

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-06-007
- vs -	:	<u>OPINION</u>
	:	2/1/2010
ANGUS J. STAMPER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 08 CRI 00210

David B. Bender, Fayette County Prosecuting Attorney, Kristina M. Rooker, 110 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

Jeffrey A. McCormick, 1225 U.S. Highway 22 SW, Washington C.H., Ohio 43160, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Angus J. Stamper, appeals his convictions for breaking and entering, theft and possession of chemicals for the manufacture of drugs. We affirm.

{¶2} Around approximately 6:00 a.m. on October 18, 2008, the Fayette County Sheriff's Office received an alarm activation from Crop Production Services (CPS). Sergeant Doug Coe responded to the alarm. Upon arriving at the business, Sgt. Coe discovered a red air tank attached to one of the company's anhydrous ammonia tanks.

The red air tank had a frost line about halfway up the tank, indicating that anhydrous was flowing into the air tank. Sgt. Coe requested that the K-9 handler for the sheriff's office, Sgt. Hicks, attempt to track and locate any criminal offenders.

{¶13} Sgt. Hicks began tracking his canine in the area of the anhydrous tanks. At trial, Sgt. Hicks explained that the canine tracks based off ground disturbance and that the ground where a person has walked smells different to the dog. The dog picked up a track in the area near the red air tank and proceeded to lead the officer to a railroad bed and along a ditch beside the railroad tracks to some brush where appellant was discovered. Appellant was found lying on his stomach in the brush and was taken into custody.

{¶14} Sgt. Coe advised appellant of his *Miranda* rights and questioned him about the incident. Appellant initially denied any involvement in the incident, however, upon further questioning appellant admitted to being involved and made several incriminating statements. Appellant informed Sgt. Coe that he and two other individuals went to the Jeffersonville area to steal anhydrous from CPS. Appellant admitted that he carried the tank onto the premises and that he was present and assisted with hooking up the tank. Appellant indicated that the tank began to fill with anhydrous, but he and the other individuals fled on foot upon observing vehicle lights from the officers. Appellant was then transported to the Fayette County Jail.

{¶15} Sgt. Coe then conducted a test to determine whether anhydrous was present in the red air tank. The test confirmed the presence of anhydrous. Appellant was indicted for breaking and entering in violation of R.C. 2911.13(B), a felony of the fifth degree, theft in violation of R.C. 2913.02(A)(1), a felony of the third degree, and possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A), a felony of the third degree.

{¶16} While being held at the Fayette County Jail, appellant made several phone calls which were recorded. In the phone calls, appellant indicated that he would be able to get another tank filled with anhydrous if somebody would bail him out of jail.

{¶17} The case proceeded to a jury trial. Appellant took the stand in his defense. Appellant testified that on that evening he was accompanying three individuals intending to obtain marijuana. While in the car, the individuals began discussing the prospects of stealing anhydrous. Appellant testified that he told the others that he wanted nothing to do with the theft. Appellant claimed that the other individuals let him out of the vehicle before they continued to CPS. Appellant then walked across a yard past an old house toward the train tracks and headed back toward Jeffersonville.

{¶18} Additionally, appellant offered the testimony of his estranged wife. According to appellant's wife, appellant contacted her during the early morning hours of the night in question, claiming that he was stuck and needed a ride. She stated that she did not know where he was calling from and hung up the phone before he could tell her. Mrs. Stamper testified that she believes she received the call just prior to 5:00 a.m. because she had to get up to go to work.

{¶19} The jury found appellant guilty as charged and the trial court sentenced him to a total of four years in prison. Appellant timely appeals, raising four assignments of error. In each of his first three assignments of error, appellant challenges the sufficiency of each respective charge. In the fourth assignment of error, he challenges the manifest weight of all of his convictions. In the interest of convenience, we will combine the sufficiency and manifest weight arguments for each charge under appellant's various assignments of error.

{¶10} Assignment of Error No. 1:

{¶11} "THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO

SUSTAIN APPELLANT'S CONVICTION FOR BREAKING AND ENTERING."

