[Cite as *State v. Abel*, 2009-Ohio-2516.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO	C. A. No. 08CA009506
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
WILLIAM B. ABEL	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 06CR072169

DECISION AND JOURNAL ENTRY

Dated: June 1, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, William Abel, appeals from his convictions in the Lorain County Court of Common Pleas. This Court affirms.

I

{¶2} Early afternoon on September 16, 2006, Allen Hall and his uncle, Michael Molnar went to the Red Clay restaurant in Vermilion, Ohio. While there, they ate and began drinking mixed drinks, shots, and beer, each consuming between 12 – 15 drinks. Later that afternoon, Abel called Molnar, who invited Abel to join him and Hall at the restaurant. Abel arrived around 4:00 p.m., and the three men continued drinking and began discussing their different monetary situations. Hall mentioned he would like to buy a boat and Molnar indicated he had heard through friends that there was a house with nearly $50,000 in cash in a cabinet in the kitchen, and that the homeowners were presently out of town. The three men then discussed going by the

house to see if anyone was home, then going in the house and taking whatever money they found.

{¶3} The three men left the restaurant together with Abel driving. Abel drove to the Lebanik's residence, where the money was supposed to be. Abel drove by the house and pulled into the driveway. Molnar exited the car and knocked on the front door. Upon receiving no answer, Molnar then went to the back of the house and went inside via the back door. Hall exited the car shortly thereafter and joined Molnar. Inside, Hall and Molnar saw several guns lying around and found more locked in a gun safe upstairs. They brought the guns downstairs, started stacking them outside the house, and took three of the guns they had found out to the car.

{¶4} At some point, Abel exited the car to relieve himself in the backyard. One of the men from inside the house yelled out to Abel to move the car farther up in the driveway, closer to the rear of the house, which he did. Hall exited the house with three hunting guns in his arm and prescription drugs stuffed in his pockets and told Abel to open the trunk. Abel pressed the trunk release button inside the car, and then walked to the back of the car to lift the trunk lid for Hall to place the guns inside. About that same time, the Lebanik's next door neighbor called out to the men, asking them what they were doing. Based on her inquiry, Hall got into the car and told Abel to sound the car's horn to let Molnar know they had to leave. Molnar exited the house, got into the car, and Abel started driving the men to Hall's house in Lorain. Within minutes, Vermilion police stopped the car based on the information the neighbor had reported to police in her 911 call.

{¶5} The police found three guns in the car's trunk and pills in the backseat and in Hall's pockets. Upon returning to the Lebanik's house, police found several shotguns leaned up

against the outside of the house near the back door. The pills were identified as Clozapine and Seroquel, both prescription drugs, as well as aspirin.

{¶6} On November 29, 2006, a Lorain County Grand Jury indicted Abel on the following counts: three counts of theft with firearm specifications, in violation of R.C. 2913.02(A)(1), felonies of the third degree; one count of burglary with firearm specifications, in violation of R.C. 2911.12(A)(2), a felony of the second degree; one count of theft, in violation of R.C. 2913.02(A)(1), a felony of the fourth degree; and one count of safecracking, in violation of R.C. 2911.31(A), a felony of the fourth degree.

{¶7} At the same time, two co-defendants, Hall and Molnar, were indicted on similar charges. Hall and Molnar pled guilty to the charges and agreed to testify against Abel if he did not plead guilty. In addition, Hall and Molnar agreed to testify for the State if Abel proceeded to trial. In return for their testimony, the State agreed to dismiss the firearms specifications against them.

{¶8} Abel pled not guilty and his case proceeded to a bench trial, at which both Hall and Molnar testified. The trial court found Abel guilty on all counts and sentenced him to one year in prison for the firearm specification and three years of community control for the remaining counts. Abel filed a motion to stay his sentencing pending appeal, which the trial court granted.

{¶9} Abel timely filed his appeal and asserts three assignments of error for our review.

II

Assignment of Error Number One

"APPELLANT'S RIGHT TO INDICTMENT BY GRAND JURY UNDER THE OHIO CONSTITUTION, AND APPELLANT'S DUE PROCESS RIGHTS UNDER THE OHIO AND FEDERAL CONSTITUTIONS WERE VIOLATED

BECAUSE COUNT FOUR OF THE INDICTMENT OMITTED ESSENTIAL ELEMENTS OF THE ELEMENTS OF BURGLARY."

