

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-L-124
THOMAS C. DIBIASE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 11 CR 000036.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Aaron T. Baker, 38109 Euclid Avenue, Willoughby, OH 44094 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Thomas DiBiase appeals from the decision of the Lake County Court of Common Pleas, which found him guilty of two counts of Burglary, two counts of Receiving Stolen Property, and two counts of Engaging in a Pattern of Corrupt Activity pursuant to a jury verdict; he was sentenced to a total of 19 years in prison. Mr. DiBiase was found to have participated in a burglary ring active in both Lake and Geauga

counties, and was prosecuted under a theory of complicity. He challenges both the sufficiency and the manifest weight of the evidence.

{¶2} We find that the state presented sufficient evidence to withstand a motion for a directed verdict, and that the manifest weight of the evidence supports the jury's verdict of guilty as to the six counts. Therefore, the judgment and sentence of the Lake County Court of Common Pleas is affirmed.

Substantive Facts and Procedural History

{¶3} In February and March 2010, a number of burglaries took place throughout Lake County demonstrating a similar *modus operandi*. It was the state's theory that these burglaries were committed by a team of people, working in concert to case potential homes, burglarize those homes, and then unload the loot via area pawn shops and precious metal dealers.

The Ritchey Burglary

{¶4} In February 2010, John Vaughan was watching over the Willoughby Hills home of his friend Stephan Ritchey. Mr. Ritchey and his wife own another home in Utah, and were residing there during the month of February. Mr. Vaughan checked on the home in mid to late February and found the Ritchey home had been burglarized. The back door had been kicked in, and items including a flat-screen television had been taken. Mr. Vaughan called the police immediately and placed a report. Officer Neath of the Willoughby Hills Police Department responded to the call, spoke to Mr. Vaughan, and collected evidence. No fingerprints, blood, or other physical evidence were recovered from the Ritchey house. During the course of his immediate investigation, Officer Neath was informed that a large brown vehicle had been seen in the area that day.

{¶5} Mr. Ritchey arrived home a few days after the burglary was discovered to take stock of the home and survey the damage. He indicated that the items stolen included the flat-screen television, jewelry and jewelry boxes, and cash; he and his wife estimated the value of the stolen items at \$5,900.

{¶6} A few weeks later, Mr. and Mrs. Ritchey located one of their missing items at George's Pawn Shop in Euclid. The receipt for the item indicated that it had been sold to the shop by a man named Dale McNaughton.

The Stewart Burglary

{¶7} On March 2, 2010, Sandra Stewart returned home from work to find that her home, located in Mentor, had been burglarized. Various items, including jewelry, jewelry boxes, personal records, and collectible coins, had been taken from her home. She estimated the value of the items taken at close to \$10,000. It appeared that the burglar had gained entry via a side door leading to the laundry room, but a window in the family room had also been broken. She later discovered that there was also damage to her sliding glass door.

{¶8} Mrs. Stewart alerted authorities, who began an investigation. The police, among other efforts to collect evidence, took molds of the damage to the window and sliding glass door, as well as foot prints found in the snow outside. They eventually connected the damage to the door and window to a blue pry tool recovered from a silver Buick driven by a young man named Sergio Reynolds, Mr. DiBiase's son, and the foot prints to shoes owned by Mr. DiBiase's friend Dale McNaughton.

{¶9} During the course of their investigation, Mentor Police were provided useful information from Bonivere Stewart and Patricia Wigand. Bonivere Stewart, Mrs. Stewart's mother-in-law and across-the-street neighbor, told police that a young man

had knocked on her door around 1:30 p.m. on March 2, 2010. She answered the door and found a college-aged man asking her to sign a petition against casinos in Ohio. He held a spiral bound notebook with the words "No Casinos in Ohio" handwritten on the front cover. Bonivere Stewart declined to sign the petition, and then observed the young man walk through her yard and on to the next house. She later identified this individual as Dale McNaughton.

{¶10} Patricia Wigand, a neighbor of the Stewarts, told police that she had observed some concerning activity on the afternoon of March 2, 2010. Ms. Wigand observed a man wearing a hoodie walk down the Stewarts' driveway and across the street carrying a plastic bag containing something. She watched the man cross the street, sit in the snow, and place a call on a cell phone. A few minutes later, Ms. Wigand observed a silver or grey Buick pick up the hoodie-clad man. She did not see the person driving the car, as he did not exit the vehicle. Ms. Wigand also stated to police that, earlier in the day, she had observed a different, darker colored vehicle driving up and down the street.

{¶11} Mrs. Stewart and her husband were able to recover some of the missing jewelry from Great Lakes Coin and Jewelry, a precious metals dealer in Willoughby. They were informed by Great Lakes Coin and Jewelry that Dale McNaughton had sold the jewelry to the store.

