

[Cite as *State v. Dick*, 2010-Ohio-2148.]

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 09CA0044-M

Appellee

v.

KARY JOE DICK

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 09CR0110

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 17, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} John Yarman caught Kary Dick attempting to break into Mr. Yarman’s garage. A jury convicted Mr. Dick of attempted breaking and entering, receiving stolen property, and possession of criminal tools. Mr. Dick has appealed, arguing that there was insufficient evidence to support the jury’s verdicts and that his convictions are against the manifest weight of the evidence. This Court affirms because there was sufficient evidence to support Mr. Dick’s convictions and they are not against the manifest weight of the evidence.

FACTS

{¶2} According to Mr. Yarman, he noticed that a five-gallon gas can was missing from his detached three-car garage. A couple of weeks later, he noticed that another five-gallon gas can was missing from the garage, as well as a cordless power drill and two fishing poles. A few nights later, he arrived home around 11:00 p.m. and parked his truck in the driveway. As he was

walking to his house, he saw the driver of a car coming down the street turn the car's headlights off about 50 feet from his driveway. The driver pulled the car into a driveway for some storage barns across the street. He saw a man get out of the car and put on a dark-colored jacket over his light-colored shirt. Mr. Yarman concealed himself behind a tree, and the man ran across the street and hid behind a grape arbor that was in Mr. Yarman's front yard. Mr. Yarman watched the man walk up to his garage and start to lift the door. Mr. Yarman sneaked up on the man and grabbed him by his neck. When the man told Mr. Yarman that he was hurting him, Mr. Yarman loosened his grip, which allowed the man to break free and escape down the road.

{¶3} After the man ran away, Mr. Yarman called the police. He also went across the street to the man's car to make sure that he did not circle back around and drive away. Mr. Yarman noticed that the keys were still in the car so he took them. When a police officer arrived, he gave the keys to the officer. The officer ran the license plate of the car, which came back to Mr. Dick. While the officer was doing an inventory search of the car, he noticed that there were three gas cans in the trunk. Mr. Yarman identified two of the cans as the ones that had been taken from his garage. He said that he had had the cans for a long time and knew they were his from their discoloration.

{¶4} The police found Mr. Dick the following day. The Grand Jury indicted him on two counts of breaking and entering, one count of attempted breaking and entering, two counts of receiving stolen property, and one count of possession of criminal tools. A jury found him not guilty of breaking and entering, but guilty of the other charges. The trial court sentenced him to nine months in prison.

ATTEMPTED BREAKING AND ENTERING

{¶5} Mr. Dick’s assignment of error is that there was insufficient evidence to support his convictions and that his convictions are against the manifest weight of the evidence. Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced the average finder of fact of his guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991). When a defendant argues that his convictions are against the manifest weight of the evidence, however, this Court “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[s] must be reversed and a new trial ordered.” *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986). “Inasmuch as a court cannot weigh the evidence unless there is evidence to weigh,” this Court will consider Mr. Dick’s sufficiency argument first. *Whitaker v. M.T. Automotive Inc.*, 9th Dist. No. 21836, 2007-Ohio-7057, at ¶13.

{¶6} Regarding Mr. Dick’s conviction for attempted breaking and entering, under Section 2923.02(A) of the Ohio Revised Code, a person is guilty of an attempt to commit an offense for which purpose is sufficient culpability, if he purposely engages in conduct that, if successful, “would constitute or result in the offense.” Under Section 2911.13(A), a person is guilty of breaking and entering if he, “by force, stealth, or deception, . . . trespass[es] in an unoccupied structure, with purpose to commit therein any theft offense . . . or any felony.”

{¶7} Mr. Yarman identified Mr. Dick as the man who attempted to enter his garage. He testified that several items had recently been taken from the garage and that Mr. Dick's car contained his stolen gas cans. He also testified that Mr. Dick did not have permission to enter his garage. Accordingly, there was sufficient evidence from which the jury could infer that Mr. Dick was attempting to trespass in Mr. Yarman's garage by stealth with the purpose to commit a theft offense therein.

