

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

In the Matter of: K. E. J.

Court of Appeals No. S-08-026

Trial Court Nos. 20720634
20720745

DECISION AND JUDGMENT

Decided: April 17, 2009

* * * * *

Jonathan G. Stotzer, for appellant.

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

* * * * *

SKOW, P.J.

{¶ 1} This matter comes on appeal from the Sandusky County Court of Common Pleas, Juvenile Division, which adjudicated appellant, K. E. J., a delinquent child and upon disposition committed him to the Department of Youth Services and ordered him to pay \$2,500 in restitution upon his release. For the following reasons, the judgment is affirmed.

{¶ 2} Three separate complaints alleged that appellant committed burglary¹, theft², and made unauthorized use of a vehicle.³

{¶ 3} The magistrate concluded that the state proved that appellant was delinquent beyond a reasonable doubt as to each count. The trial court affirmed this conclusion. From this judgment, appellant raises one assignment of error for review:

{¶ 4} "The verdict of the court in this case is against the manifest weight of the evidence and must be reversed."

{¶ 5} A criminal conviction may be overturned on appeal because it is against the manifest weight of the evidence. When determining whether a conviction is against the manifest weight of the evidence, the appeals court acts as a "thirteenth juror" to determine whether the fact-finder lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In making this determination, we must review the entire record, weigh the evidence and all reasonable inferences, and consider witness credibility. *Id.* Because the fact-finder sees and hears the witnesses and is particularly competent to

¹Burglary, a violation of R.C. 2911.12(A)(2), is a felony of the second degree if committed by an adult.

²Theft, with a specification that the victim was an elderly person, a violation of R.C. 2913.02(A)(1), (B)(3), is a felony of the fourth degree if committed by an adult.

³Unauthorized use of a vehicle, with a specification that the victim was an elderly person and property damage in excess of \$5,000 occurred, a violation of R.C. 2913.03(B), (D)(4)(c), is a felony of the third degree if committed by an adult.

decide "whether, and to what extent, to credit the testimony of particular witnesses," we afford substantial deference to its determinations of credibility.

I. Facts

{¶ 6} At adjudication, the state presented the testimony of Detective James Consolo, the investigating officer; Emily K., who admitted committing the offenses with appellant; and Herman D. ("the victim"), who is also the grandfather of appellant's half-brother. Appellant testified on his own behalf. The state also presented a taped interview of Detective Consolo interviewing appellant.

{¶ 7} Detective Consolo testified that he was called to investigate a burglary call at the victim's residence that also involved theft of a motor vehicle, a 2004 Ford Focus. Consolo then learned that the vehicle had been recovered. Consolo processed the vehicle and found no usable prints. He found some cigarette butts in the vehicle, but these were not processed for DNA.

{¶ 8} Detective Consolo then stated that he learned (without mentioning how he learned) that appellant had been involved in the burglary and car theft, and he went to the Juvenile Detention Center to interview appellant. The state played a recording of the interview. Appellant told Consolo that one Sunday afternoon, he and two friends, Mitch L. and "Heather," were picked up by Emily K. and a female named "Katie." Appellant said that, the night before the burglary, he spent the night at the house of a friend, "Ken." Katie was driving a white car, a Mercedes, and Emily K. was driving a silver car. He stated that he, Mitch, and Heather all got into the silver car that Emily K.

drove, while Katie followed them in the white car. They caravanned the two cars to Norwalk, Ohio, and drove around. Appellant told Consolo that he did not know where the white car came from, but that Emily told him the silver car belonged to her parents. After driving around for a while, he said that Emily and Katie dropped appellant and Mitch back where they started.

{¶ 9} Appellant identified the silver car as the victim's Ford Focus when Consolo asked. Appellant then stated in the interview that Emily and Katie told them that they "got everything from a house in Clyde." Appellant said that he learned, after the incident, from police that the victim's house had been burglarized. Appellant then assumed that Emily and Katie had burglarized the victim's home and taken the silver car. Appellant admitted to having been to the victim's home before because of their relationship.

{¶ 10} At adjudication, Consolo testified that after talking to appellant, he interviewed Mitch, who was being held at the Sandusky County jail. Consolo testified that Mitch told Consolo that appellant was "a liar." Mitch told Consolo that appellant had not been with Mitch and Heather, but that appellant, driving the victim's stolen Ford Focus, and Emily, driving a white car, came to pick Mitch up.

{¶ 11} Consolo then interviewed Emily at the Huron County Jail, where she was incarcerated for theft of the white car. Emily admitted to Consolo that she and appellant had stolen items from the victim's residence. Consolo testified that Emily "corroborated everything [Mitch] said." Emily had some items stolen from the victim's residence on her person when she was booked into the Huron County Jail.

{¶ 12} Consolo then re-interviewed appellant, who, according to Consolo, reiterated the same information from the first interview. Consolo acknowledged that there was no physical evidence to support his conclusion that appellant participated in the burglary and car theft; his conclusions were based on Mitch's and Emily's statements.

{¶ 13} The victim, owner of the burglarized home and stolen car, testified that he had left his home unlocked when he and his family attended church on the Sunday morning that the burglary occurred. He testified to the items that were missing from his home when they returned. He also testified that he had never given appellant permission to use his motor vehicle.

{¶ 14} Emily K. testified that on the day of the burglary, she and appellant were driving around in the stolen white Mercedes. Appellant told her they could stop at his grandparents' house (in fact, the victim's house) to charge Emily's cell phone. Emily said that the door to the home was unlocked. While there, appellant and Emily took items from the home. They put the stolen items in the white Mercedes. Emily testified that appellant found the keys to the victim's Ford Focus, which was in the garage, and that appellant drove off with the Focus and Emily left in the Mercedes. Emily acknowledged that she had also been charged with the burglary and had not yet been sentenced. She asserted, however, that she had not been promised anything in exchange for her testimony.