The Ivancic Burglary

{¶12} On March 12, 2010, Eileen Ivancic learned that her home in Willoughby Hills had been burglarized. A police officer had been called to the area to investigate suspicious activity and found the Ivancic's front door kicked in. Mrs. Ivancic and her husband were in Florida at the time; they returned home to evaluate the damage and

determine what had been taken from them. The Ivancics identified that the items stolen included jewelry, coins, cash, and a black Luger handgun. They estimated the value of the stolen items to be between \$25,000 and \$30,000.

{¶13} The police took evidence from the Ivancic's home, including a lift of a large shoe print found on the front door of the house. The shoe print was submitted to the Lake County Crime Lab.

{¶14} Willoughby Hills Police were informed by Denise Penza, a resident of Kirtland, that she had observed a suspicious young male hiding behind a guardrail on March 12, 2010, at approximately 8:00 p.m. The young man was carrying a white sack that appeared to be full. She observed him get into a vehicle driven by someone else, but was unable to describe the vehicle.

The Investigation

{¶15} A task force was set up between different law enforcement agencies in Lake and Geauga Counties to investigate this rash of similarly committed burglaries.

{¶16} Based on evidence provided by Mrs. Stewart that she had located a few of her stolen items at Great Lakes Coin and Jewelry, authorities spoke to Michael Ponsart, the owner. Mr. Ponsart stated that he was familiar with Mr. McNaughton and Mr. DiBiase, who both frequented his store to sell items for cash. Mr. DiBiase and Mr. McNaughton would come into Great Lakes Coin and Jewelry individually at times, and together at others; Mr. Ponsart described the men as a "team". The paperwork provided by Mr. Ponsart indicated that Mr. McNaughton had sold items at Great Lakes Coin and Jewelry on February 5, 9, and 24 and March 1, 2, 6, and 13, 2010; the bill of sale from March 6, 2010 indicated that he had sold the two rings later identified as having been stolen from the Stewart residence. Mr. DiBiase sold items to Great Lakes

Coin and Jewelry on March 6 and 15, 2010. Mr. Ponsart reported that he often saw the two men arrive together in a grey Buick.

{¶17} Following up on this information, Mentor Police obtained address information for Mr. DiBiase and Mr. Ponsart, and learned that they lived just ten houses away from one another on the same street in Eastlake. Detective Collier of the Mentor Police Department conducted a drive-by of the homes, and observed a silver or grey Buick parked in Mr. DiBiase's driveway.

{¶18} On March 15, 2010, Mr. DiBiase went to Great Lakes Coin and Jewelry for a final time; he sold miscellaneous coins that day. Store video captured Mr. DiBiase arriving as passenger in a silver or grey Buick, which parked and waited for him while he went inside. Mr. Ponsart overheard Mr. DiBiase state to one of the store employees that this was going to be the last time they would see him, as he was headed to jail.

{¶19} Detective Collier received a call from Mr. Ponsart four days later, who stated that Mr. McNaughton and another male had arrived in the same grey or silver Buick and were currently in his store. He provided the police with the license plate number, which was determined to be a stolen dealer plate. Officers followed the vehicle to the street in Eastlake where both Mr. McNaughton and Mr. DiBiase resided.

{¶20} A few days later, the Buick was lawfully stopped with Mr. DiBiase's son, Sergio Reynolds, inside. A search warrant was obtained for the Buick, and officers found several items inside which implicated the Buick and its occupants in the various burglaries. Found in the car were: (1) a spiral notebook with the words "Anti-Abortion" hand-printed on the cover; (2) Mr. McNaughton's driver's license; (3) miscellaneous items of jewelry; (4) a receipt with the name of a Geauga County resident whose home had been burglarized in a similar fashion to the three burglaries in Lake County; and (5)

a blue pry bar. The pry bar was sent to Lake County Crime lab, which confirmed that it was a positive match for the impressions located on the Stewarts' window and sliding door.

{¶21} After speaking to Mr. Reynolds, the police felt enough probable cause existed to obtain search warrants for both Mr. DiBiase's and Mr. McNaughton's residences. During the execution of these warrants, some of Sandra Stewart's jewelry was recovered from Mr. DiBiase's bedroom, while her stolen personal documents and two stolen jewelry boxes were found in Mr. McNaughton's home. Further, shoes were found in Mr. McNaughton's home that were determined to have a pattern consistent in shape, size, and tread pattern with the shoe impressions collected at the Stewart residence. The police were also able to recover about \$500 worth of stolen property from the Ivancic residence from Mr. McNaughton's home, and the Lake County Crime lab could not eliminate Mr. McNaughton's shoes as the source of the shoe impression left on the Ivancic's front door. Mr. McNaughton was arrested.

