevented from doing so by the arrival of the police. Accordingly, the trial court did not err in overruling appellant's Crim.R. 29 motion for acquittal.

{¶ 16} In the second assigned error, appellant argues that his conviction is against the manifest weight of the evidence. In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

{¶ 17} "The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing

belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. '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 factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 18} Still, determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. A judgment of a trial court should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶ 19} Appellant argues that the weight of the evidence should have tipped in his favor. He claims that the evidence fails to establish that he was on the roof to commit a theft offense. He argues that the evidence shows that he was at that house to collect a gambling debt from Thorton. He told the police that he had called Thorton from a cell phone and was at the house

under the mistaken belief that it was Thorton's house. He also told them that his truck was so full of stuff that he could not fit anything else in even if he wanted to. He argues that he had his brother's cell phone in his possession when he was arrested but the police did not investigate to see if such a call was made. He further argues that the police did not follow up on their investigation to locate Thorton or to see if his truck was as full as he told them.

{¶ 20} Appellant's statements to the police conflict with Smith's account of the events. Appellant told police he knocked at the door and rang the doorbell before he climbed up on the sunroof to try and wake Little Moe up. Smith testified that appellant did not ring the doorbell or knock on the door before climbing up on the sunroof. Therefore, while appellant offers an innocent explanation for climbing up onto Smith's sunroof, the jury could reasonably reject his explanation as not credible, and infer, instead, that he climbed up on the roof with the purpose of committing a theft offense. Accordingly, the second assignment of error is overruled.

{¶ 21} For his third assigned error, appellant asserts that the court erred by sentencing him to concurrent sentences on the two counts of attempted burglary. He argues that he was convicted under alternative theories for the same conduct and, therefore, under R.C. 2941.25 the two counts should have merged as allied offenses at sentencing. He maintains

that his convictions must be vacated and the case remanded for resentencing. The state concedes that the two offenses should merge. The state asks this court to affirm the findings of guilt and remand for resentencing, at which time it will elect one of the counts for sentencing.

{¶ 22} In *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, the Ohio Supreme Court held that if a court of appeals finds reversible error in the imposition of multiple punishments for allied offenses, the court must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant. Id. at ¶25. However, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. Id. at ¶27.

{¶ 23} Accordingly, we sustain appellant's third assignment of error. The determinations of appellant's guilt under both subsections of R.C. 2911.12(A) remain intact, but we remand to the trial court for a new sentencing hearing consistent with the holding in *Whitfield*.

{¶ 24} This cause is affirmed in part, reversed in part and remanded for resentencing consistent with this opinion.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

MELODY J. STEWART, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR