[Cite as *State v. Bullard*, 2010-Ohio-3464.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0096**
- vs -	:	
REGINALD D. BULLARD,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 555.

Judgment: Affirmed in part and reversed in part.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams, & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Reginald D. Bullard appeals from a judgment of the Trumbull County Court of Common Pleas which convicted him of breaking and entering, and possessing criminal tools. For the following reasons, we affirm his conviction of breaking and entering but reverse his conviction of possessing criminal tools.

{¶2} **Substantive Facts and Procedural History**

{¶3} On the evening of July 14, 2008, the police received a report that a man had entered an empty building formerly occupied by the Sparkle Market. After a search

of the building, the police found Mr. Bullard. Two other men were also found in an adjacent area. Those two men had with them bolt cutters and a bag containing items typically used in scrap theft. The two men apparently were about to remove some copper piping when found by the police. Mr. Bullard did not have any tools with him.

{¶4} Mr. Bullard was subsequently charged with breaking and entering, a felony of the fifth degree, in violation of R.C. 2911.13(A), and possessing criminal tools, also a felony of the fifth degree, in violation of R.C. 2923.24(A) and (C).

{¶5} Sergeant Gargas, a 20-year police veteran with the Warren City Police Department, testified that he was working on an off-duty security job in the Austin Village Plaza. He was approached by a concerned citizen who reported that a black male had just entered an empty store formerly occupied by Sparkle Market, a building that the sergeant knew had been repeatedly vandalized since the market closed in 2007.

{¶6} Sergeant Gargas called for backup, and Officer Wilson, Patrolman Krempasky, and Officer Simpson arrived to assist him. Between 8:00 and 8:30 p.m. when there was no longer full daylight, the officers split into two teams to search the pitch-dark building by flashlight, as the light fixtures had been removed. The building was boarded up, and the only entrance to the building was a spot where a roll-up door had once been. This opening in the rear of the building was only covered by plywood which could be easily kicked in to gain access.

{¶7} Sergeant Gargas testified that due to the declining population and the departures of businesses, the City of Warren has many vacant homes and buildings. Thieves are known to break into these abandoned buildings to remove the copper

piping and electrical wiring, which they then sell to the scrap dealers. The cost of repairing the damaged plumbing and wiring is prohibitive, making a damaged building very difficult to rehabilitate -- a major problem in the City of Warren and every major metropolitan area.

{¶8} The plaza's property maintenance manager, Mr. Vignon, testified that the empty Sparkle Market building had been broken into, vandalized, defaced with graffiti, and boarded up. He estimated the cost of replacing the piping of the refrigeration unit would be $2,500.

{¶9} Patrolman Krempasky testified that prior to going inside the building the officers announced their presence and ordered anyone inside to come out. No one came forward. With a flash light in one hand and a taser in the other, Patrolman Krempasky searched several empty rooms and found Mr. Bullard hiding, "crouched down on the floor behind a door." He shined his flashlight on Mr. Bullard, who raised his arms quickly, causing the officer to taser him in the shoulder.

{¶10} Sergeant Gargas and Patrolman Krempasky searched the back area where the offices and freezers were located. Sergeant Gargas heard Patrolman Krempasky deploy his taser when the patrolman opened a door next to him. Sergeant Gargas and Patrolman Krempasky handcuffed Mr. Bullard and escorted him to the police car. They asked Mr. Bullard if anyone else was in the building; Mr. Bullard answered "no." The other two officers continued the search and found the two other men "right around the corner" from where Mr. Bullard was discovered. The two men were in a small freezer unit and appeared to be getting ready to remove the freezer's

copper piping. Around them the officers found a bag of tools and two pairs of bolt cutters: a small one and a large one with a three-foot long handle.

{¶11} Following trial, the jury found Mr. Bullard guilty of both counts.[1] The court sentenced him to a term of nine months for his conviction of breaking and entering and six months for possessing criminal tools, to be served concurrently.

{¶12} Mr. Bullard now appeals, assigning the following two errors for our review:

{¶13} "[1.] Appellant's convictions are not supported by sufficient evidence.

{¶14} "[2.] The appellant's convictions are against the manifest weight of the evidence."