{¶10} In his first assignment of error, Abel argues that his due process rights were violated because count four of his indictment omitted an essential element of the burglary charge, namely, it failed to identify what criminal offense he intended to commit upon trespassing into the home of another. We disagree.

{¶11} Crim.R. 7(B) requires an indictment contain "a statement that the defendant has committed a public offense[.]" That statement "may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged." Crim.R. 7(B). The burglary statute requires that:

> "No person, by force, stealth, or deception, shall *** [t]respass 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 when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense[.]" R.C. 2911.12(A)(2).

Abel asserts, however, that pursuant to *State v. Colon* (2008), 118 Ohio St.3d 26, 2008-Ohio-1624, the State's failure to include the criminal act alleged to have taken place in the structure constitutes a failure to charge all the elements of the offense. This Court has held, however, that an "indictment[] for burglary [that] follow[s] the statutory elements of the burglary offense, *** need not have designated the particular criminal offense appellant[] allegedly intended to commit." *State v. McDevitt*, 9th Dist. Nos. 06CA009016 & 06CA009017, 2007-Ohio-4349, at ¶9, citing *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006. See, also, *State v. Grant*, 8th Dist. No. 86220, 2006-Ohio-177, at ¶28 (concluding that "[i]t is well settled that an indictment for burglary is not improper if it does not designate the specific underlying felony intended to be

committed"); *State v. Davis*, 10th Dist. No. 05AP-193, 2006-Ohio-193, at ¶24 (concluding that appellant's indictment under R.C. 2911.12(A)(2) "need not have designated the particular criminal offense appellant allegedly intended to commit").

{¶12} Moreover, Abel has failed to otherwise argue that he had multiple errors at trial following his allegedly defective indictment, as was the case in *Colon*. See *State v. Snow*, 9th Dist. No. 24298, 2009-Ohio-1336 (concluding that structural error analysis was inappropriate because the defendant-appellant had not raised any arguments as to significant errors that permeated his trial). Therefore, we find the *Colon* case inapplicable to the case at bar and Abel's argument without merit. Accordingly, his first assignment of error is overruled.

Assignment of Error Number Two

"THE CONVICTIONS FOR ALL COUNTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

Assignment of Error Number Three

"THE CONVICTIONS FOR THE GUN SPECIFICATIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶13} Though separately captioned, Abel has combined his arguments for his second and third assignments of error. In those assignments, he generally avers that his convictions for all counts in the indictment, as well as the gun specifications, were against the manifest weight of the evidence because those convictions were largely based upon the testimony of his co-defendants Hall and Molnar. Abel alleges they lacked credibility because their testimony was motivated by their agreement to plead guilty and testify as State's witnesses in his case, in exchange for the dismissal of the gun specification charges against them. Abel argues that their testimony was self-serving, suspect, and biased, therefore, it should be excluded. We disagree.

{¶14} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

> "[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *State* v. *Thompkins*, 78 Ohio St.3d 380, 387.

{¶15} In a bench trial, "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Cremeans*, 9th Dist. No. 22009, 2005-Ohio-261, at ¶6. Thus, "we will not overturn a conviction as against the manifest weight of the evidence simply because conflicting evidence was presented and the trial court chose to believe the State's evidence." *Akron v. Shook*, 9th Dist. No. 22390, 2005-Ohio-1821, at ¶19. This Court's "discretionary power to grant a new trial should be exercised only in the exceptional case [] where the evidence weighs heavily against the conviction." *Otten*, 33 Ohio App.3d at 340.

{¶16} Abel was charged with four counts of theft, in violation of R.C. 2913.02(A)(1), which states that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services *** [w]ithout the consent of the owner or person authorized to give consent[.]" Three of his four theft charges included a firearm specification, which under R.C. 2941.141(A), requires the imposition of a one-year mandatory prison term if Abel "had a firearm on or about [his] person or under [his] control while committing the offense."

{¶17} Additionally, he was charged with burglary, in violation of R.C. 2911.12(A)(1) which reads, in relevant part:

> "No person, by force, stealth, or deception, shall *** [t]respass 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 when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense[.]"

Abel was also charged with safecracking under R.C. 2911.31(A), which makes it a violation for a person to "knowingly enter, force an entrance into, or tamper with any vault, safe, or strongbox" with the purpose to commit an offense therein.