{¶8} According to Mr. Yarman, when he grabbed Mr. Dick and asked him what he was doing, Mr. Dick replied that he was looking for his wallet. There is no evidence in the record to explain why Mr. Dick would have thought that his wallet was in Mr. Yarman's garage. The police officer said that he found Mr. Dick's wallet on the front seat of Mr. Dick's car. The jury did not lose its way when it convicted Mr. Dick of attempted breaking and entering.

RECEIVING STOLEN PROPERTY

{¶9} Regarding Mr. Dick's conviction for receiving stolen property, under Section 2913.51(A) of the Ohio Revised Code, "[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense." Mr. Yarman testified that Mr. Dick had two gas cans in the trunk of his car that had been stolen from him. He also testified that he caught Mr. Dick attempting to break into his garage. Accordingly, there was sufficient evidence from which the jury could infer that Mr. Dick knowingly retained property that had been obtained through the commission of a theft offense.

{¶10} Regarding whether his receiving stolen property conviction is against the manifest weight of the evidence, Mr. Dick has noted that his father testified that he owns a number of gas cans similar to the ones Mr. Yarman said were missing from his garage. Mr. Dick has argued

that the gas cans were standard in size and color and commonly available at discount stores. Mr. Dick's father explained that Mr. Dick kept the gas cans in the trunk of his car because his car leaks gas.

{¶11} Mr. Yarman testified that he knew the gas cans were his from the way their color had faded over the years and because one of the cans was missing a plastic tab that he said had broken off. The jury did not lose its way in choosing to believe that the gas cans in Mr. Dick's trunk were the ones that had been stolen from Mr. Yarman.

POSSESSION OF CRIMINAL TOOLS

{¶12} Regarding Mr. Dick's conviction for possessing criminal tools, under Section 2923.24(A) of the Ohio Revised Code, "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A). The indictment alleged that Mr. Dick's car and dark-colored jacket were criminal tools. The jury found that he intended to use those items to commit a breaking and entering.

{¶13} A car, in the abstract, is a "substance, device, instrument, or article" that can be used criminally under Section 2923.24(A). *State v. Spencer*, 10th Dist. No. 86AP-300, 1987 WL 26327 at *7 (Dec. 1, 1987) (quoting R.C. 2923.24(A)). The possessor of the car, however, must intend to use it "to commit or complete an element of a particular crime." *Id.* "If the possessor intends a noncriminal use of the [car], then the statute has not been offended." *Id.* Section

2923.24(A) requires “the specific intention to use the article to commit a crime.” *State v. McDonald*, 31 Ohio St. 3d 47, 49 (1987).

{¶14} The record contains sufficient evidence that Mr. Dick purposely intended to use the car and dark-colored jacket to commit the offense of breaking and entering. Mr. Yarman testified that, as Mr. Dick approached his property, he turned the headlights of his car off. He said that Mr. Dick was wearing a light-colored shirt when he exited the car, but put on the dark-colored jacket before crossing onto his property. There was evidence, therefore, that Mr. Dick used the car and coat to enable him to trespass on Mr. Yarman’s property for the purpose of committing a theft offense “by . . . stealth.” R.C. 2911.13(A).

{¶15} Mr. Dick has argued that he only used the car to transport himself to Mr. Yarman’s house and that the car and jacket were merely incidental to the other charged offenses. This Court, however, concludes that the jury did not lose its way when it inferred that Mr. Dick purposely turned off his headlights and put on the dark-colored jacket to remain undetected while breaking into Mr. Yarman’s garage. Mr. Dick’s assignment of error is overruled.

CONCLUSION

{¶16} Mr. Dick’s convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. The judgment of the Medina County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

JOSEPH F. SALZGEBER, attorney at law, for appellant.

DEAN HOLMAN, prosecuting attorney, and RUSSELL A. HOPKINS, assistant prosecuting attorney, for appellee.