{¶ 15} At adjudication, appellant testified that he had not spent the night before the burglary at "Ken's" house, as he initially told Consolo, but rather at a different friend's

house. He said that he had not seen Mitch or Emily the day of the burglary at all. He denied riding in either a white car or a silver car with either Mitch or Emily.

{¶ 16} It was at this point that the state played the tape of appellant's interview with Consolo. Appellant then asserted that his testimony at the adjudication was correct and that he gave Consolo incorrect information because he was "under the influence" at the time of the interview.

{¶ 17} The state recalled Consolo, who testified that appellant had no symptoms of being under the influence of drugs or alcohol at the time of the interview.

II. Analysis

{¶ 18} Appellant's challenge to the evidence presented against him focuses on three main areas: First, he asserts that Emily K.'s testimony was unreliable as she was being prosecuted for crimes arising from the same events. Second, he argues that his convictions were based solely on testimonial evidence and the state presented no "forensic" evidence. Last, he argues that the state did not disprove appellant's testimony in which he presented an alibi. We find each argument unpersuasive.

{¶ 19} Appellant argues that Emily K.'s testimony was unreliable as she was being prosecuted for offenses arising from the same acts. This fact, however, counts towards Emily's credibility. The trial court found Emily's testimony more credible than appellant's. Considering the totality of Emily's testimony and appellant's testimony, we agree that Emily's testimony is more credible. Appellant's testimony at adjudication was

at complete variance from the taped interview with Consolo. Emily freely admitted to her involvement in the burglary.

{¶ 20} Appellant also briefly argues that Consolo should not have been allowed to testify to Mitch's statements. Consolo asserted that Emily corroborated "everything" Mitch said regarding appellant's involvement in the burglary and unauthorized use of the Ford Focus. The state did not present Mitch as a witness at adjudication.

{¶ 21} Consolo testified: "[Mitch] stated that [appellant] was a liar, that he was not telling the truth about spending the night with him and another girl at the residence. [Mitch] stated that [appellant] is actually the one that drove the stolen vehicle to the other girl's house * * * the same morning as the burglary. * * * [Mitch] stated that [appellant] was driving [the victim's] stolen Focus."

{¶ 22} Hearsay is an out-of-court statement made by the declarant offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Also, where testimonial evidence is presented, the Confrontation Clause of the Sixth Amendment requires that the declarant be unavailable and that the defense had a prior opportunity for cross-examination. *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, at paragraph one of the syllabus and ¶ 16, quoting *Crawford v. Washington* (2004), 451 U.S. 36, 38. Mitch's statements were given to Consolo during a police interview while Mitch was in the county jail. Statements given during police interrogation are testimonial, as they are made under circumstances which would lead one to believe the statement was available for later use at trial. *Stahl*, supra, at paragraph one of the syllabus.

{¶ 23} The state did not prove that Mitch was unavailable for testimony and appellant did not have a prior opportunity for cross-examination. Insofar as Mitch's statements were introduced to prove that, in truth, appellant had stolen the Ford Focus, they are testimonial hearsay and violate the Sixth Amendment's Confrontation Clause. However, Mitch's statements, in context, were also presented to explain Consolo's investigation procedure. The statements also show how Consolo gained personal knowledge that Emily was involved, which led him to interview Emily K.

{¶ 24} We must also consider whether the error was harmless. Appellant did not object to the use of Mitch's statements at adjudication. Where testimonial hearsay statements are cumulative and the facts supported by other evidence, the error is harmless. *State v. O'Neal* (2000), 87 Ohio St.3d 402, 411; *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 78. Mitch's statements to Consolo were duplicated by Emily's testimony and were, therefore, cumulative. Also, Mitch's statements were also given to demonstrate Consolo's investigative procedure and thus were not necessary to be offered to prove the truth of the matters asserted. Because the error was harmless, his argument is not well-taken.

{¶ 25} Next, appellant argues that his convictions were against the manifest weight of the evidence because the state failed to present any "forensic," or direct, evidence and relied only on testimonial evidence. Circumstantial evidence and direct evidence possess the same probative value and therefore should be subjected to the same standard of proof.

State v. Biros (1997), 78 Ohio St.3d 426, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, at paragraph one of the syllabus.

{¶ 26} Appellant's adjudications were largely supported by Emily's testimony. However, appellant's statements to Consolo during the first taped interview more closely matched Emily's description. Also, in the interview, Consolo told appellant that cigarette butts were found in the Focus' back seat; appellant explained that Mitch had been smoking there. Appellant's testimony contradicted his previous statements to Consolo and undermined his credibility. Given the comparison between Emily's and appellant's testimony, the trial court's judgment was supported by competent, credible evidence. This is not the exceptional case where the evidence "weighs heavily against conviction." *Thompkins*, 78 Ohio St.3d at 387.

{¶ 27} Last, appellant argues that the state did not disprove his alibi offered at adjudication – specifically, that he was with other friends the night before and the day of the burglary. The state, however, does not have the burden to disprove an alibi. Appellant's alibi testimony is weighed along with all of the other evidence offered. Because appellant's alibi testimony at adjudication conflicted with the alibi testimony he gave Consolo during the interview, we agree with the trial court that this undermines appellant's credibility. Further, appellant had the opportunity to call witnesses on his behalf and thus could have supported his alibi. The state was not required to do so.

{¶ 28} For the foregoing reasons, we find appellant's adjudications were not against the manifest weight of the evidence. His assignment of error is, therefore, not well-taken.

{¶ 29} Finding that substantial justice was done the party complaining, the judgment of the Sandusky County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Sandusky County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

William J. Skow, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.