Phone Records

{¶22} During the investigation, authorities were able to gather additional evidence to support the charges against Mr. DiBiase and Mr. McNaughton, and to demonstrate the coordinated effort between the two. The police learned that Mr. DiBiase had opened a cellular phone account with Revol Wireless on February 9, 2010. He opened a "shared plan," and put one phone in his name and the other under the name "Dale." Detective Vetter of the Geauga County Sheriff's Department, using the telephone records provided by Revol, determined that Mr. DiBiase and Mr. McNaughton called one another quite frequently through the entire day, and was able to determine their locations when these calls were placed.

{¶23} The records indicated that on March 2, 2010, multiple, short-interval calls were made by Mr. McNaughton to Mr. DiBiase between 1:11 p.m. and 1:38 p.m. Both of the cell phones were routed through the Reynolds Road cell tower in Mentor, which was in close proximity to the Stewart residence. On March 12, 2010, the records again showed multiple calls between Mr. McNaughton and Mr. DiBiase, beginning early in the morning and lasting throughout the day. Around 8:00 p.m., Mr. McNaughton placed two short calls to Mr. DiBiase; both their phones were routed through the Kirtland Road and Par Lane cell tower in Willoughby and Willoughby Hills, respectively. Both cell towers were in close proximity to the Ivancic residence.

{¶24} The records indicate frequent phone calls between the two men until March 15, 2010, when Mr. DiBiase was taken into custody in relation to another matter. Beginning on March 15, 2010, text messages indicated that Sergio Reynolds began using Mr. DiBiase's phone.

Receipts

{¶25} Law enforcement also obtained receipts from Precious Metals Refineries, a kiosk located in the Great Lakes Mall. Records indicated that Mr. DiBiase and Mr. McNaughton sold coins and jewelry for cash at this kiosk. On March 3, 2010, the day after the Stewart burglary, receipts show that Mr. DiBiase sold jewelry twice to Precious Metals Refineries. Apparently, Mr. DiBiase told the kiosk employee that Mr. McNaughton was his son and that they were selling his mother's jewelry to get money for Mr. McNaughton to move to Florida.

Jail-House Phone Calls

{¶26} Flowing from Mr. DiBiase's March 15, 2010 incarceration, the police were able to obtain recordings of jail-house phone calls between Mr. DiBiase and his son, Mr.

Reynolds, and Patricia Hale, Mr. McNaughton's girlfriend. On March 19, 2010, Mr. Reynolds stated that he "did shit last night with Dale" on Fairmount, had given money to Dale, and that Dale was now not answering his phone. Mr. DiBiase quickly told Mr. Reynolds not to say anything further on the phone. The Geauga County Sheriff's Department confirmed that a burglary had occurred on Fairmount Boulevard on March 18, 2010. In a later phone conversation with Mr. Reynolds, Mr. DiBiase made continuous inquiries as to whether Mr. Reynolds had made a statement to the police. Mr. Reynolds denied doing so, but was lying, as he had made a statement upon being stopped in the Buick.

{¶27} In conversations with Ms. Hale, Mr. DiBiase expressed concern about the execution of the search warrants and Mr. McNaughton's arrest. He told Ms. Hale to tell Mr. McNaughton to stay strong, keep quiet, and not to talk to police; he warned her that "loose lips sink ships." Ms. Hale admitted to police that in one call she had spoken in code about the location of a black gun Mr. McNaughton had hidden at Mr. DiBiase's home. Ms. Hale also told police that prior to their arrests, Mr. DiBiase and Mr. McNaughton spoke frequently and often went places together in Mr. DiBiase's silver sedan.

Indictment and Trial

{¶28} Based on the investigation and evidence collected, Mr. DiBiase was indicted by a Lake County Grand Jury on two counts of Burglary in violation of R.C. 2911.12, felonies of the second degree; three counts of Receiving Stolen Property in violation R.C. 2913.51, felonies of the fifth degree; one count of Burglary in violation of R.C. 2911.12 with an attendant firearm specification; and two counts of Engaging in a

Pattern of Corrupt Activity in violation of R.C. 2923.32, felonies of the first and second degree. He entered a plea of not guilty to all counts.

{¶29} The matter proceeded to jury trial in July 2011. The state presented substantial evidence in the form of 19 witnesses and over 55 exhibits. At the close of the state's case, Mr. DiBiase moved for acquittal pursuant to Crim.R. 29 as to all counts; the trial court denied his motion. Mr. DiBiase declined to call any witnesses, rested his case, and renewed his Crim.R. 29 motion, which was again denied. The jury returned a verdict as to two counts of Burglary, two counts of Receiving Stolen Property, and two counts of Engaging in a Pattern of Corrupt Activity. The trial court sentenced him a total of 19 years in prison.