{¶15} **Sufficiency of Evidence**

{¶16} When reviewing a challenge of the sufficiency of evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

{¶17} A sufficiency challenge requires this court to review the record to determine whether the state presented evidence on each of the elements of the offense. This test involves a question of law and does not permit us to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

1. Regarding the count of possessing criminal tools, that offense is a misdemeanor of the fifth degree. However, if the circumstances indicate that the instrument involved in the offense was "intended for use in the commission of a felony," the offense is a felony of the fifth degree. R.C. 2923.24(C). Here, although

{¶18} **Breaking and Entering**

{¶19} We first review Mr. Bullard's conviction of breaking and entering, an offense prohibited by R.C. 2911.13, which states, in pertinent part:

{¶20} "(A) No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony."

{¶21} The state concedes that Mr. Bullard did not trespass the Sparkle Market building by force or deception. The only issue in this case is whether Mr. Bullard trespassed by stealth. Mr. Bullard argues the evidence in this case is insufficient to prove the element of stealth.

{¶22} R.C. 2911.13 does not define the term "stealth." Ohio Jury Instructions defines "stealth," for purposes of the offense of breaking and entering, as "any secret or sly act to gain entrance," citing *State v. Lane* (1976), 50 Ohio App.2d 41. See Ohio Jury Instructions CR 511.13(A).

{¶23} In *Lane*, a case involving the offense of aggravated burglary, the court defined "stealth" as "any secret, sly or clandestine act to avoid discovery and to gain entrance into or to remain within a residence of another without permission." Id. at 47.

{¶24} After reviewing the case law regarding the definition of "stealth," this court noted in *State v. Sims*, 11th Dist. No. 2001-L-081, 2003-Ohio-324, that several appellate courts had applied the *Lane* definition of the term "stealth" to the offense of breaking and entering as well. Id. at ¶57, citing *State v. Davis*, 1st Dist. No. C-010477, 2002-Ohio-1982 (defining "stealth" as any secret, sly or clandestine act to avoid

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finding Mr. Bullard guilty of possessing criminal tools, the jury made the factual finding that he had not used or intended to use the criminal tools to commit a felony, specifically, felony theft.

discovery and to gain entrance into or to remain within a structure of another without permission); *State v. Isom* (Nov. 29, 2001), 8th Dist. No. 78959, 2001 Ohio App. LEXIS 5312, *10; *In re Markunes* (Sept. 20, 1996), 2d Dist. Nos. 15601 and 15617, 1996 Ohio App. LEXIS 4029, *13.

{¶25} Thus, it appears "stealth" is defined more broadly by the courts than in the Ohio Jury Instructions. Under the definition adopted by several appellate courts, the element of stealth can be satisfied if a defendant *remained* in the structure by a secret, sly, or clandestine act. Pursuant to Ohio Jury Instructions, however, the state must prove a secret or sly act to *gain entrance* to the structure.

{¶26} In this case, the trial court gave an instruction close to the definition given in the Ohio Jury Instructions. It instructed the jury that "stealth" is "any sly, secret, or clandestine act to gain entrance." This instruction is not challenged by the parties either at trial or on appeal. Therefore, we review the record to determine if the evidence produced by the state, if believed, would convince the average mind that Mr. Bullard gained entrance to the Sparkle Market building by a sly, secret, or clandestine act.

{¶27} The testimony at trial shows that after receiving a report that an individual was seen around 8 p.m. entering the empty Sparkle Market building, which had been repeatedly vandalized, several officers arrived to investigate the matter. Prior to entering, the officers announced their presence and ordered anyone inside to exit the building. Mr. Bullard did not come forward. While using a flashlight to search the building, Patrolman Krempasky walked into a dark room and found Mr. Bullard hiding, "crouched down on the floor behind a door." Right around the corner where Mr. Bullard

was found, the officers found two more individuals in a freezer unit, who appeared to be getting ready to remove the freezer's copper piping.

{¶28} In *Sims*, supra, the defendant walked through the lobby area of an apartment building and entered its parking garage to assist another individual in stealing from the vehicles parked in the garage. The defendant argued there was no evidence presented by the state to show that he obtained entrance to the garage by "stealth," pointing to the fact that he did not attempt to "conceal his intentions" when he walked past the apartment building's security guard, opened the unlocked the door, and entered the garage. This court concluded otherwise, stating "In short, [the defendant] has no legitimate purpose for being in the garage. Such evidence [under the circumstances of the case] produces a reasonable inference that [the defendant] was using stealth to gain access into the parking garage." Id. at ¶62.

