

[Cite as *State v. Hill*, 2010-Ohio-2552.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 09CA30
 :
 vs. :
 :
 JUSTIN HILL, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Susan M. Zurface Daniels, P.O. Box 589, Hillsboro, Ohio 45133

COUNSEL FOR APPELLEE: James B. Grandey, Highland County Prosecuting Attorney, and Anneka P. Collins, Highland County Assistant Prosecuting Attorney, 112 Governor Foraker Place, Hillsboro, Ohio 45133

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-1-10

ABELE, J.

{¶ 1} This is an appeal from Highland County Common Pleas Court judgment of conviction and sentence. A jury found Justin Hill, defendant below and appellant herein, guilty of (1) breaking and entering in violation of R.C. 2911.13(A); and (2) theft in violation of R.C. 2913.02(A)(1).

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED IN OVERRULING THE

DEFENDANT'S CRIM.R. 29(A) MOTION FOR ACQUITTAL ON THE GROUNDS THAT, WHEN VIEWED IN A LIGHT MOST FAVORABLE TO THE PROSECUTION, THE STATE HAD FAILED AT THE CLOSE OF ITS EVIDENCE TO MEET ITS BURDEN ON ESSENTIAL ELEMENTS OF EACH CHARGE."

SECOND ASSIGNMENT OF ERROR:

"THE VERDICTS FINDING DEFENDANT GUILTY OF BREAKING & ENTERING IN VIOLATION OF O.R.C. §2911.13(A) AND OF THEFT IN VIOLATION OF O.R.C. §2913.02(A)(1) WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

THIRD ASSIGNMENT OF ERROR:

"THE VERDICTS FINDING DEFENDANT GUILTY OF FORGERY IN VIOLATION OF BREAKING & ENTERING IN VIOLATION OF O.R.C. §2911.13(A) AND OF THEFT IN VIOLATION OF O.R.C. §2913.02(A)(1) WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶ 3} On April 29, 2009, at approximately 2 AM, someone gained entry into the "Ole Depot Carry Out Tavern." The intruder stole cash, several cartons of cigarettes and lottery tickets. A surveillance camera captured the event. Later that day, Bo Burns (an employee) phoned his cousin, Amy Ames, and asked her to view the tape to identify the perpetrator. Ames identified appellant as the individual on the tape. Several law enforcement officers then visited Latisha Price's apartment, where appellant had spent the night, and after Price gave the authorities permission to search her residence, they found cash, cigarettes and lottery tickets.¹

{¶ 4} On June 2, 2009, the Highland County Grand Jury returned an indictment

¹ The record suggests that not all of the cash stolen from "Ole Depot" was recovered. Approximately \$300 was missing from the stolen funds.

charging appellant with the theft and breaking and entering. Appellant requested and received a jury to hear the matter. At the conclusion of the State's case, appellant moved for a Crim.R. 29(A) judgment of acquittal on grounds that the prosecution had not carried its burden of proof as to the perpetrator's identity. The trial court denied appellant's motion, however. After hearing the evidence and counsels' arguments, the jury returned guilty verdicts on both counts.

{¶ 5} The trial court sentenced appellant to serve eleven months on each count, with the sentences to be served consecutively for a total of twenty-two months imprisonment. This appeal followed.

I

{¶ 6} Appellant asserts in his first assignment of error that the trial court erred by overruling his Crim.R. 29(A) motion for a judgment of acquittal. He also claims in his third assignment of error that insufficient evidence supports his convictions. Because these assignments of error involve the same standard of review, see State v. Jackson, Ross App. No.09CA3120, 2010-Ohio-1846, at ¶5; State v. Terry, Athens App. No. 09CA23, 2010-Ohio-1604, at ¶¶18-19, we consider them together.

{¶ 7} When reviewing a sufficiency of the evidence claim, an appellate court must focus on the adequacy of the evidence; that is, whether the evidence adduced at trial, if believed, could reasonably support a finding of guilt beyond a reasonable doubt. State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541; State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. The pertinent standard of review is whether, after viewing all of the evidence and the inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could

have found all of the essential elements of the offense beyond a reasonable doubt.

Jenks, supra at 273; Jackson v. Virginia (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. Furthermore, reviewing courts must not assess “whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.” Thompkins, 78 Ohio St.3d at 390, 678 N.E.2d 541 (Cook, J., concurring).

{¶ 8} Appellant’s arguments under these assignments of error are premised on the issue of the perpetrator's identification. Appellant argues that the evidence is insufficient to establish that he was, in fact, the perpetrator of the break-in. We disagree with appellant.

