[Cite as *State v. Scott*, 2010-Ohio-1734.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
LEE DARBY SCOTT	:	Case No. 09CA20
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 08CR80
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 19, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DANIEL G. PADDEN 139 West Eighth Street P.O. Box 640 Cambridge, OH 43725	MELISSA M. WILSON 213 North Eighth Street Cambridge, OH 43725

Farmer, J.

{¶1} On June 6, 2008, the Guernsey County Grand Jury indicted appellant, Lee Darby Scott, on one count of breaking and entering in violation of R.C. 2911.13(B) and one count of theft in violation of R.C. 2913.02. Said charges arose from an incident wherein appellant entered a building and took some items after a day of drinking.

{¶2} A jury trial commenced on April 2, 2009. The jury found appellant guilty as charged. By judgment entry filed May 4, 2009, the trial court sentenced appellant to an aggregate term of eleven months in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "APPELLANT WAS DEPREIVED (SIC) OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS TESTIMONY WAS PROVIDED BY A NARRATIVE."

II

{¶5} "THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN THAT GUERNSEY COUNTY PROSECUTING ATTORNEY FAILED TO PRODUCE SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION."

I

{¶6} Appellant claims he was denied effective assistance of trial counsel because defense counsel had him testify by means of a narrative. We disagree.

{¶7} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶8} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶9} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶10} The trial court instructed appellant as follows:

{¶11} "THE COURT: All right. Mr. Scott, the Judge will control the courtroom, and we've already greeted each other properly. You were asked to testify. I have permitted - - and I'll tell the ladies and gentlemen of the jury, your attorney has requested your testimony be a narrative form rather than question and answer by him through you, but it should be a narrative. And you may commence the testimony you wish to give the jury at this time." T. at 241.

{¶12} Appellant claims his own statements during his narrative, "I was so intoxicated that I had to lay down," "I was getting dizzy," "I was done for," and "as soon as he put the cuffs on me, I just fell over," were all highly prejudicial. T. at 242, 243.

{¶13} We find these comments exemplified why appellant was unaware of the theft of the items. We can hardly say appellant's own defense was prejudicial to him. Appellant remembered very little of the entire day. On cross-examination, appellant admitted he could not remember any particularities of the day in question or what he had told the investigating officer. T. at 245-252, 256.

{¶14} In addition, appellant argues he was prejudiced because the narrative opened the door for the state to ask him about his prior convictions. Once appellant testified, whether by narrative or question and answer form, his prior convictions, if proper under Evid.R. 609, were fair game.

{¶15} Upon review, we find no ineffective assistance of counsel.

{¶16} Assignment of Error I is denied.

II

{¶17} Appellant claims his conviction was against the sufficiency and manifest weight of the evidence. We disagree.

{¶18} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "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. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶19} Appellant was convicted of breaking and entering in violation of R.C. 2911.13(B) which states, "[n]o person shall trespass on the land or premises of another, with purpose to commit a felony" and theft in violation of R.C. 2913.02 which states the following:

{¶20} "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶21} "(1) Without the consent of the owner or person authorized to give consent;

{¶22} "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

{¶23} "(3) By deception;

{¶24} "(4) By threat;

{¶25} "(5) By intimidation."

{¶26} Appellant argues forensic or eyewitness evidence was not presented linking him to the crimes. We note circumstantial evidence is that which can be "inferred from reasonably and justifiably connected facts." *State v. Fairbanks* (1972), 32 Ohio St.2d 34, paragraph five of the syllabus. "[C]ircumstantial evidence may be more

certain, satisfying and persuasive than direct evidence." *State v. Richey,* 64 Ohio St.3d 353, 1992-Ohio-44. It is to be given the same weight and deference as direct evidence. *Jenks,* supra.

{¶27} Presented during the trial was the circumstantial evidence of shoe prints found in the dust of the building that had been broken into which matched shoes found at the residence where defendant was found. T. at 211. Also found at the residence was the stolen couch, and broken pieces of glass that did not come from the residence. T. at 147, 152. The glass appeared to be very thick, like commercial glass. T. at 147. Angela Hanning testified appellant was her boyfriend at the time and he brought the couch to her residence. T. at 167, 170. Ms. Hanning had told appellant she needed a couch. T. at 170. A weed eater, missing from the building, was found in a grassy area near Ms. Hanning's residence. T. at 144.

{¶28} A witness to the break-in saw two men carrying out the couch and another man carrying the weed eater. T. at 197. The building's front door glass was broken out and there was blood on the door. T. at 101. When appellant was arrested, there were cuts on his arms and elbows that appeared to be fresh. T. at 151.

{¶29} The direct evidence included testimony from the building's owner that the items seized from Ms. Hanning's residence belonged to him. Further, in appellant's own typed statement, State's Exhibit C, he admitted to going into the building and taking the couch:

{¶30} "I got to Mr. G's; I bought a gallon of gin and a 2 liter of Dr. Pepper. I got on the railroad tracks right there behind that Smokey's and all that, there's construction or whatever back there. I got on the railroad tracks; I just started walking. I started

drinking. I got pretty lifted. I walked back in town; it was probably 11:30 - 12 o'clock, something around there somewhere. And then I was coming up the thing and I seen a window busted. I turned my head, I was like, and 'Well what do we have here?' So I went in the building. I went in and looked around a little bit, didn't see anything; like bumped into a couch. I said, 'Damn.' I picked it up to see if it was heavy. It wasn't that heavy so I picked it up and started to drag it out the door and cut my hand and stuff. And that's all I remember. That's it."

{¶31} We find the direct and circumstantial evidence presented were sufficient to establish all of the elements of breaking and entering and theft. We do not find a manifest miscarriage of justice.

{¶32} Assignment of Error II is denied.

{¶33} The judgment of the Court of Common Pleas of Guernsey County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ William B. Hoffman

JUDGES

SGF/sg 0316

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
LEE DARBY SCOTT	:	
Defendant-Appellant	:	CASE NO. 09CA20

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Guernsey County, Ohio is affirmed. Costs to appellant.

_s/ Sheila G. Farmer_____

_s/ Julie A. Edwards_____

_s/ William B. Hoffman_____

JUDGES