

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-224
 : (C.P.C. No. 11CR-02-669)
 Jared E. Walker, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on March 14, 2013

Ron O'Brien, Prosecuting Attorney, *Seth L. Gilbert* and
Branden J. Albaugh, for appellee.

Clark Law Office, and *Toki M. Clark*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Jared E. Walker is appealing from his conviction on a charge of burglary.

He assigns four errors for our consideration:

[I.] THE CONVICTION OF APPELLANT IS AGAINST THE
MANIFEST WEIGHT OF THE EVIDENCE.

[II.] THE TRIAL COURT ERRED WHEN IT FAILED TO
ACQUIT THE DEFENDANT.

[III.] THE CRIMINAL DEFENDANT FAILS TO GET A FAIR
TRIAL WHEN A TRIAL COURT ALLOWS A JUROR TO
REMAIN ON THE PANEL AFTER THE JUROR
ANNOUNCES SHE KNOWS A CO-DEFENDANT.

[IV.] THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE DEFENDANT AIDED AND ABETTED IN A BURGLARY.

{¶ 2} On January 26, 2011, Joseph Powell broke into the house where Jevon Crews lived. Powell broke in via smashing a window on the porch of the residence, and in the process he seriously injured his arm. Jared Walker was with Powell when Powell broke in and Walker carried a television belonging to Crews to the van which had brought Powell and Walker to the area.

{¶ 3} Because of Powell's injury, the driver of the van drove the van with the television inside to Ohio State University East Hospital so Powell could be treated. Police officers responded to the hospital, finding the van and the three individuals who had been in it. All three were arrested as a result.

{¶ 4} The evidence clearly indicates that Powell was guilty of burglary. The statute, R.C. 2911.12, reads:

(A) No person, by force, stealth, or deception, shall do any of the following:

(1) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense;

(2) 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 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;

(3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense.

(B) No person, by force, stealth, or deception, shall trespass in 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. (C) As used in this section, "occupied structure" has the same meaning as in section 2909.01 of the Revised Code. (D) Whoever violates division (A) of this section is guilty of burglary. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree. (E) Whoever violates division (B) of this section is guilty of trespass in a habitation when a person is present or likely to be present, a felony of the fourth degree.

{¶ 5} The evidence also indicates that Walker was with Powell when Powell broke in and that Walker helped Powell remove the television from the residence.

{¶ 6} Police responded to the residence, 775 East Third Avenue in Columbus, Ohio, after receiving a 9-1-1 call indicating that three individuals were seen breaking into the house. The person who made the 9-1-1 call did not testify at trial.

{¶ 7} Crews did testify at the trial, indicating that her window had not been broken when she left for work. She also testified that a large television stand weighing approximately 300 pounds had been moved and a separate television stolen.

{¶ 8} In the middle of Walker's trial, a plea bargain was discussed in the record, but nothing was finalized because Walker consistently maintained that he did not enter the house himself so he did not believe he was guilty of burglary.

{¶ 9} When the charge to the jury was given, the jury was informed that Walker was charged both as a principal offender and as an accomplice. Complicity is defined in R.C. 2923.03 as follows:

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code.

(D) If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:

"The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

{¶ 10} Despite the paucity of evidence that Walker was a principal offender, no Crim.R. 29 motion for judgment of acquittal was made. As a result, the trial judge was within his discretion to charge on both theories of guilt.

{¶ 11} Because the issue of a judgment of acquittal based on the sufficiency of the evidence was not presented to the trial judge via a motion under Crim.R. 29, the judge cannot be faulted for failing to enter such a judgment sua sponte.

{¶ 12} The second assignment of error is overruled.

{¶ 13} Sufficiency of the evidence is the legal standard applied to determine whether the case should have gone to the jury. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In other words, sufficiency tests the adequacy of the evidence and asks whether the evidence introduced at trial is legally sufficient as a matter of law to support a verdict. *Id.* "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*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307 (1979). The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks* at 273. If the court determines that the evidence is insufficient as a matter of law, a judgment of acquittal must be entered for the defendant. *See Thompkins* at 387.

{¶ 14} Even though supported by sufficient evidence, a conviction may still be reversed as being against the manifest weight of the evidence. *Thompkins* at 387. In so doing, the court of appeals, sits as a "thirteenth juror" and, after "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.* (quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983)); *see also Columbus v. Henry*, 105 Ohio App.3d 545, 547-48 (10th Dist.1995). Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most "exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶ 15} As this court has previously stated, "[w]hile the jury may take note of the inconsistencies and resolve or discount them accordingly, *see [State v.] DeHass* [10 Ohio St.2d 230 (1967)], such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Nivens*, 10th Dist. No. 95APA09-

1236 (May 28, 1996). It was within the province of the jury to make the credibility decisions in this case. *See State v. Lakes* 120 Ohio App. 213, 217 (4th Dist.1964), ("It is the province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness.") *See State v. Harris*, 73 Ohio App.3d 57, 63 (10th Dist.1991), (even though there was reason to doubt the credibility of the prosecution's chief witness, he was not so unbelievable as to render verdict against the manifest weight).

{¶ 16} Although the sufficiency and weight of the evidence is questionable as to Walker being a principal offender, the evidence fully supports finding Walker guilty as an accomplice. Walker went to the residence with Powell and was apparently nearby when Powell broke the window to enter the residence. Walker helped Powell transport the stolen television immediately after and urged the driver of the van to leave the area quickly. The jury could reasonably find that Walker aided and abetted Powell, at least as a lookout while the burglary was going on and helped Powell flee with stolen goods after the burglary. Walker's help in the theft of the television could reasonably be interpreted as sharing Powell's intention to steal.

{¶ 17} The first and fourth assignments of error are overruled.

{¶ 18} The third assignment of error addresses the fact that the second alternate juror knew a co-defendant of Walker's. That co-defendant, Nedra Walker, testified at trial. However, the second alternate juror never participated in the jury deliberations, so could not have had an affect on the guilty verdict.

{¶ 19} The third assignment of error is overruled.

{¶ 20} All four assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT, P.J., and BROWN, J., concur.
