[Cite as *State v. Bice*, 2009-Ohio-4672.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-10-098
	:	O P I N I O N
- vs -		9/8/2009
	:	
CHRISTIAN D. BICE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008-CR-00458

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 N. Third Street, Batavia, OH 45103-3033, for plaintiff-appellee

Christine Y. Jones, 114 East 8th Street, Suite 400, Cincinnati, OH 45202, for defendant-appellant

YOUNG, J.

{¶1} Defendant-appellant, Christian Bice, appeals his conviction and sentence from the Clermont County Court of Common Pleas for breaking and entering, theft, safecracking, and possessing criminal tools. We affirm appellant's conviction and sentence.

{¶2} Between April and May 2008, several businesses along State Route 32

reported break-ins. Roy Rogers restaurant, located at 474 Romey Lane in Clermont County, was the first to report a break-in, which occurred in the early morning hours of April 20, 2008. According to the testimony of police officers and a restaurant employee, two individuals entered through a drive-thru window, pried a safe free using a crowbar, slid the safe onto a counter and out of the restaurant. The safe contained $2,950 in cash and $200 in gift certificates.

{¶3} On May 5, 2008, the Sports Page Café, located at 455 Old State Route 74 in Clermont County, reported a break-in. Testimony at trial and a surveillance video revealed that the two perpetrators entered the business by cutting a hole in a metal exit door in the walk-in cooler. They stole the restaurant's safe and 50 to 60 bottles of liquor, pried open cash drawers, cracked touch screens, and attempted to steal cash from an ATM machine located in the restaurant by cutting a hole through the side and prying back the metal with a crowbar.

{¶4} On May 12, 2008, the Busken Bakery, located at 956 Old State Route 74 in Clermont County, reported a break-in that occurred between the hours of 2:30 a.m. and 4:30 a.m. The perpetrators smashed the drive-thru window and entered the bakery. They cut through a safe and stole $773.41 from it. They also took 64 Monster drinks, bottles of milk and tea, and fresh donuts.

{¶5} On the same date, the perpetrators broke into the Snappy Tomato Pizza store on North Riverside Drive in the village of Batavia, Clermont County. They entered the restaurant by cutting out the air conditioner located on the rear door. The store was not in business at the time, but they stole a Nintendo player, 20 to 30 Nintendo games, a cash register, and several two-liter bottles of soda.

{¶6} Just after midnight on May 15, 2008, Jeff Richards, a Batavia resident, saw two individuals conceal a metal bar and approach a closed business. They fled the area upon discovering that Richards was watching them. Richards, however, obtained the license plate number of the car they were driving and notified the police, who entered the information into the Ohio Law Enforcement Gateway (OHLEG).

{¶7} Approximately two hours later, the perpetrators broke into five stores in the Village of Newtown, located on the eastern edge of Hamilton County. The stores, Youthland Academy, Bamboo Salon and Spa, State Farm Insurance, Indian Oven and Widmer's, all share a common edifice with Subway along State Route 32.

{¶8} The offenders entered the building by prying open the rear door of Youthland Academy. They proceeded to cut through the drywall separating the establishments to reach each business. Before they were able to cut through the wall between Widmer's and Subway, however, they triggered an alarm at Widmer's and fled the scene through the rear door of Indian Oven.

{¶9} Evidence at trial revealed that the perpetrators stole $350 in cash, $320 worth of nail polish, $90 worth of shampoo, and $60 worth of hair coloring products at the Bamboo Salon and Spa. They also wrecked the store and stole towels and a trash can. From Indian Oven, the offenders stole $100 from a cash register and $150 from a tip container. Although nothing was stolen from the other businesses, the owners reported damages to their establishments.

