

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-02-005
- vs -	:	<u>OPINION</u>
	:	8/29/2011
BRYAN BAILEY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CRI2010-0116

Stephen J. Pronai, Madison County Prosecuting Attorney, Eamon P. Costello, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

Robert C. Bannerman, P.O. Box 77466, Columbus, Ohio 43207-0098, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Bryan Bailey, appeals from his conviction in the Madison County Court of Common Pleas for breaking and entering. For the reasons outlined below, we affirm.

{¶2} Appellant, who lives in Knox County, was indicted on one count of breaking and entering in violation of R.C. 2911.13(A), a fifth-degree felony, after he allegedly broke into a garage owned by Ronald Sparks located on State Route 142 in Madison County, Ohio.

Following a two-day jury trial, appellant was found guilty and sentenced to serve ten months in prison. Appellant now appeals from his conviction, raising two assignments of error for review.

{¶3} Assignment of Error No. 1:

{¶4} "APPELLANT'S CONVICTION WAS LEGALLY INSUFFICIENT AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶5} In his first assignment of error, appellant argues that the state provided insufficient evidence to support his conviction and that his conviction was against the manifest weight of the evidence. These arguments lack merit.

{¶6} As this court has previously stated, "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35; *State v. Urbin*, 148 Ohio App.3d 293, 2002-Ohio-3410, ¶31. In turn, while a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, this court's determination that appellant's conviction was supported by the manifest weight of the evidence will be dispositive of the issue of sufficiency. *State v. Rigdon*, Warren App. No. CA2006-05-064, 2007-Ohio-2843, ¶30, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52; see, e.g., *State v. Rodriguez*, Butler App. No. CA2008-07-162, 2009-Ohio-4460, ¶62.

{¶7} A manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Clements*, Butler App. No. CA2009-11-277, 2010-Ohio-4801, ¶19. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State*

v. Lester, Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James*, Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide since it is in the best position to judge the credibility of the witnesses and the weight to be given to the evidence. *State v. Gesell*, Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Therefore, the question upon review is 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. *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶8} Appellant was charged with breaking and entering in violation of R.C. 2911.13(A), a fifth-degree felony, which prohibits any "person by force, stealth, or deception" from "trespass[ing] in an unoccupied structure, with purpose to commit therein any theft offense * * * or any felony." Force, as defined by R.C. 2901.01(A)(1), means "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

{¶9} Initially, appellant argues that "the meager physical evidence and the unreliability of the witnesses' testimony render the State's evidence insufficient to sustain the guilty verdict." We disagree.

{¶10} At trial, Jacob Walker, Sparks' co-worker, testified that he noticed two vehicles, a pickup truck and a car, parked outside Sparks' garage on the evening of May 10, 2010. Walker, who was standing across the street at the time, continued monitoring the garage when he noticed four men come out from behind the garage and get into the two vehicles. According to Walker, one of the men was wearing a bandana and "had a bad limp" that

"looked like he was under the influence or something." Finding this unusual, Walker testified that he took down the vehicles' license plate numbers and relayed his concerns to Sparks.

{¶11} After being told of the suspicious behavior, Sparks testified that he went to his garage where he found the back door "kicked in" and three speakers that he kept upstairs missing. Sparks then testified that he called the Madison County Sheriff's Department and provided them with the vehicles' license plate numbers he received from Walker. A search of the vehicles' license plate numbers conducted by Deputy John Bockman returned two vehicles: a pickup truck owned by Wayne Reynolds and a car owned by Wayne's brother, Scott Reynolds.

{¶12} Also at trial, Wayne Reynolds, who later pled guilty to receiving stolen property resulting from this incident, testified that Scott, his brother, asked him to help "his friend move." Not wanting to upset his brother, Wayne, who admittedly owned the pickup truck Walker saw parked outside Sparks' garage, drove down to meet his brother at a gas station. Once they arrived at the gas station, Wayne testified that "that guy approached me, got out of my brother's car and was like, yeah, I'm the one that needs stuff moved, this is my father's property, this is my stuff, and blah, blah, blah. And come to find out it was [appellant]." Wayne then testified that appellant and his brother told him to "follow [them] down there."

{¶13} Upon arriving at the garage, which was "all boarded up," Wayne testified that appellant, who was wearing a bandana and "had a real bad limp," kept "ensuring [him] that, yeah, everything is fine, that's my father's property." Wayne, however, who "just had a gut feeling something wasn't right," testified that he sat in his pickup truck while "all of them got out and went around back, and went inside."

{¶14} Continuing, Wayne testified that Tracy Hagans, who had also arrived with appellant and Scott, then came out of the garage and asked him to help carry "some stuff," so he "went around and went inside and [appellant's] like, yeah, this, this and this is mine. It

was the speakers." Wayne then testified that he and Hagans picked up the speakers and put them in the back of his pickup truck. When asked who "was directing [him] on that day," Wayne testified that appellant, who he identified at trial, was directing him to take the speakers. Wayne then testified that as he and Hagans were following appellant and his brother in his pickup truck, "this cruiser got on—turned on his lights and stuff, and pulled in behind me and did their thing."

{¶15} In addition, Lieutenant Eric Semler of the Madison County Sheriff's Department testified that after Wayne's pickup was stopped, Wayne and Hagans were arrested and transported to the sheriff's office for questioning. According to Lieutenant Semler, Wayne, although he "wasn't sure of the name," implicated appellant, who he identified as wearing a bandana, and Scott, his brother, in the crime. When asked if Wayne was "getting any consideration" by implicating appellant and his brother, Lieutenant Semler testified that he was not.