{¶12} In his first assignment of error, appellant challenges his conviction for breaking and entering. Appellant argues that the evidence presented by the state fails to prove that he was actually on the premises. Appellant argues that nobody witnessed him on the property and there was no physical evidence tying him to the crime scene. Further, appellant urges that, although the canine tracked to his location, there is no testimony that the dog was following his scent. Additionally, appellant criticizes the testimony of Sgt. Coe and the alleged confession. Appellant argues that none of the statements made to the officer were recorded or taped, so any admissions cannot be accepted. Finally, appellant relies upon his trial testimony and directs the court to the testimony of his estranged wife, arguing that it is "highly unlikely that he would be calling his wife for a ride an hour prior to the CPS alarm sounding."

{¶13} When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298. The relevant inquiry becomes "whether, after viewing the evidence in a light most favorable to the prosecution, any reasonable 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, paragraph two of the syllabus.

{¶14} "Unlike a sufficiency of the evidence challenge, 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.*] *Carroll*, [Clermont App. Nos. CA2007-02-030, 2007-03-041, 2007-Ohio-7075] at ¶118. An appellate court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and

consider the credibility of witnesses. *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25, citing [*State v.*] *Hancock*, [108 Ohio St.3d 57], 2006-Ohio-160 at ¶39. Under a manifest weight challenge, the question is 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. *Good* at ¶25. This discretionary power would be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *State v. Heflin*, Summit App. No. 21655, 2003-Ohio-7181, ¶5." *State v. Hart*, Warren App. No. CA2008-06-079, 2009-Ohio-997, ¶18.

{¶15} Circumstantial evidence and direct evidence have the same probative value, and in some instances, certain facts can only be established by circumstantial evidence. *State v. Mobus*, Butler App. No. CA2005-01-004, 2005-Ohio-6164, ¶51, citing *Jenks*, 61 Ohio St.3d at 272. A conviction based on circumstantial evidence is no less sound than one based on direct evidence. *Mobus* at ¶51.

{¶16} "Breaking and entering" is defined for the purposes of this case as, "[n]o person shall trespass on the land or premises of another, with purpose to commit a felony." R.C. 2911.13(B).

{¶17} Appellant was discovered in close proximity to the property of CPS after being tracked by the canine in brush along the railroad tracks. After receiving his *Miranda* rights, appellant admitted to Sgt. Coe that he was on CPS property, carried the red air tank, and assisted in hooking the tank up to CPS's anhydrous tank.

{¶18} The primary issue raised by appellant relates to credibility, specifically appellant's confession and the credibility of Sgt. Coe. Although we review credibility when considering the manifest weight of the evidence, the credibility of witnesses is primarily a determination for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The trier of fact 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. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81.

{¶19} When viewing the direct evidence combined with the circumstantial evidence presented by the state, we find no indication that appellant's conviction for breaking and entering is against the manifest weight or sufficiency of the evidence or that the trier of fact lost its way in crediting the testimony of Sgt. Coe over appellant's version of the events. Further, the canine began tracking appellant's scent while on CPS property near the red air tank and followed the scent until appellant was discovered hiding in brush near the railroad tracks.

{¶20} Appellant's first assignment of error is overruled.

{¶21} Assignment of Error No. 2:

{¶22} "THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION FOR THEFT"

{¶23} In his second assignment of error, appellant disputes his theft conviction. Appellant urges that there is no physical evidence linking him to the theft of the anhydrous ammonia. Additionally, appellant challenges the evidence presented by the recorded phone calls from jail. Appellant claims that although the phone calls seemingly implicate appellant in the theft offense, appellant was actually assisting the Fayette County Sheriff's Office in attempting to arrest the other individuals involved in the theft. Appellant claims that he was lying to the individuals in an attempt to coax them to return to Fayette County.

{¶24} "Theft" is defined as "[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."
R.C. 2913.02(A)(1).