{¶10} At 2:20 a.m., 11 minutes after the perpetrators triggered the alarm at Widmer's, Officer Dave Perkins and his partner of the Union Township Police Department stopped appellant and his friend, Nathan Rich, after they were seen leaving

the lot of a business on Old State Route 74 in Mount Carmel, which is located one quarter mile from State Route 32 and is a six-minute drive to the east from Widmer's in Newtown. The officers checked and recorded their identification before releasing them with a warning for an inoperable license plate light. Officer Perkins, however, thought appellant's name seemed familiar and looked up his information on OHLEG, where he noticed that a Batavia police officer had viewed the same information only a few hours before. After contacting the department, Officer Perkins learned that appellant's license number was the same as that of the car involved in the thwarted Batavia break-in. He then sent out a report and surveillance photographs of both appellant and Rich and patrolled the area looking for their car.

{¶11} At approximately 4:30 a.m., Officer Perkins found the car, a white Oldsmobile, parked at the Beechwood Villa Apartments, which is located less than one mile from State Route 32. At that time, the officer observed a crowbar, partially covered by a sweatshirt, on the driver's side rear passenger seat floorboard. Officer Perkins then left the area for approximately one hour. When he returned, the car was gone.

{¶12} Approximately four hours later, at 8:30 a.m. on May 15, 2008, Union Township police officers, who had since learned of the reported break-ins in Clermont County and Newtown, spotted Rich driving the white Oldsmobile. Rich failed to stop at a stop sign as he was leaving the apartment complex and was not properly licensed to drive a car. Police pulled his vehicle over and took him and Kelly Bice (Kelly), the passenger of the car and sister of appellant, into custody. While in custody, Kelly permitted police to search her apartment, where the police learned that appellant and Rich lived with Kelly and appellant's girlfriend, Sarah Reeves, in the Beechwood Villa

complex.

{¶13} During the search of the apartment, police found the Nintendo equipment, the Nintendo games in a Snappy Tomato Pizza box, and drink products in blue plastic trays from Busken Bakery. Police also found numerous pairs of gym shoes, boots, and clothing covered in drywall dust and glass fragments. In the dumpster outside, there was a Busken Bakery box filled with donuts that had been thrown into the garbage.

{¶14} At some point in the search, police were directed to a blue Buick in the parking lot that had been purchased by Rich. As the officers looked in the car, they noticed the crowbar and some items in plain view. After obtaining a search warrant to search the vehicle on May 19, 2008, police found, among other things, the crowbar, a small handheld electric grinder, a bag containing screwdrivers, three boxes containing liquor from the Sports Page Café, and a garbage can containing bottles of nail polish, towels, and hair products from the Bamboo Salon and Spa. At trial, the state presented testimony from an expert from the Bureau of Criminal Investigation and Identification (BCI), who determined that the crowbar seized from car was used to make the tool mark found on the freezer door at the Sports Page Café.

{¶15} Appellant and Rich were arrested on May 15, 2008. While in jail, appellant made several telephone calls to Reeves and Kelly. In those calls, he attempted to create an alibi and altered the alibi as he learned of the evidence seized by police. Eventually, he wrote his sister a letter, directing her to account for his whereabouts for the evening and morning hours for every day a break-in occurred, April 19-20, May 5-6, May 11-12, and May 14-15. At trial, however, Kelly testified that appellant and Rich brought the stolen items into her apartment.

{¶16} The Clermont County Grand Jury returned a 25-count indictment against appellant on May 21, 2008. Counts 1 through 8 of the indictment charged appellant with breaking and entering under R.C. 2911.13(A). Counts 9 through 13 charged him with theft pursuant to R.C. 2913.02(A)(1). Counts 14 through 16 charged appellant with safecracking pursuant to R.C. 2911.31(A). Counts 17 through 25 charged appellant with possessing criminal tools with the intent to use in the commission of a felony, pursuant to R.C. 2923.24(A). Counts 1, 9, 14, and 17 relate to the Roy Rogers break-in, and Counts 2, 10, 15, and 18 relate to the Sports Page Café break-in. Counts 3, 11, 16, and 19 correspond to the break-in at Busken Bakery. Counts 4 and 12 relate to the offenses committed at Snappy Tomato Pizza, Counts 5 and 25 relate to the offenses committed at Indian Oven, and Counts 6, 13, and 22 relate to those committed at Bamboo Nail Salon and Spa. Count 21 relates to the thwarted Batavia break-in at Riverside Coffee Mill. Counts 7 and 23 correspond with the State Farm Insurance break-in, and Counts 8 and 24 correspond to the Widmer's Dry Cleaning break-in. Prior to trial, the state dismissed count 20.