{¶18} At trial, both Hall and Molnar testified that Abel had joined them at the Red Clay restaurant after they had been there drinking for a few hours. Hall testified that he was talking about how he would like to buy a boat and Molnar replied that he had heard there was "a bunch of money" at the Lebanik's house. Hall indicated that all three men discussed how they could go to the house and take the money. Hall stated that Abel joined in the conversation at the restaurant and drove him and Molnar to the Lebanik house. Hall further stated that Abel found the house, drove by it, and then backed up to pull in the driveway. Hall went to the back yard to relieve himself and went into the house once he saw Molnar inside. Hall came out of the house with three shotguns in his arms and prescription drugs stuffed in his pockets and told Abel to open the trunk. Hall stated that Abel released the trunk from inside the car, but had to come to the back of the car next to Hall to actually lift up the trunk lid. Hall indicated that when he placed the guns in the trunk, they were clearly visible to Abel and within his reach, recalling that the guns were "right next to [him], *** maybe less than a foot" away from him. Hall testified that Abel never protested helping him or objected to what the men were doing at the house.

Once Hall and Abel heard the neighbor yell over to them, they both got in Abel's car, then Abel "hit the horn" to let Molnar know they had to leave.

{¶19} Molnar's testimony was consistent with Hall's and reiterated that all three men had discussed where the money was, what they would all do with the money once they got it, and where the Lebanik's house was located. Molnar admitted that he knocked on the front door, then went to the back door and entered the house. He then searched the kitchen for the money, but was unable to find it. He did, however find pills and guns lying everywhere around the house. He testified that he went to the upstairs bedroom where he found a gun safe and broke into it, finding two more guns. He took those guns downstairs and set them outside the back door, then went back in the house. Molnar was downstairs looking around when he heard Abel's horn beep, so he left the house and got in the car. Abel then started toward Hall's house, but the police stopped his car minutes later. Molnar admitted that once stopped, he acted like he did not know what was going on and was not truthful with police. Instead, he "play[ed] dumb."

{¶20} Both Hall and Molnar testified that they made a written proffer admitting their guilt and implicating Abel before they were offered any plea agreement by the State. Both, too, agreed to accept the prosecutor's offer to dismiss the gun specification in exchange for their testimony if Abel did not plead guilty.

{¶21} Andrew Lebanik testified that he was out of town for the weekend when Abel, Hall, and Molnar came to his house on September 16, 2006. Though he testified that he did not recognize the guns that were removed from his home, he believed they were at his house and confirmed that he had not given anyone permission to enter his home or remove any items from it, such as the guns or his wife's prescription drugs. Lebanik's son, David, who was away at college at the time of the incident, also testified that, although he had met Molnar and Abel in the

past through common friends, he never gave them permission to enter his house or to take anything from it.

{¶22} Shannon Hite, Lebanik's next door neighbor, testified that at approximately 7:00 p.m. that same night she was outside with her dog when she witnessed a car drive by her house, turn around down the street, and return to the Lebanik's house where it parked at the end of the driveway. She observed three men in the car and identified Abel as the driver. After returning inside, Hite looked out her bathroom window and noted that the car had moved closer to the back of her neighbor's house. She testified that she saw a man walking out of the house with three guns in his hands. The man placed the guns in the trunk of the car. She then called out her window asking them what they were doing. She stated she saw the two men get into the car, and a third man come around from the back of the house and get in the car before the car left. Hite immediately called 911 to report what she had seen and was able to include a description of the vehicle and part of the license plate number. Based on her information, police stopped Abel's car shortly after the men left the Lebanik's house.

{¶23} Officer Carl Johnson of the Vermilion Police Department testified that, upon receiving the information from the 911 call, he and two other officers convened upon the car, initiated an investigatory detention, and placed the three men in separate police cars for questioning. Officer Johnson testified that he saw pills and pill bottles in the back seat of the car, and based on the 911 report, opened the trunk where he found three guns. Officer Johnson testified that, in order to get into the trunk, he had to lift the trunk lid once he had pushed the release button. Officer Johnson indicated he primarily dealt with Hall who appeared "extremely intoxicated." When initially questioned, Hall denied having any knowledge of what had gone on there, but soon changed his response to reflect that Hall had bought the guns from someone

who was at the house he was just at in Vermilion. Officer Johnson further testified that he returned to the Lebanik residence and found that "the back door was forced open" and that several guns were stacked against the house "like everybody was going to take them all."