{¶16} In his defense, appellant presented testimony from Christie O'Neill, a certified occupational therapist assigned to provide home care to appellant after he had surgery to remove several disks from his neck in February 2010, testified that appellant exhibited significant physical limitations during her initial visits that made it difficult for him to walk, get dressed, and eat. O'Neill, who testified that it would appear to a layperson that appellant had a "really bad limp, like he was drunk or born with a bad leg," also testified that he was unable to lift heavy objects, would have difficulty maneuvering up and down steps, and that she "wouldn't think he would be able to" kick in a locked door.

{¶17} Appellant also presented testimony from his mother, Linda Parks, who testified that appellant "couldn't do anything" following his surgery. Parks also testified that "there is no way possible" that appellant could kick in a locked door, that he would "definitely need help" to negotiate a flight of stairs, and that he could not lift heavy objects.

{¶18} After a thorough review of the record, we cannot say the jury clearly lost its way so as to create such a manifest miscarriage of justice requiring appellant's breaking and entering conviction be reversed. As noted above, the state presented extensive competent and credible evidence indicating appellant, who, at the time, was wearing a bandana and had a "real bad limp," directed his cohorts to Sparks' garage where they kicked in the locked door and stole three speakers that were being kept upstairs. In fact, Wayne, who later pled guilty to receiving stolen property from this incident, testified appellant, who he identified at trial, explicitly told him to take the speakers after the four of them entered Sparks' garage.

{¶19} Despite this, appellant argues that his conviction was improper "because he was physically infirm at the time of the crime" making it "physically impossible for [him] to participate in the crime[.]" However, while appellant did provide some evidence indicating his alleged physical infirmities would make it difficult for him to kick in a locked door, traverse a staircase, or carry heavy objects, the jury was certainly entitled to convict appellant of the offense upon proof that he was complicit in its commission. See R.C. 2923.03(F); *State v. Herring*, 94 Ohio St.3d 246, 251, 2002-Ohio-796; *State v. Coleman* (1988), 37 Ohio St.3d 286, paragraph two of the syllabus. In fact, as the trial court's jury instructions explicitly stated:

{¶20} "The defendant is charged in the indictment as a principal offender. You may find him guilty of the offense whether he participated as a principal offender or as an accomplice if you are satisfied beyond a reasonable doubt of his guilt."

{¶21} The uncontroverted evidence indicates appellant, at a minimum, advised, assisted, and directed the others in the commission of the crime, and therefore, his conviction was certainly not against the manifest weight of the evidence. *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, syllabus; *State v. Gragg*, 173 Ohio App.3d 270, 2007-Ohio-4731, ¶21; *State v. Hood* (1999), 132 Ohio App.3d 334, 338-339; *State v. Smith*, Butler

App. No. CA2008-03-064, 2009-Ohio-5517, ¶82. In turn, having found appellant's breaking and entering conviction was not against the manifest weight of the evidence, we necessarily conclude the state presented sufficient evidence to support the jury's finding of guilt. Accordingly, appellant's first assignment of error is overruled.

{¶22} Assignment of Error No. 2:

{¶23} "APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶24} In his second assignment of error, appellant argues that he received ineffective assistance of trial counsel. We disagree.

{¶25} To prevail on his ineffective assistance of counsel claim, appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and that he was prejudiced as a result. *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶194; *State v. Smith*, Warren App. No. CA2010-06-057, 2011-Ohio-1188, ¶63, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052. In order to demonstrate prejudice, appellant must establish, but for counsel's errors, a reasonable probability exists that the result of his trial would have been different. *State v. Ritchie*, Butler App. No. CA2008-12-304, 2009-Ohio-5280, ¶21, citing *Strickland* at 694. The failure to make an adequate showing on either prong is fatal to appellant's ineffective assistance of counsel claim. *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶77, citing *Strickland* at 697; *State v. McIntosh*, Butler App. Nos. CA2006-03-051, CA2006-10-282, CA2007-10-241, 2008-Ohio-5540, ¶12.

{¶26} Initially, appellant argues that he received ineffective assistance of trial counsel where counsel "did not object to hearsay identification" testimony of Lieutenant Semler. However, even if we were to find his trial counsel's performance fell below an objective standard of reasonableness, it cannot be said that appellant was prejudiced by his trial counsel's failure to object to Lieutenant Semler's so-called "hearsay identification." This is

especially true when considering the extensive other evidence identifying appellant, which included, among other things, Wayne's in-court identification of appellant as the individual who directed him to take the speakers from Sparks' garage. Therefore, appellant's first argument is overruled.

{¶27} Appellant also argues that he received ineffective assistance of trial counsel when counsel "allowed the introduction of prior criminal conduct" through O'Neill's deposition testimony indicating appellant missed several therapy sessions when he was incarcerated on other charges. However, while appellant claims this information was "crucial" to the jury's finding of guilt, there is simply nothing in the record that convinces this court that the result of his trial would have been different had this evidence been excluded. Therefore, because we find no resulting prejudice, appellant's second argument is likewise overruled.

{¶28} In light of the foregoing, having found no merit to either argument advanced by appellant under his second assignment of error, appellant's second assignment of error is overruled.

{¶29} Judgment affirmed.

POWELL, P.J., and PIPER, J., concur.