{¶17} The matter proceeded to trial in August 2008, and the jury returned guilty verdicts on each count. On September 30, 2008, the court sentenced appellant to a total of 12 years in prison. From his conviction and sentence, appellant timely appeals, asserting six assignments of error.

{¶18} Assignment of Error No. 1:

{¶19} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY FINDING HIM GUILTY OF BREAKING AND ENTERING, THEFT, SAFECRACKING, AND POSSESSING CRIMINAL TOOLS, AS THOSE FINDINGS

WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶20} Assignment of Error No. 2:

{¶21} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY FINDING HIM GUILTY OF BREAKING AND ENTERING, THEFT, SAFECRACKING, AND POSSESSING CRIMINAL TOOLS, AS THOSE FINDINGS WERE CONTRARY TO LAW."

{¶22} Assignment of Error No. 3:

{¶23} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY OVERRULING HIS MOTION FOR ACQUITTAL UNDER OHIO CRIMINAL PROCEDURE RULE 29."

{¶24} For ease of discussion, we will consider appellant's first three assignments of error together.

{¶25} Our review of a trial court's denial of a Crim.R. 29 motion for acquittal is governed by the same standard as that used for determining whether a verdict is supported by sufficient evidence. *State v. Haney,* Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶14. In reviewing the sufficiency of the evidence supporting a criminal conviction, an appellate court examines the evidence to determine whether such evidence, if believed, would support a conviction. *State v. Carroll,* Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117. In examining the evidence in a light most favorable to the prosecution, the court must determine whether "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

{¶26} 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. *Carroll* at ¶118. In reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of witnesses, an appellate court must determine whether the jury, in resolving conflicts in the evidence, clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *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, ¶39.

{¶27} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Wilson,* Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35. As a result, a determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. Id.

{¶28} Appellant argues because there was no physical evidence linking him to the crime scenes and because the owners and/or employees of the various businesses testified that they had never seen him, his conviction should be reversed.

{¶29} Although this case turns on circumstantial evidence, the Supreme Court of Ohio has held that "[a] conviction can be sustained based on circumstantial evidence alone." *State v. Franklin* (1991), 62 Ohio St.3d 118, 124, citing *State v. Nicely* (1988), 39 Ohio St.3d 147, 154-155. In fact, circumstantial evidence may "'be more certain, satisfying and persuasive than direct evidence.'" *State v. Lott* (1990), 51 Ohio St.3d 160, 167, quoting *Michalic v. Cleveland Tankers, Inc.* (1960), 364 U.S. 325, 330, 81 S.Ct. 6.

{¶30} In both the Roy Rogers and Busken Bakery break-ins, which were separated only by 22 days, appellant and his accomplice entered through a drive-thru window and used tools to free a safe at Roy Rogers and to open a safe a Busken Bakery. Police officers found the tools used in the commission of these offenses in Rich's blue Buick. Appellant attempted to fabricate an alibi for both evenings. The record also demonstrates the police officers found clothing covered in drywall dust and glass fragments in the apartment where appellant was residing. In addition, the timeline presented at trial supports the jury's guilty verdicts, where (a) appellant's vehicle was spotted by the Batavia resident during the thwarted break-in, (b) the string of break-ins in Newtown occurred two hours later, and (c) only minutes after the break-ins, the police officers issued a warning to appellant for an inoperable license plate light nearby.

{¶31} Further, it is well-established in Ohio that the unexplained possession of recently stolen property presents a permissive inference that the accused is guilty of theft or burglary. *State v. Conway*, Clark App. No. 07CA0034, 2008-Ohio-3001; *State v. Griggs* (Sept. 18, 1990), Franklin App. No. 89AP-1417, citing *Methard v. State* (1869), 19 Ohio St. 363; *State v. Coker* (1984), 15 Ohio App.3d 97.