{¶24} Officer Aaron Bolton of the Vermilion Police Department was also present when the men were stopped. He placed Molnar in his vehicle for questioning, and Molnar informed Officer Bolton that he had been at the Red Clay restaurant and was on his way to a friend's house. Later, Molnar indicated they had stopped at a friend's house in Vermilion first, but were then heading back to Hall's house when police stopped them.

{¶25} Officer Bolton also testified that he questioned Abel once they returned to the police station and, though Abel had a slight smell of alcohol about him, Officer Bolton did not believe Abel was impaired at all. Officer Bolton testified that Abel "kept saying over and over that he just picked [Hall and Molnar] up at Red Clay, drove them to the friend's house, [and] they put something in the trunk; that he never got out of the car."

{¶26} Officer Bolton testified that Hite, however, had stated to police that all three people were outside of the car when she saw them and then they went behind the house. When confronted with this information, Abel admitted to Officer Bolton that he had gotten out of the car to relieve himself but otherwise, "that was the story he stuck to." Officer Bolton questioned Abel about the guns and prescription drugs found in the car, but he denied knowing anything about them. Abel provided police with a written statement asserting the same.

{¶27} Sergeant Larry Miller, then with the Vermilion Police Department, confirmed that the Lebanik's had not authorized anyone to be in their house on the night in question, nor did anyone have permission to remove any guns or prescription drugs from their home. Sergeant Miller confirmed that Abel told him the same information as was in Abel's written statement.

{¶28} In his defense, Abel attempted to impeach the credibility of both Hall and Molnar by pointing to their plea agreements with the State, as well as their past experience in lying to police and others. Specifically, Abel questioned Hall about a letter he had written to a municipal court judge in which he asserted that Abel had no involvement in the matter and did not know what was going on the night the men were arrested. Hall testified that he was dating Veronica, Abel's sister, at the time and that her mother, Mrs. Abel, had requested he write the letter to the judge, which he did in an attempt to try to salvage his relationship with Veronica. He testified at trial, however, that the letter was not true. Hall testified that Abel was aware of what the plans were, and that once the three men left the Red Clay restaurant, they all understood they were going to the Lebanik's house to look for the money and take it.

{¶29} Abel further alleges that Hall is not credible because when he was first arrested, he told police that he had bought the guns found in the trunk, which was not true. Abel asserts that Hall has lied to police and to a judge and that his testimony before the trial court could not be considered credible.

{¶30} Abel also points to Molnar's admission that he was not truthful with police when he was first arrested because he claimed he didn't know what was going on and was "playing dumb." Abel also proffered the testimony of Ashley Turner, Abel's girlfriend, who testified that she was at a New Year's Eve party at Hall's house a few months later when Molnar told her "not to be mad at [Abel] because [he] didn't know what was going on" and that "[Abel] didn't have anything to do with it." Turner also stated that, after his arrest, Abel told her "that [he] didn't know what was happening" when the men went to Lebanik's.

{¶31} Molnar's testimony, however, conflicted with Turner's. Specifically, Molnar testified that he had "never discussed any of that" with Turner and that he had never indicated to anyone that Abel was not involved in their plans that night.

{¶32} Abel asserts that his convictions are against the manifest weight of the evidence because the only two witnesses who inculpated him had admitted to lying to police and others about their, and his, involvement. Additionally, because Molnar and Hall agreed to testify against him at trial in return for the dismissal of their guns specifications, Abel maintains that their testimony is self-serving and untruthful.

{¶33} Abel argues that our decision in *State v. Chapman*, 9th Dist. No. 07CA009161, 2008-Ohio-1452, should control our determination in this case. In that case, Chapman alleged prosecutorial misconduct based on evidence adduced at trial from his co-defendant who testified on behalf of the State against Chapman. There, the testimony revealed that the prosecutor had offered the co-defendant a considerably less severe sentence in exchange for his testimony, if that testimony resulted in Chapman's conviction. *Chapman*, at ¶25-27 (recounting that the co-defendant's plea agreement reduced his sentence from 51 years to life down to 13 years if his testimony resulted in Chapman's conviction). We considered the contingent nature of the plea agreement, and concluded that:

