[Cite as *State v. Wise,* 2010-Ohio-5739.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	
-vs-	:	
	:	Case No. 10-CAA-010003
DAVID L. WISE, JR.	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Delaware County Court of common Pleas, Case No. 09CRI080411
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 22, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
DAVID A. YOST DELAWARE COUNTY PROSECUTOR BY: BRENDAN INSCHO 140 North Sandusky Street Delaware, OH 43015	WILLIAM T. CRAMER 470 Olde Worthington Road, Ste. 200 Westerville, OH 43082

Gwin, J.

{¶1} Defendant-appellant David L. Wise, Jr. appeals from his conviction and sentence in the Delaware County Court of Common Pleas on one count of grand theft of firearms in violation of R.C. 2913.02(A)(1), one count of receiving stolen property in violation of R.C. 2913.51(A), and one count of breaking and entering with purpose to commit a felony in violation of R.C. 2911.13(B). Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} In the early morning hours of August 17, 2009, the Black Wing Shooting Center (Black Wing) was broken into and approximately 200 knives, 35 firearms, ammunition bags, cases, and backpacks were stolen resulting in a total estimated loss of approximately $50,000.

{¶3} At 3:00 a.m. on Monday August 17, 2009, a person living near Black Wing noticed that their telephone service was down. When the condition persisted until 5:00 a.m., they called Verizon to complain. A Verizon servicer was dispatched and discovered that the utility pedestal outside Black Wing had been torn open and the wires had been cut. The servicer immediately called the police because that was often how people attempted to disable alarm systems.

{¶4} Approximately ten minutes later, a Black Wing employee arrived. After being informed of the situation, the employee entered the store. The employee noticed that the lights were on, cabinets were open, and the alarm indicated that there had been a breach. The employee exited the building just as the sheriff's deputies arrived.

{¶5} Sheriff's deputies found a window broken out of the back door and small glass particles on the ground leading to the road. A brown jersey glove was found in

front of the building. A muzzle-loading firearm was discovered lying in the parking lot. The door to the owner's office had been forced open, doors and cabinets had been opened. The deputies found a bag on the floor full of ammunition from the shelves, and knives missing from the knife case. A crowbar apparently left by the intruder was found on top of a display case. No useable fingerprints were discovered.

{¶6} Although most of the firearms had been placed in a vault before closing on Sunday night, the owner testified that 35 firearms had been stolen. Some of the stolen firearms had been left out on a sale rack, others were .22 caliber rifles that were kept behind a counter for use in the rifle range, and 13 others had been kept in the owner's office, including some historical firearms and two AR-15 assault rifles. Approximately 200 knives of various types were also stolen from a display case.

{¶7} Several days after the reported break-in it was discovered that the thieves had stolen the change from a soda pop vending machine. This was discovered when someone tried to use the machine, but the money kept falling out of the machine. When the machine was opened to fix the problem, it was discovered that the entire coin mechanism had been removed from the machine.

{¶8} Black Wing had several security cameras that recorded the incident. The owner and his son reviewed all of the different cameras and identified two separate perpetrators who carried out multiple loads of stolen goods. The perpetrators wore masks and gloves, and could not be identified from the videos.

{¶9} During the weeks following the break-in, appellant offered to sell the stolen guns and knives to a wide range of people. Appellant approached long-time friend Brad

Maynard with a large black bag filled with knives, firearms, and ammunition of the same make as those stolen from Black Wing and offered to sell them to Maynard.

{¶10} The weekend after the Black Wing theft, appellant attempted to sell knives at a local flea market. Brad Maynard testified that he asked appellant to go to the flea market. Maynard saw appellant selling knives at the market. Maynard testified that appellant became nervous that a repeat customer was with law enforcement, so he took his knives and called his mother who lived nearby. Wise returned without the duffle bag and they all left the market together in Maynard's father's van. Several of appellant's friends asked him where he managed to acquire the guns and knives he was purveying. Appellant stated to most of his friends that he purchased the weapons from a "crack head," though he told variations of that story at different times. Witness Sasha Mattox testified that appellant told her a different story that being that he got the knives from his father.

{¶11} Appellant's father testified that appellant lived with him for a short time prior to the Black Wing theft, and that appellant did not have a car or a stable home. Sometime after the Black Wing theft, one of his daughters told him that appellant left a black duffle bag at their house. Appellant's father checked the bag and saw an old revolver, a couple boxes of shotgun shells, and two or three pocketknives. He set the bag outside behind the house and it disappeared. He presumed that appellant came to get it, but never actually saw him do so

{¶12} Around this time, Maynard's neighbor saw a news report about the Black Wing theft and reported it. The neighbor subsequently noticed that there was a $5,000

reward for information leading to a successful arrest or prosecution, and eventually claimed the reward.

{¶13} Evidence of cell phone usage was presented to the jury, placing appellant in the area of Black Wing at the time of the theft. An expert witness presented to the jury information concerning the tracking of cellular phones using signal towers and the different variables involved in how a cellular phone transmits calls through surrounding signal towers.

{¶14} While appellant was in jail awaiting trial, the sheriff recorded a telephone conversation that he had with his brother. During the conversation, the issue of the missing duffle bag was discussed. Appellant responded that he hoped the police could swim. A detective testified that appellant's mother lived across from a wooded area that contained a stream and a large body of water. The police and ATF searched the area using dogs trained to locate ordinance, but never found the duffle bag.

{¶15} Appellant was arrested and charged with grand theft of firearms, receiving stolen property, breaking and entering with purpose to commit a felony and disrupting public services.