{¶ 9} At trial, Amy Ames identified appellant as the person on the surveillance tape. Latisha Price also testified that most of the stolen items (cigarettes, money and lottery tickets) were found in her apartment’s “downstairs closet.” Price stated that she did not know the items were there, and, further, the cigarettes are not the brand she smokes. The cigarettes are, however, the brand that appellant smokes. Finally, authorities found clothing in Price's apartment similar to that worn by the individual on the surveillance tape. After our review of the record, we readily conclude that the evidence is sufficient to defeat a Crim.R. 29(A) motion for judgment of acquittal and support the jury verdict.

{¶ 10} Appellant counters that (1) no fingerprint or DNA evidence identified him as the perpetrator; (2) the videotape was not preserved; and (3) various deficiencies arose in Ames’s identification of him as the person on the tape. This, however, involves the weight and credibility of the evidence, rather than the sufficiency of the evidence.

Evidence weight and credibility are issues to be determined by the trier of fact. See State v. Dye (1998), 82 Ohio St.3d 323, 329, 695 N.E.2d 763; State v. Williams (1995), 73 Ohio St.3d 153, 165, 652 N.E.2d 721. Also, a trier of fact is free to believe all, part or none of the testimony of any witness who appears before it. State v. Nichols (1993), 85 Ohio App.3d 65, 76, 619 N.E.2d 80; State v. Caldwell (1992), 79 Ohio App.3d 667, 679, 607 N.E.2d 1096. Here, the jury obviously believed (1) Ames when she identified appellant as the person on the videotape, and (2) Price when she testified that the stolen items in her closet did not belong to her. We will not second-guess the trier of fact's determination in this matter.

{¶ 11} Accordingly, based upon these reasons, we hereby overrule appellant's first and third assignments of error.

II

{¶ 12} In his second assignment of error, appellant asserts that the jury verdicts are against the manifest weight of the evidence. Once again, we disagree with appellant.

{¶ 13} Appellant accurately acknowledges that “sufficiency” and “manifest weight” are different legal concepts, Thompkins, supra at 386. Manifest weight arguments typically arise when “competing theories of the case” are presented to a jury, and the jury must choose which argument is more persuasive. See e.g. State v. Cooper, 170 Ohio App.3d 418, 867 N.E.2d 493, 2007-Ohio-1186, at ¶3. In the case sub judice, however, appellant did not actually present a “competing theory” as to who committed the offense, but, instead, challenged the identification evidence (that we have already found sufficient to sustain his convictions).

{¶ 14} When determining whether a criminal conviction is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." State v. Eskridge (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph two of the syllabus. "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Martin at 175, 485 N.E.2d 717 (citations omitted). Generally, an appellate court will not reverse a conviction on the grounds that it is against the manifest weight of the evidence unless it is obvious that the trier of fact clearly lost its way and created a manifest miscarriage of justice that requires reversal and a new trial. See State v. Earle (1997), 120 Ohio App.3d 457, 473, 698 N.E.2d 440; State v. Garrow (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814.

{¶ 15} Our review of the record, including and the evidence that we discussed with respect to appellant's first and third assignments of error, reveals that in this matter the jury did not lose its way. We believe that the record contains substantial evidence upon which the trier of fact could reasonably conclude that the elements of the offense have been proven beyond a reasonable doubt. To the extent that appellant attacks the verdicts as based on circumstantial evidence, we note that this is only partially true. Ames's identification of the surveillance video constitutes direct, rather than circumstantial, evidence. Although appellant argues that her testimony is an "obvious misidentification," we find no merit to that argument. Again, any problems with the identification involves evidence weight and credibility that the trier of fact must consider and decide. Similarly, we are not persuaded that any arguable discrepancies in Ames'

identification resulted in a “manifest miscarriage of justice.” Moreover, as appellant accurately notes, criminal convictions may in fact be based on circumstantial evidence alone. See Jenks, supra at paragraph one of the syllabus; also see State v. Terry, Athens App. No. 09CA23, 2010-Ohio-1604, at ¶23; State v. Throckmorton, Highland App. No. 08CA17, 2009-Ohio-5344, at ¶20. Here, the recovery of the stolen property, along with other circumstantial evidence, fully supports the jury's determination.

{¶ 16} Accordingly, for all these reasons, we hereby overrule appellant's second assignment of error. Having reviewed all the errors assigned by appellant and argued in his brief, and having found merit in none, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.