> "[The co-defendant's] contingency agreement with the State violated Chapman's due process rights. The plea agreement which, according to [the co-defendant], afforded him a reduction in his sentence from, at most, 51 years to 13 years if he testified truthfully *and* the jury convicted Chapman motivated [the co-defendant] to commit perjury or at the least, to selectively remember past events in a manner favorable to the indictment or conviction of Chapman. This agreement deprived Chapman of a fair trial, even absent a specific showing of perjured testimony. [The co-defendant] was one of the State's key witnesses and the only witness who could place Chapman at the scene of the crime, place the gun in his hand, and describe the shooting and the escape. Given this fact, there is a reasonable probability that, but for the prosecutor's misconduct, [the co-defendant] may have provided different testimony (or none at all) and the result of the proceeding may

> have been different." (Internal citations and quotations omitted.) (Emphasis in original.) *Chapman* at ¶33.

In this case, however, the plea arrangements the State made with Hall and Molnar were in no way contingent on the successful prosecution of Abel. Instead, the prosecutor in Abel's case went to great lengths to clarify that, both Hall and Molnar had submitted written proffers of their guilt before being offered any type of agreement from the State to testify against Abel. Additionally, the men had both pled guilty to all the charges before they knew whether or not Abel was going to plead or go to trial. Thus, not only was their agreement not contingent in nature, they pled guilty to the gun specification without the certainty of knowing it would be dropped, but only the possibility of such if Abel went to trial.

{¶34} Based on the testimony adduced at trial and the great deference this Court must accord to the trier of fact, we conclude that Abel's convictions were not against the manifest weight of the evidence. Here, the trial judge was in the best position to gauge the credibility of all witnesses. The judge's decision to credit the testimony of Molnar and Hall, which implicated Abel as a knowledgeable and willing participant in the crimes, does not constitute a miscarriage of justice. See *State v. Miller*, 4th Dist. No. 06CA11, 2007-Ohio-427, at ¶31-36 (concluding appellant's convictions for theft and safecracking were not against the manifest weight of the evidence, where the co-defendant's credibility was challenged because he testified against appellant in exchange for a reduced sentence). Here, there was testimony from Molnar and Hall that the three men discussed taking money from the Lebanik's house while the Lebaniks were out of town. The men went to the house, entered the premises without permission, and stole three guns and prescription drugs. Molnar admitted to breaking into the Lebanik's gun safe and removing two shotguns. Additionally, while placing the guns in Abel's trunk, there was evidence that the guns were sufficiently close to Abel to be considered "on or about [his] person"

pursuant to R.C. 2941.141(A). See *State v. Riley*, 9th Dist. No. 21852, 2004-Ohio-4880, at ¶7-22 (concluding that appellant's gun specification conviction was not against the manifest weight of the evidence, where the shotgun was found between the mattress and box springs in the bed on which appellant was sitting when police arrived). See, also, *State v. Hickman*, 5th Dist. No. 2003-CA-00408, 2004-Ohio-6760, ¶67 (noting that "even if appellant sat in the car during the offenses, he is subject to a *** gun specification [because] his accomplices used a *** gun during the commission of the offenses") (Internal quotations omitted.)

{¶35} Based on the foregoing, we conclude that Abel's convictions are not against the weight of the evidence. Accordingly, Abel's second and third assignments of error are overruled.

III

{¶36} Abel's three assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
CONCURS

BELFANCE, J.
CONCURS, SAYING:

{¶37} I concur. With respect to the first assignment of error addressing the sufficiency of the indictment, a statement designating the offense the defendant intended to commit while in the home is not required in the indictment. However, a defendant may obtain more specificity by requesting the information in a bill of particulars. "[W]hen the indictment sufficiently tracks the wording of the statute of the charged offense, the omission of an underlying offense in the indictment can be remedied by identifying the underlying offense in the bill of particulars." *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, at ¶10, citing *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, at ¶30. Thus, when Abel received the indictment and was unsure of what underlying offense the State was alleging he intended to commit while inside the home, it was his duty to request that the State provide him with that specific information via a bill of particulars. While the record indicates that Abel did request and obtain a bill of particulars from the State, there is no evidence that he objected to its contents or requested an amendment to it. Thus, I concur that Abel's first assignment of error should be overruled.

APPEARANCES:

JACK W. BRADLEY, Attorney at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney, BILLIE JO BELCHER, and CHRISTOPHER J. PIERRE, Assistant Prosecuting Attorneys, for Appellee.