{¶16} Following a jury trial, appellant was found guilty of the first three charges, but not guilty of disrupting public services. The trial court found that receiving stolen property was an allied offense of grand theft and merged the two for purposes of sentencing pursuant to R.C. 2941.25. The court imposed a sentence of five years on the count for grand theft and twelve months for the count of breaking and entering. The trial court ordered the sentences be served concurrently.

{¶17} Appellant timely appealed and raises the following two assignments of error for our consideration:

{¶18} "I. APPELLANT'S THEFT CONVICTION IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶19} "II. APPELLANT'S THEFT CONVICTION IS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE."

I. & II.

{¶20} In his first assignment of error, appellant maintains that his convictions for theft is based upon insufficient evidence; in his second assignment of error appellant argues that his conviction for theft is against the weight of the evidence. Because we find the issues raised in appellant's first and second assignments of error are closely related, for ease of discussion, we shall address the assignments of error together.

{¶21} The function of an appellate court on review is to assess the sufficiency of the evidence "to determine 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, 574 N.E.2d 492, paragraph two of the syllabus. In making this determination, a reviewing court must view the evidence in the light most favorable to the prosecution. Id.; *State v. Feliciano* (1996), 115 Ohio App.3d 646, 652, 685 N.E.2d 1307, 1310- 1311.

{¶22} While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest-weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541, 548-549 (Cook, J., concurring). In making this determination,

we do not view the evidence in the light most favorable to the prosecution. Instead, we must "review 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 Trier of fact 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. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, supra. In *State v. Thompkins*, supra the Ohio Supreme Court further held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." 78 Ohio St.3d 380 at paragraph three of the syllabus.

{¶23} Appellant does not dispute that there is sufficient evidence for the jury to have concluded that appellant was guilty of receiving stolen property; appellant's main argument is that his conviction for theft is based upon insufficient evidence and against the weight of the evidence introduced at trial to identify him as a perpetrator in the break-in. We disagree.

{¶24} In this case, appellant was convicted of one count of theft. The elements of theft are set forth in R.C. 2913.02, which provides in pertinent part:

{¶25} "(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:

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

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

{¶28} "* * *"

{¶29} If the State relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "'such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." ' *State v. Jenks* (1991), 61 Ohio St.3d 259, 272, 574 N.E.2d 492 at paragraph one of the syllabus. "'Circumstantial evidence and direct evidence inherently possess the same probative value [.]" ' *Jenks*, 61 Ohio St .3d at paragraph one of the syllabus. Furthermore, "'[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." ' *Jenks,* 61 Ohio St.3d at 272, 574 N.E.2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott* (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293, citing *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329, 331, 130 N.E.2d 820. Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott*, 51 Ohio St.3d at 168, 555 N.E.2d 293, citing *Hurt*, 164 Ohio St. at 331, 130 N.E.2d 820.

{¶30} Appellant contends that the evidence presented to the jury was insufficient to connect him to the scene of the theft, criticizing the evidence presented concerning

the phone records placing him near Black Wing, as well as the amount of the stolen property found on his person.

{¶31} The unexplained possession of recently stolen property presents a permissive inference that the accused is guilty of theft or burglary. *Methard v. State* (1869), 19 Ohio St. 363; *State v. Simon*, Lucas App. No. H-04-026, 2005-Ohio-3208 at ¶ 14; *State v. Richey* (Nov. 15, 1991), Highland App. No. 768; *State v. Griggs* (Sept. 18, 1990), Franklin App. No. 89AP-1417.

{¶32} In the case at bar, the state presented evidence that appellant offered to sell the stolen guns and knives to a wide range of people. Further appellant attempted to sell stolen items at a flea market. Evidence of cell phone usage was presented to the jury, placing appellant in the area of Black Wing at the time of the theft. Further, while appellant was in jail awaiting trial, the sheriff recorded a telephone conversation that he had with his brother. During the conversation, the issue of the missing duffle bag was discussed. Appellant responded that he hoped the police could swim.

{¶33} Viewing this evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had committed a theft offense. We hold, therefore, that the state met its burden of production regarding attempting or committing a theft offense as required by R.C. 2911.02(A)(1) and, accordingly, there was sufficient evidence to support appellant's conviction.

{¶34} Although appellant argues that the evidence of his cell phone usage is ambiguous and is affected by many variables and further he was only seen with a very small portion of the firearms and knives that were stolen, the trier of fact was free to

accept or reject any and all of the evidence offered by the appellant and assess the witness's credibility.

{¶35} "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' *United States v. Barnard*, 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)". *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶36} The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* Franklin App. No. 02AP-604, 2003- Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke*, Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶37} After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the conviction. The jury did not create a manifest injustice by concluding that appellant was guilty of the crime of theft. We conclude the Trier of fact, in resolving the conflicts in the evidence, did not create a manifest injustice to require a new trial. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶38} Appellant's first and second assignments of error are overruled.

{¶39} The judgment of the Delaware County Court of Common Pleas is affirmed.

{¶40} For the foregoing reasons, the judgment of the Delaware County Court of Common Pleas, Ohio, is affirmed.

By Gwin, J.,

Edwards, P.J., and

Hoffman, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. WILLIAM B. HOFFMAN

WSG:clw 1020

[Cite as *State v. Wise*, 2010-Ohio-5739.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DAVID L. WISE, JR.	:	
Defendant-Appellant	:	CASE NO. 10-CAA-010003

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

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

_____
HON. WILLIAM B. HOFFMAN