{¶32} Appellant was photographed at Sports Page Café and police officers found the liquor stolen from the bar in the blue Buick. Possession of the Nintendo Games from the Snappy Tomato Pizza break-in, merchandise from the Bamboo Nail Salon and Spa, and merchandise from the Busken Bakery also link him to the crimes for which he was charged. Appellant's sister also testified she saw him bring the stolen items into their apartment.

{¶33} Based upon the evidence presented at trial, we cannot say the jury clearly

lost its way and created a manifest miscarriage of justice that would warrant a reversal. Therefore, the evidence was also sufficient to support appellant's conviction and the denial of his motion for acquittal. Accordingly, appellant's first three assignments of error are overruled.

{¶34} Assignment of Error No. 4:

{¶35} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY IMPOSING A SENTENCE THAT WAS AN ABUSE OF DISCRETION."

{¶36} Appellant argues his sentence was excessive because the trial court sentenced him to consecutive sentences for a total of 12 years, which was "far above the maximum sentence for the most serious" of his offenses.

{¶37} Trial courts "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Wright,* Warren App. No. CA2008-03-039, 2008-Ohio-6765, ¶56, citing *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, ¶100. In reviewing felony sentences, an appellate court must (1) examine the trial court's compliance with all applicable rules and statutes in imposing the sentence to determine whether it is clearly and convincingly contrary to law, and (2) review the term of imprisonment for an abuse of discretion. *State v. Taylor,* Madison App. No. CA2007-12-037, 2009-Ohio-924, ¶67, citing *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, ¶26. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶38} After thoroughly reviewing the record, we find the trial court's decision to

sentence appellant to a total of 12 years in prison is not clearly and convincingly contrary to law. As appellant acknowledges, the court imposed a sentence within the appropriate sentencing range for each crime of which he was convicted. First, the court imposed 10 pairs of concurrent 12-month terms: Counts 1 and 17; 9 and 14; 2 and 18; 3 and 19; 11 and 16; 4 and 12; 5 and 25; 6, 13 and 22; 7 and 23; and 8 and 24. The court ordered these 10 prison terms to be served consecutively to each other and consecutively to an additional 18-month term imposed for Count 15 and a 6-month term imposed for Count 21. Finally, the court imposed a 12-month term for Count 10, but ordered appellant to serve this sentence concurrently to the 18-month term for Count 15. See R.C. 2929.14; *Kalish* at ¶18.

{¶39} In addition, we find no abuse of discretion in the trial court's sentencing decision as the record demonstrates the trial court imposed the sentence after carefully considering the purposes and principles of sentencing in R.C. 2929.11. In doing so, the court found appellant was not amenable to community control, discussed factors as set forth in R.C. 2929.12, and paid due attention to relevant sentencing considerations.

{¶40} As a result, and in light of the foregoing, we cannot say that the court acted unreasonably, arbitrarily, or unconscionably by imposing appellant's sentence for all 24 counts relating to the break-ins discussed above. *Kalish* at ¶19-20. Therefore, appellant's fourth assignment of error is overruled.

{¶41} Assignment of Error No. 5:

{¶42} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY ALLOWING THE STATE TO PRESENT CERTAIN EVIDENCE."

{¶43} Appellant argues the state failed to respond to his discovery requests in a

timely manner. Appellant does not point to any specific evidence, but only states that he "addressed the lateness of evidence provided by the State to him and ask (sic) the trial court not to accept this evidence." Appellant argues the court erred when it responded by offering him "the choice of a continuance, with the waiver of his speedy trial rights, or examine the evidence or having the opportunity to have an independent expert test the evidence."

{¶44} It is well-established that the admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157-58.

{¶45} Crim.R. 16 provides for discovery and inspection by either party in a criminal case. The purpose of Crim.R. 16 is "to prevent surprise and the secreting of evidence favorable to one party." *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 3. Pursuant to Crim.R. 16(D), the state is under a continuing duty to disclose any evidence it discovers up to, and during, the time of trial. Crim.R. 16(E)(3) authorizes the court to impose sanctions when a willful failure to act in accordance with this rule is established. "It is within the trial court's discretion to decide what sanction to impose." *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107.