{¶29} Based on *Sims*, therefore, we conclude the state in this case produced sufficient evidence, including direct and circumstantial evidence, on the element of stealth, which, if believed, would convince the average mind beyond a reasonable doubt that Mr. Bullard gained entrance to the abandoned Sparkle Market building by "a sly, secret, or clandestine act."

{¶30} **Possessing Criminal Tools**

{¶31} Mr. Bullard was also convicted of possessing criminal tools prohibited by R.C. 2923.24(A), which states: "No person shall possess or have under his control any substance, device, instrument, or article, with purpose to use it criminally."

{¶32} "Actual physical possession is not a prerequisite for a conviction of possession of criminal tools if a defendant was in constructive possession." *State v.*

Bewsey, 9th Dist. No. 15857, 1993 Ohio App. LEXIS 3116, *13, citing *State v. Colon* (Mar. 25, 1992), 9th Dist. No. 91CA005003, 1992 Ohio App. LEXIS 1536, *7. "Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Hankerson* (1982), 70 Ohio St.2d 87, syllabus.

{¶33} Mr. Bullard argues the state did not present sufficient evidence for his conviction of possessing criminal tools. We find this contention to have merit. The entirety of evidence presented by the state to show Mr. Bullard possessed criminal tools consists of the officers' testimony that two individuals found in the next room had with them two pairs of bolt cutters and appeared to be getting ready to remove the copper piping of the freezer unit when found by the police.

{¶34} The state concedes that Mr. Bullard did not have actual possession of the bolt cutters but argues there was sufficient evidence before the jury to sustain his conviction based upon a theory of constructive possession.

{¶35} The only evidence linking Mr. Bullard to the criminal tools, i.e., the bolt cutters, is Mr. Bullard's physical proximity to two other individuals in the next room, who were about to use the bolt cutters to steal copper piping.

{¶36} The state's theory involves an inference upon an inference. Although a trier of fact is permitted to make reasonable inference based on the evidence presented, it may not rely on "an inference based entirely upon another inference, unsupported by any additional fact or another inference from other facts." *State v. Fields*, 3d Dist. No. 16-09-05, 2009-Ohio-5909, ¶23, quoting *State v. Taylor* (Feb. 9, 2001), 7th Dist. No. 98 JE 31, 2001 Ohio App. LEXIS 498, *3. See, also, *State v. Cowans* (1999), 87 Ohio

St.3d 68, 78. In order to find Mr. Bullard guilty of possessing criminal tools, the trier of fact must first draw the inference that he knew the other two individuals in the building, *and*, based upon that *inference*, infer that he shared the use of the bolters with them. Such a stacking of an inference upon an inference is impermissible.

{¶37} The scant evidence presented by the state is not sufficient to show Mr. Bullard exercised dominion and control over the bolt cutters. His physical proximity to individuals who actually possessed the criminal tools, without more, is insufficient to permit the jury to conclude beyond a reasonable doubt that Mr. Bullard had possession, actual or constructive, of the bolt cutters.

{¶38} Because insufficient evidence exists to convict Mr. Bullard of possessing criminal tools, the trial court erred in not granting Mr. Bullard's Crim.R. 29 motion regarding the count of possessing criminal tools. His conviction of possessing criminal tools is reversed.

{¶39} The first assignment of error is overruled in part and sustained in part.

{¶40} **Manifest Weight**

{¶41} In his second assignment of error, Mr. Bullard contends his convictions of breaking and entering and possessing criminal tools are against the manifest weight of the evidence. Because we reverse his conviction of possessing criminal tools, that portion of the assignment of error is moot, and we only review his claim regarding his conviction of breaking and entering.

{¶42} "Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines

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 and a new trial ordered.'" *State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶43} "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." *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *Martin* at 175. "A finding on review that the jury's verdict was against the manifest weight of the evidence must be reserved for those extraordinary cases where, on the evidence and theories presented, and taken in a light most favorable to the prosecution, *no reasonable jury could have found the defendant guilty*." (Emphasis original.) *Higgins* at ¶37 (citations omitted).

{¶44} The evidence in this case is largely uncontroverted. Mr. Bullard was found in an empty building in a room in a crouched position behind a door, while two men in the next room were found with bolt cutters and about to remove some copper piping. Mr. Bullard did not come forward when the police announced their presence prior to their search of the building. Furthermore, he did not offer any explanation as to why he was in an abandoned pitch-dark building in close proximity to two other individuals who were in the process of stealing copper piping. Neither did he offer an account of how he entered the building. Weighing all reasonable inferences from the evidence presented, we cannot say the jury lost its way. Based on the evidence, the jury could reasonably infer that Mr. Bullard acted with stealth in both *gaining access* and *remaining* in the building. Therefore, we cannot conclude that "on the evidence and theories presented,

and taken in a light most favorable to the prosecutions," *no* reasonable jury could have found him guilty of breaking and entering. Accordingly, we overrule the portion of the second assignment of error regarding his conviction of breaking and entering.

