[Cite as *State v. Hardman*, 2015-Ohio-2483.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 14 CAA 09 0056
HOLLIE J. HARDMAN	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Delaware County Court of Common Pleas, Case No. 14-CR-I-05-0224 A
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 19, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
CAROL O'BRIEN Delaware County Prosecuting Attorney ANDREW BIGLER Assistant Prosecuting Attorney 140 North Sandusky Street, 3rd Floor Delaware, OH 43015	ELIZABETH OSORIO Law Office of Brian Jones 2211 U.S. Highway 23 North Delaware, OH 43015

Gwin, P.J.

{¶1} Defendant-appellant Hollie Hardman ["Hardman"] appeals his conviction and sentence after a jury trial in the Delaware County Court of Common Pleas on one count of breaking and entering, a felony of the fifth degree in violation of R.C. 2911.13(A).

Facts and Procedural History

{¶2} Count One of the indictment issued on May 30, 2014, alleged an incident of breaking and entering pursuant to R.C. 2911.13(A) in an unoccupied structure at 12 Columbus Avenue in Delaware, Ohio. (Indictment, May 30, 2014). Barbara Ramey, resident of 12 Columbus Avenue, testified at Mr. Hardman's trial on August 12, 2014.[1]

{¶3} Christopher Estrada, a neighbor of Mrs. Ramey testified that the alleyway near the garage has very little foot traffic. On May 22, 2014, Mr. Estrada noticed Hardman walking down the alley and "something just didn't feel right. I kept looking in my mirror at him and then proceeded to back out. And, like I said, something didn't feel right." (1T. at 153). Mr. Estrada testified that Harman just kept "looking around." Mr. Estrada felt so uneasy that he called his daughter to warn her and ask her to "make sure he doesn't get into our garage..." Id.

{¶4} Lillian Duty, Mr. Estrada's daughter, testified that she called the police when she observed a man "[w]alking in the alley, like he came out of the garage." 1T. at 162. The individual had "some type of pole..."

[1] Mr. Hardman was acquitted on Count Two, breaking and entering, and the lesser included charge of criminal trespassing at trial. (3T. at 2-4). Mr. Hardman conceded the facts and behavior that led to the misdemeanor obstruction of official business charge, therefore, at issue on his appeal is the conviction on Count One of the indictment.

{¶5} Officer Sean Franks of the Delaware Police Department was dispatched to 357 West Columbus Street around 3:30 P.M. for a reported theft. Officer Franks spoke to Ms. Duty, and Mr. Estrada. He then went to speak to the owner of the garage that Ms. Duty had suspected to be entered by the suspect, Mrs. Ramey. At that time, Ms. Ramey was unable to say whether anything had been taken out of her garage. Officer Franks gave Mrs. Ramey a card and asked that she call him if she found something missing.

{¶6} On May 22, 2014, Mrs. Ramey testified she was at home working in her yard. Her granddaughter was planting flowers in the front yard. Mrs. Ramey's great-grandchildren were playing in the side yard. Ms. Ramey's seven-year-old great-granddaughter told Ms. Ramey that there was a man in the garage. (1T. at 140). Apparently, Hardman had spoken to the child. Ms. Ramey testified that Hardman was attempting to remove a ground plain pipe, one of a series of pipes that screw together to mount a CB antenna, from the rafters of her garage. Hardman had his hands on it; however the pipe was stuck and he could not remove it. Mrs. Ramey testified that Hardman did not have permission to be inside her garage, nor did he have permission to remove the pipe from the garage. Mrs. Ramey testified,

> I said, well, you can't do that. You can't get into people's garages and just take what you want and I said, I'm gonna have to call the police department.

1T. at 133. Mrs. Ramey testified that Hardman begged her not to call the police, claiming he wanted the pipe to make a swing set for his children. After she called the police, Mrs. Ramey testified that Hardman,

> He went down three houses down and then he went up in their yard near this big tree... and then I saw him walking back toward their garage. And there was a black car parked there...And he got in there and he backed out and started to leave, and then the police officers came...

1 T. at 135.

{¶7} Officer Greg Bates of the Delaware Police Department testified that he arrived in the north/south alley between Toledo Avenue and Columbus Avenue as a black vehicle was pulling out of the alley. A female was driving, with Hardman seated in the passenger seat. Hardman got out of the car and was talking to Officer Bates. As they were talking, Hardman suddenly began to run north through the alley. Officer Frank's arrived in a separate police cruiser.

{¶8} After apprehending Hardman, Officer Franks, observed several items on the backseat of the black vehicle, including two pipes. (1T. at 192). He took the items to Mrs. Ramey who identified several parts of her late husband's CB radio apparatus that had been stored in the garage. (1T. at 135-137; State's Exhibit 2).

