

STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 09 JE 13
PLAINTIFF-APPELLEE,)	
)	
- VS -)	O P I N I O N
)	
SHELDON JACKSON,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 08CR161.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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Prosecuting Attorney
Attorney Michael Calabria
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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 2, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Sheldon Jackson appeals from his conviction in the Jefferson County Common Pleas Court of burglary, a violation of R.C. 2911.12(A)(4), a fourth degree felony, and two counts of assault on a peace officer, a violation of R.C. 2903.13(A), a fourth degree felony. The issue raised in this appeal is whether the conviction for burglary was against the manifest weight of the evidence. For the reasons expressed below, the judgment of the trial court is affirmed.

STATEMENT OF THE FACTS AND CASE

¶{2} On September 22, 2008, at around 5:00 a.m., Sheldon Jackson allegedly burglarized Judith Davis' home located on 28 Township Road 281, Lot 20, Steubenville, Jefferson County, Ohio. Davis called 911 after the alleged burglary and identified Jackson, her neighbor, as the intruder. The two deputies that responded to the call arrested Jackson that morning at his home.

¶{3} As a result of the occurrences that allegedly happened that morning, Jackson was indicted for burglary, a violation of R.C. 2911.12(A)(4), a fourth degree felony and two counts of assaulting a police officer, a violation of R.C. 2903.13(A), a fourth degree felony. Although he originally entered a not guilty plea to all charges, Jackson later withdrew his not guilty plea on the assault charges and changed those pleas to guilty. He did not change his not guilty plea to the burglary charge and consequently, that charge was tried before a jury. After hearing the evidence, the jury convicted Jackson of burglary.

¶{4} Following trial, the court proceeded to sentencing. Jackson received 15 months for the burglary conviction and 12 months for each of the assault convictions. The sentences for the assault convictions were ordered to be served concurrent to each other. The sentence for the burglary conviction was ordered to be served consecutive to the sentences for the assault convictions. Accordingly, Jackson received an aggregate sentence of 27 months.

¶{5} Jackson timely appeals from the jury conviction for burglary; the convictions and sentences for the assaults on a police officer are not appealed.

ASSIGNMENT OF ERROR

¶{6} “THE JURY VERDICT OF GUILTY FOR THE OFFENSE OF BURGLARY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

¶{7} Weight of the evidence deals with the inclination of the greater amount of credible evidence to support one side of the issue over the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. In reviewing a manifest weight of the evidence argument, the reviewing court examines 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 trial court clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.* That said, determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

¶{8} A reversal on weight of the evidence is ordered only in exceptional circumstances. *Thompkins*, 78 Ohio St.3d at 387.

¶{9} Jackson was convicted of burglary, a violation of R.C. 2911.12(A), which states:

¶{10} “(A) No person, by force, stealth, or deception, shall do any of the following:

¶{11} “* * *

¶{12} “4) 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.”

¶{13} Jackson’s argument focuses on the fact that there was no physical evidence recovered from the scene, such as DNA, fingerprints or footprints; and that Davis was allegedly not credible because some of her trial testimony conflicted with the testimony she offered at the preliminary hearing.

¶{14} It is true that no physical evidence was recovered from the scene. Deputy Christopher Papendry explained that physical evidence could not be collected because there was “contamination” throughout the residence. For instance, Davis herself had touched light switches and door knobs after Jackson had allegedly touched them. (Tr. 120). Furthermore, there were no apparent footprints. (Tr. 120).

¶{15} However, in this instance, the lack of physical evidence does not render the verdict against the manifest weight of the evidence. Physical evidence was not needed in this case to link Jackson to the crime because Davis' testimony asserted that Jackson was the perpetrator. Davis testified that Jackson is her neighbor. (Tr. 86). She explained that on the morning of the burglary, she was just waking up to her alarm when she noticed lights going off and on in her trailer. (Tr. 89-90). She called out to her husband, William, thinking he had come home early from work; he worked at night at Kroger as part of the floor crew. (Tr. 85, 90, 91). There was no answer. (Tr. 91). She then noticed someone enter her bedroom and touch her. (Tr. 91). She testified that she immediately knew that it was not her husband because the person was shorter than her husband and had softer hands. (Tr. 91-92). She turned on the light and pushed the intruder away. (Tr. 92). It was at that point that she could identify the intruder as Jackson. (Tr. 92). She ran to her living room, got out a 9 mm gun and instructed Jackson to leave the residence, which he did. (Tr. 92-93). Admittedly, during her testimony, she did indicate that she does wear glasses and was not wearing them at the time of the incident. (Tr. 96-97). However, she explained that her glasses were only for reading. (Tr. 96-97). She then reiterated the fact that when the intruder was in her bedroom she was five to six inches away from him and there was "no mistake" that the intruder was Jackson. (Tr. 109).

¶{16} Davis' identification of Jackson as the intruder and her testimony concerning what occurred that night establishes the elements of burglary. If her testimony is believed then the lack of fingerprints, DNA, footprints or any other type of physical evidence does not render the conviction against the manifest weight of the evidence.

¶{17} Jackson asserts Davis is not credible because there were inconsistencies between her preliminary hearing testimony and her trial testimony. During trial, the alleged discrepancies were brought to the attention of the jury. She admitted that at the preliminary hearing she testified that the gun she used was a 45 mm not a 9 mm. (Tr. 105). She also admitted that at the preliminary hearing she testified that after running out of the bedroom to the living room to get the gun she did not turn on any of the lights in the trailer. (Tr. 107). However, at the trial she testified

that she was wrong about that and that she did turn on the kitchen light when going to get the gun. (Tr. 107).

¶{18} Jackson appears to believe that these minor discrepancies show her testimony to not be credible. We disagree. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Long* (1998), 127 Ohio App.3d 328, 335. While it is true that under a manifest weight analysis we consider the credibility of the witnesses, it must be remembered that primarily witness credibility is left to the trier of fact, which in this case was the jury. Or in other words, although an appellate court must act as a “thirteenth juror” when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Deltoro*, 7th Dist. No. 07MA90, 2008-Ohio-4815, ¶62. The jury saw the witness's demeanor, gestures and voice inflections, and, as such, is in the best position to determine witness credibility. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

¶{19} Consequently, considering Davis' testimony and the fact that the jury could believe any, part, or all of her testimony, we find that the decision is not against the manifest weight of the evidence. This assignment of error lacks merit.

¶{20} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.