{¶30} Mr. DiBiase timely appealed and now brings the following assignment of error:

{¶31} "Appellant's convictions as to counts three (3) through eight (8) of the indictment, were both without sufficient evidence and against the manifest weight of the evidence."

Standard of Review

{¶32} A trial court shall grant a motion for acquittal when there is insufficient evidence to sustain a conviction. Crim.R. 29(A). When reviewing a challenge of the sufficiency of the 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*, 61 Ohio St.3d 259 (1991), 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.*

{¶33} 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*, 20 Ohio App.3d 172, 175 (1983).

{¶34} “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, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶35} “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.

{¶36} “[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.” *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. When examining witness credibility, “the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.” *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). A fact finder is “free to believe all, some, or none of the testimony of each witness appearing before it.” *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29.

{¶37} “When reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume that the findings of the trier of fact are

correct. * * * This presumption arises because the trial judge had an opportunity to view the witnesses and observe their demeanor in weighing the credibility of the witnesses.” *State v. Reeves*, 11th Dist. No. 2006-T-0099, 2007-Ohio-4765, ¶14, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80-81 (1984).

{¶38} Because “a determination of whether a conviction is or is not supported by the weight of the evidence ‘necessarily rests on the existence of sufficient evidence[.]’” we review and resolve Mr. DiBiase’s contention that his convictions were against the manifest weight of the evidence only. *State v. Pesec*, 11th Dist. No. 2006-P-0084, 2007-Ohio-3846, ¶44, citing *State v. McCrory*, 11th Dist. No. 2006-P-0017, 2006-Ohio-6348, ¶40. See also *State v. Egli*, 11th Dist. No. 2007-P-0052, 2008-Ohio-2507.

The Evidence Supports the Convictions

{¶39} Mr. DiBiase was found guilty of burglary, receipt of stolen property, and engaging in a pattern of corrupt activity. The state pursued a theory of complicity against Mr. DiBiase as to the burglaries, as physical evidence establishing him as a principal actor in the home invasions was not available. Mr. DiBiase challenges the jury’s verdict on the theory that the state presented “a wholly circumstantial case which did not prove that [he] was involved in a conspiracy with Dale McNaughten and others to commit various burglaries in the community.” His attack on the convictions is extremely general, and does not point to any specific shortcomings in the trial court’s denial of his Crim.R. 29 motions or the jury’s verdict, other than the circumstantial nature of the evidence against him. However, “[c]ircumstantial evidence and direct evidence inherently possess the same probative value.” *Jenks* at 272. See also *State v. Kaseda*, 11th Dist. No. 2012-L-002, 2012-Ohio-4652.

{¶40} Given the lack of physical evidence linking Mr. DiBiase directly to the home invasions, but the existence of copious circumstantial evidence connecting him to Mr. McNaughton and establishing that they were working together to burglarize homes and sell the stolen items for cash, the trial court's instruction to the jury on complicity was entirely proper. "To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime." *State v. Johnson*, 93 Ohio St.3d 240 (2001), syllabus.

{¶41} The evidence presented by the state at trial painted a picture in which Mr. DiBiase purposefully assisted Mr. McNaughton and Mr. Reynolds in the commission of the burglaries by being present in the area during the times the homes were broken into, providing logistical support via the telephone, and picking up the assailant upon leaving the homes with stolen property. Further, Mr. DiBiase accompanied Mr. McNaughton to various pawn shops and precious metal dealers the day after the commission of each of the three burglaries in this case, selling items for cash. Some of those items were identified by their true owners as stolen from their homes. Further, Mr. DiBiase's silver Buick was regularly seen in the vicinity of the burglaries the day of the break-ins. Lastly, some of Ms. Stewart's jewelry was recovered from Mr. DiBiase's bedroom upon execution of the search warrant, further tying him to these crimes. Couple this with the phone conversations he had with Mr. Reynolds and Ms. Hale, which suggested his knowledge and ultimate complicity in the burglaries, it is impossible to say the jury lost its way in finding Mr. DiBiase guilty.

{¶42} We further find it noteworthy that the jury did not convict Mr. DiBiase of counts one and two of the indictment. This outcome suggests that the jury took its job seriously and engaged in an appropriate weighing of the evidence. It is clear that the jury found the evidence supporting counts three through eight much more compelling, and thus convicted him on those six counts.

{¶43} A review of the record demonstrates that the state submitted substantial evidence as to the six counts Mr. DiBiase was convicted of, and the jury did not lose its way in delivering a guilty verdict. The assignment of error is without merit and the judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.