Assignments of Error

{¶9} Hardman raises two assignments of error,

{¶10} "I. MR. HARDMAN'S CONVICTION OF BREAKING AND ENTERING WAS BASED UPON INSUFFICIENT EVIDENCE AS THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. HARDMAN UTILIZED FORCE, STEALTH, OR DECEPTION TO TRESPASS IN AN UNOCCUPIED STRUCTURE AS REQUIRED BY R.C. 2911.13(A), THEREBY VIOLATING HIS RIGHTS UNDER THE

DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND ARTICLE 1, SECTION 16 OF THE OHIO CONSTITUTION.

{¶11} "II. MR. HARDMAN'S CONVICTION FOR BREAKING AND ENTERING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE RESULTING IN A MISCARRIAGE OF JUSTICE, IN VIOLATION OF SECTION 3, ARTICLE IV OF THE OHIO CONSTITUTION, BECAUSE THE MANIFEST WEIGHT OF THE EVIDENCE ESTABLISHED TRESPASS IN AN UNOCCUPIED STRUCTURE WITHOUT THE NECESSARY USE OF FORCE STEALTH OR DECEPTION."

I & II

{¶12} In his first assignment of error, Hardman challenges the sufficiency of the evidence. In his second assignment of error, Hardman contends his conviction is against the manifest weight of the evidence produced by the state at trial. Hardman's first and second assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶13} Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court of appeals to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id.; see also *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 673, 175 L.Ed.2d 582(2010) (reaffirming this standard); *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶146; *State v. Clay*, 187 Ohio App.3d 633, 2010-Ohio-2720, 933 N.E.2d 296(5th Dist.), ¶68.

{¶14} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668. Weight of the evidence 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. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue, which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." Id. at 387, 678 N.E.2d 541, *quoting* Black's Law Dictionary (6th Ed. 1990) at 1594.

{¶15} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the fact finder's resolution of the conflicting testimony. Id. at 387, 678 N.E.2d 541, *quoting Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). However, an appellate court may not merely substitute its view for that of the jury, but must find that "'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. Thompkins, supra*, 78 Ohio St.3d at 387, *quoting State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721 (1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" Id.

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.
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> * * *
>
> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶16} To find Hardman guilty of breaking and entering the jury would have to find beyond a reasonable doubt that Hardman by force, stealth, or deception trespassed 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. R.C. 2911.13(A).

{¶17} Hardman argues that the state failed to prove he entered the unattached garage of Mrs. Ramey though force, stealth, or deception.

{¶18} The Ohio Revised Code does not define "stealth." However, the most current version of the Ohio Jury Instructions gives the following definition: "'Stealth' means any secret or sly act to avoid discovery and to gain entrance into or to remain within a structure of another without permission." 2 CR Ohio Jury Instructions 511.13(A). *State v. McLeod,* 5th Dist. Licking No. 14 CA 53, 2015-Ohio-93, ¶53. In *McLeod* this Court noted,

> This Court and other appellate courts of this state have used a definition that includes "remaining" on the premises as opposed to merely "entering" the premises. *See State v. Stone*, 5th Dist. No. 1999 AP 030012, 1999 WL 1072199 (Nov. 10, 1999); *State v. Davis*, 1st Dist. No. C–010477, 2002–Ohio–1982; *State v. Patton*, 2d Dist. No. 2011 CA 94, 2013–Ohio–961 ¶ 14; *In re Predmore*, 3d Dist. Nos. 8–09–03, 8–09–04, 8–09–05, 2010–Ohio–1626, ¶ 44; *In re Carter*, 4th Dist. Nos. 04CA15, 04CA16, 2004–Ohio–7285, ¶ 24; *State v. DeBoe*, 6th Dist. No. H–02–057, 2004–Ohio–403, ¶ 66; *In re J.M.*, 7th Dist. No. 12 JE 3, 2012–Ohio–5283, ¶ 15; *State v. Isom*, 8th Dist. No 78959, 2001 WL 1671432, *4 (Nov. 29, 2001); *State v. Trikilis*, 9th Dist. Nos. 04CA0096–M, 04CA0097–M, 2005–Ohio–4266, ¶ 31; *State v. Lane*, 50 Ohio App.2d 41, 47, 361 N.E.2d 535 (10th Dist.1976); *State v. Sims*, 11th Dist. No.2001–L–081, 2003–Ohio–324, ¶ 58; *State v. Lamberson*, 12th Dist. No. CA2000–04–012, 2001 WL 273806, (Mar. 19, 2001).

McLeod, ¶54.

{¶19} We find that the jury could have found that the evidence presented concerning Hardman's actions in entering the garage while Mrs. Ramey's granddaughter and great grandchildren were present in the yard proved the element of stealth. Alternatively, the jury could have found that Hardman's actions in parking the black car several houses away and walking down the alleyway as if he were looking for something constituted stealth. The jury could also have found that Harman's claim that he wanted the pole to use for a swing set constituted "deception" as he made this

statement only after having been observed inside the garage. Further, Hardman's unexplained possession of other items taken from Mrs. Ramey's garage before he contends that he sought permission belies his contention that he was attempting to obtain permission to remove the pole. He had no legitimate reason for being in the possession of Mrs. Ramey's property in the trunk of the black car.