{¶45} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas is affirmed in part and reversed in part.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with Concurring/ Dissenting Opinion,

TIMOTHY P. CANNON, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with Concurring/ Dissenting Opinion.

{¶46} I concur with the majority's well-reasoned decision to reverse Mr. Bullard's conviction for possessing criminal tools. I respectfully dissent from its affirmation of his conviction for breaking and entering. I agree the state presented insufficient evidence that he gained entrance to the abandoned Sparkle Market by "stealth."

{¶47} As the majority notes, in *Sims* this court upheld appellant's conviction for breaking and entering by stealth, even though appellant openly passed a security guard on his way to entering an apartment building's parking garage, where he and an accomplice allegedly were to rob vehicles. *Sims* at ¶7-10. Appellant asserted the trial court erred in giving an instruction on the element of stealth based on the facts presented. Id. at ¶59. In affirming the trial court, this court held, in pertinent part:

{¶48} "At trial, it was established that Sims was not a resident of the apartment complex. In addition, Sims was not accompanied by a resident when he entered the garage. Nor did he have permission from the security guard to be in the garage. When Sims entered the lobby area of the building, he walked very slowly, watched [the guard] while she was on the phone with the police, then took off running and entered the parking garage. Sims entered the garage even though he claimed that Mr. Glass was going to pick him up outside. Furthermore, neither Sims nor Mr. Glass had a vehicle parked in the garage. In short, Sims had no legitimate purpose for being in the garage. Such evidence produces a reasonable inference that Sims was using stealth to gain access into the parking garage." *Sims* at ¶62.

{¶49} I admit to finding the reasoning in *Sims* perplexing, or, rather, backwards. That a person is on property with "no legitimate purpose" is simply not the same as a "secret, sly or clandestine act to avoid discovery" – i.e., the definition of stealth derived from *Lane*, supra, at 47.

{¶50} Consequently, I concur in part, and dissent in part.

TIMOTHY P. CANNON, J., concurring and dissenting.

{¶51} I respectfully concur in part and dissent in part.

{¶52} I concur with the majority that the element of stealth need not be established by the initial entry into a structure, as inferred by the Ohio Jury Instruction. The limitation in the definition of "stealth" contained in the Ohio Jury Instruction is a limitation that simply does not exist in the conduct proscribed by R.C. 2911.13(A).

There are many circumstances where one could enter onto land of another quite lawfully, even with good intentions. However, if the individual remains on the property beyond the express or implied consent of the landowner and decides to commit a theft offense, the statute has been violated. An example would be the customer who gains entry to a store during business hours, but hides at closing time with purpose to commit a theft after everyone leaves. For such a circumstance, the Ohio Jury Instruction needs to be modified to fit the statute and the facts.

{¶53} The erroneous instruction, more narrowly tailored than what the statute prohibited, clearly benefited appellant. This is because the evidence is clear that appellant used stealth to hide and not respond to the police after he was in the structure. It is less clear that he used stealth to "gain entry" as described in the instruction. While there may have been an error in the instruction, it was never objected to. As a result, it is analyzed under a plain error analysis. Since it is clear the outcome of the trial would have been the same, the conviction should stand. Therefore, I concur on this point with the majority.

{¶54} With regard to the possession of criminal tools conviction, the question for the jury to decide was whether appellant was acting in concert or cooperating in any way with the two other occupants of the building in the pursuit of the theft. The other two occupants clearly had criminal tools. The jury was in a good position to determine the nature of these tools, the proximity of the other two occupants to appellant, and the nature of their conduct while they were inside the building. It is not unreasonable for the jury to conclude that appellant was aware of the presence of the other two trespassers. Upon his apprehension, appellant was handcuffed and asked if anyone else was in the

building. He twice replied “no.” If the jury reasonably believed he was aware of the presence of the other two trespassers, it is clear that this false response to the police was meant to do one thing—to further the enterprise of those who were using the criminal tools to commit a theft offense. As a result, there was sufficient evidence to support a conviction for possession of criminal tools. I, therefore, would affirm the convictions on both counts.