{¶46} Our review of the record indicates that the evidence to which appellant may be referring includes a tool mark report and a 42-hour recording of telephone calls appellant made in jail. Prior to the commencement of the trial, appellant's counsel brought to the court's attention that he had only received a written report of an analysis

done on some crowbar marks left at a crime scene a week before trial. Counsel also stated that the state provided him with the audio recordings of phone calls made by appellant only days before trial. As appellant's trial counsel acknowledged, the state had continuously provided the evidence as it was received by the state, but it had also only come into the possession of that evidence shortly before trial. Although appellant's counsel suggested to the court that he would prefer a continuance to properly examine the evidence, appellant himself refused to waive his right to a speedy trial and continue the trial. The judge, in a lengthy conversation with appellant, thoroughly discussed the options with appellant, who ultimately decided to proceed with the trial, despite his counsel's advice. The judge then gave appellant and his counsel an additional day to review the evidence, and the state provided counsel with a list of specific phone calls out of the 42 hours of recordings that it was going to use at trial.

{¶47} In reviewing the record, it is clear that the state fully complied with Crim.R. 16(D). This rule merely requires that a party promptly notify and make available to the opposing party any newly-discovered witness or evidence. The record reflects that when the State discovered the new evidence, it immediately informed defense counsel of its existence. Despite advice from his counsel, appellant decided to proceed with the trial, knowing the evidence would be used at trial. Accordingly, the trial court did not abuse its discretion in admitting the evidence, as the state's disclosure of the evidence did not violate Crim.R. 16(D). Appellant's fifth assignment of error is overruled.

{¶48} Assignment of Error No. 6:

{¶49} "DEFENDANT-APPELLANT WAS DENIED HIS RIGHTS OF DUE PROCESS AND OF ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH

AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSITUTION AND ARTICLE 1, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION BECAUSE HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE."

{¶50} Appellant argues that his trial counsel was "ineffective by not requesting separate trials" and that he was prejudiced by counsel's inaction. Appellant asserts counsel should have requested "relief from prejudicial joinder of the offenses under Crim.R. 14" because "the offenses involved different locations, dates, victims, and evidence."

{¶51} In order to establish ineffective assistance of counsel, an appellant must satisfy a two-part test. *State v. Bradley* (1989), 42 Ohio St.3d 136, 141. Appellant must show that "counsel's representation fell below an objective standard of reasonableness," and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Sanders*, 94 Ohio St.3d 150, 151, 2002-Ohio-350, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Bradley* at 142, quoting *Strickland* at 694.

{¶52} "Judicial scrutiny of counsel's performance is to be highly deferential and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Sallie*, 81 Ohio St.3d 673, 674, 1998-Ohio-343, quoting *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104. To establish ineffective assistance of counsel, "the appellant must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id.

{¶53} The law favors joinder of multiple offenses in a single trial if the offenses

charged are of the same or similar character, or are based on the same act or transaction. Crim.R. 8(A); *Lott* at 163. An accused may move to sever the charges under Crim.R. 14, but he has the burden to affirmatively demonstrate that his rights will be prejudiced by the joinder. *Lott,* supra. A showing by the state that the evidence relating to each crime is simple and direct negates any claims of prejudice and renders joinder proper. *Lott,* supra; *State v. Roberts* (1980), 62 Ohio St.2d 170; *State v. Torres* (1981), 66 Ohio St.2d 340.

{¶54} Appellant has failed to demonstrate that his rights were prejudiced by the joinder. Further, appellant has failed to show that there was a reasonable possibility that the trial court would have granted a motion to sever had his attorney filed one. The evidence relating to each crime, as discussed above, was simple and direct, and would not confuse the jury or cause the jury to improperly cumulate the evidence of the various crimes. See *Torres*; *Lott*. Therefore, appellant's trial counsel did not perform in a constitutionally deficient manner by failing to file such a motion. Appellant's sixth assignment of error is overruled.

{¶55} Judgment affirmed.

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