{¶20} In *State v. Ward*, 85 Ohio App.3d 537, 620 N.E.2d 168, 170 (3rd Dist. 1993), the court found that evidence of a defendant entering two different homes while the homeowners were occupied with other activities and without attempting to speak to the owners prior to entry was sufficient to establish that the defendant entered the homes by "stealth." *Ward*, 620 N.E.2d at 169-70. The defendant in *Ward* attempted to contact the owner and offer an explanation for being on the premises only after being discovered. Id. at 170. The *Ward* court found that under the circumstances the defendant wished "to avoid detection as he entered" the premises, and so the evidence supported a finding of stealth. Id.

{¶21} Hardman relies upon *State v. Isom*, 8th Dist. Cuyahoga No. 78959, 2001-WL-1671432(Nov. 29, 2001). In *Isom*, the homeowner saw the defendant inside her garage and watched him ride away on her daughter's bicycle. The homeowner testified, "that she did not know whether [the defendant] had simply walked up her driveway and into her garage and... that [the defendant] walked through the door that was open." *Isom* at *3. Further, the state:

> Presented no evidence that [the defendant] entered the garage by stealth or deception. Stealth has been defined as "any secret, sly, or clandestine act to avoid discovery and to gain entrance into or to remain

> within a structure of another without permission." *State v. Ward*, 85 Ohio App.3d 537, 540 (1993), *citing State v. Lane*, 50 Ohio App.2d. 41 (1976). Here the State offered no evidence that [the defendant] tried to avoid detection when he entered [the homeowner's] garage; indeed there was no evidence whatsoever regarding how he entered the garage***Finally, there is nothing in the record to suggest that [the defendant] entered the garage by use of any deception or trickery.

Isom at *34. On that basis, the Eighth District Court of Appeals found that the state had failed to prove that the defendant had entered the homeowner's garage by stealth, force, or deception, "an essential element of the offense of breaking and entering," and therefore, there was insufficient evidence to support the defendant's conviction of the same.

{¶22} In the case at bar, Hardman walked into the open garage while members of Ms. Ramey's family were outside in the yard. He had previously entered the garage unnoticed and made off with items of Mrs. Ramey's property. The jury could conclude that Hardman only attempted to obtain permission after the great grandchild discovered him. Accordingly, we believe that a rational jury could therefore conclude that Hardman used stealth to enter or remain in the garage without permission.

{¶23} 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*, 61 Ohio St.3d 259, 272, 574 N.E. 2d 492(1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v.*

Smith, *80 Ohio St.3d 89, 684 N.E.2d 668(1997).* "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*, 51 Ohio St.3d 160, 168, 555 N.E.2d 293(1990), citing *Hurt v. Charles J. Rogers Transp. Co*, 164 Ohio St. 329, 331, 130 N.E.2d 820(1955). 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.

{¶24} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Hardman committed the crime of breaking and entering. We hold, therefore, that the state met its burden of production regarding each element of the crime of breaking and entering, and, accordingly, there was sufficient evidence to support Hardman's conviction.

{¶25} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base his or her judgment. *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA–5758, 1982 WL 2911(Feb. 10, 1982). Accordingly, judgments supported by some competent, credible evidence

going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction*, 54 Ohio St.2d 279, 376 N.E.2d 578(1978). The Ohio Supreme Court has emphasized: "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.'" *Eastley v. Volkman*, 132 Ohio St.3d 328, 334, 972 N.E. 2d 517, 2012-Ohio-2179, *quoting Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978). Furthermore, it is well established that the trial court is in the best position to determine the credibility of witnesses. *See, e.g., In re Brown*, 9th Dist. Summit No. 21004, 2002–Ohio–3405, ¶9, *citing State v. DeHass*, 10 Ohio St .2d 230, 227 N.E.2d 212(1967).

{¶26} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.'" *State v. Pallai*, 7th Dist. Mahoning No. 07 MA 198, 2008-Ohio-6635, ¶31, *quoting State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002-Ohio-1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999).

{¶27} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶28} The jury as the trier of fact 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*, 10th Dist. Franklin No. 99AP-739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 WL 284714 (May 28, 1996). Indeed, the jury need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP-1238, 2003-Ohio-2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks, supra.*

{¶29} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury neither lost his way nor created a miscarriage of justice in convicting Hardman of the charge.

{¶30} Based upon the foregoing and the entire record in this matter, we find Hardman's conviction is not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury as a trier of fact can reach different conclusions concerning the credibility of the testimony of the state's witnesses and Hardman This court will not disturb the jury's finding so long as competent evidence was present to support it. *State v. Walker*, 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The jury heard the witnesses, evaluated the evidence, and was convinced of Hardman's guilt.

{¶31} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crime beyond a reasonable doubt.

{¶32} Hardman's first and second assignments of error are overruled.

By Gwin, P.J.,

Hoffman, J., and

Baldwin, J., concur