{¶25} In this case, appellant's conviction for theft is supported by sufficient evidence and not against the manifest weight of the evidence. Appellant admitted to Sgt. Coe that he assisted in hooking the air tank to CPS's anhydrous tank. Sgt. Coe stated that upon arriving at CPS, the frost line on the tank was halfway up the tank. See *State v. Rollins*, Paulding App. No. 11-05-08, 2006-Ohio-1879, ¶23. Sgt. Coe, who has specialized training in dealing with methamphetamine laboratories, tested the contents of the red air tank. The tank's contents tested positive for the presence of anhydrous ammonia. Additionally, a CPS employee testified that the company's anhydrous tank had been impermissibly tampered with on October 18, 2008 and that, based upon his observations, it was apparent that anhydrous was present in the red tank.

{¶26} Sgt. Coe also explained the context of the recorded phone calls. Initially, the Fayette County Sheriff's Office worked with appellant in an attempt to get the other individuals involved in the incident to return to Fayette County. However, as Sgt. Coe explained, a definite time limit was placed on the arrangement and the phone calls used at trial were clearly outside of these parameters and were made without the knowledge or assistance of the sheriff's office. During the calls, appellant clearly implicated himself in the theft of the anhydrous as well as demonstrated his knowledge of anhydrous in Fayette County and his willingness to steal it in the future.

{¶27} Appellant's second assignment of error is overruled.

{¶28} Assignment of Error No. 3:

{¶29} "THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR ILLEGAL POSSESSION OF CHEMICALS FOR MANUFACTURE OF DRUGS."

{¶30} In his third assignment of error, appellant challenges his conviction for illegal possession of chemicals for the manufacture of drugs. Appellant argues that the state presented insufficient evidence that appellant ever had control over the anhydrous ammonia because he had no air tanks, hoses or any other physical evidence on or near his person when he was found. Further, appellant urges that there is no evidence that appellant intended to use the chemical to manufacture a Schedule I or II drug.

{¶31} Possession of chemicals for manufacture of drugs states that "[n]o person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code." R.C. 2925.041(A). "[I]t is not necessary to allege or prove that the offender assembled or possessed all chemicals necessary to manufacture a controlled substance * * *. The assembly or possession of a single chemical that may be used in the manufacture of a controlled substance * * * is sufficient to violate this section." R.C. 2925.041(B).

{¶32} "Possess" or "possession" means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found. R.C. 2925.01(K). Possession can be either actual or constructive. *State v. Brooks* (1996), 113 Ohio App.3d 88, 90, citing *State v. Haynes* (1971), 25 Ohio St.2d 264, 269-270. "The crucial issue is not whether the accused has actual physical contact with the controlled substance but, rather, whether the accused is capable of exercising dominion and control over the substance." *Id.*, citing *State v. Wolery* (1976), 46 Ohio St.2d 316, 332.

{¶33} According to Sgt. Coe, appellant admitted arriving at CPS property and

hooking the red air tank to the company's anhydrous tank. Under appellant's supervision, anhydrous was siphoned into the red air tank. Clearly, the red air tank was within appellant's dominion and control. See *State v. Gragg*, 173 Ohio App.3d 270, 2007-Ohio-4731.

{¶34} Further, Sgt. Coe testified about the characteristics and uses of anhydrous ammonia. Sgt. Coe testified that the only legitimate use for anhydrous was in the farming industry, but that it was often stolen and used by individuals in the manufacture of methamphetamine. *Rollins* at ¶24. Additionally, during the taped telephone conversations, appellant clearly indicated that he would steal additional anhydrous if someone would bail him out of jail. Based upon appellant's statement there is a clear inference that appellant possessed the anhydrous.

{¶35} After review of the record, we find that appellant's conviction for possession of chemicals for the manufacture of drugs is supported by sufficient evidence and not against the manifest weight.

{¶36} Appellant's third assignment of error is overruled.

{¶37} Assignment of Error No. 4:

{¶38} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN CONVICTING HIM OF BREAKING AND ENTERING; THEFT; AND ILLEGAL POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS."

{¶39} Under his fourth assignment of error, appellant challenges the manifest weight of each of his convictions. Having already addressed these manifest weight arguments, appellant's fourth assignment of error is overruled.

{¶40} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.

