[Cite as *State v. Davis*, 2011-Ohio-1510.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. MICHAEL J. DAVIS Appellant	C.A. No. 25439 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 04 1095

DECISION AND JOURNAL ENTRY

Dated: March 30, 2011

DICKINSON, Judge.

INTRODUCTION

{¶1} The owner of Aquatic Interiors arrived at his store one morning to find his fish tanks smashed, the fish suffocating, and his parrot injured. Evidence at the scene led the police to arrest Michael Davis, and he was indicted for breaking and entering, vandalism, and animal cruelty. While Mr. Davis was out on bail awaiting trial, an off-duty police officer spotted him driving away from Donzell's Flower Garden Center in the middle of the night with the trunk of his car overflowing with shrubberies stolen from the garden center. He was subsequently indicted for breaking and entering and theft. A jury acquitted Mr. Davis of vandalism and animal cruelty but convicted him of breaking and entering Aquatic Interiors. It acquitted him of breaking and entering Donzell's but convicted him of theft. We affirm his convictions because the trial court did not err by denying his Rule 29 motion for acquittal or commit plain error by

not defining "unoccupied structure" for the jury and because his convictions are based on sufficient evidence and are not against the manifest weight of the evidence.

BACKGROUND

{¶2} Stephen Mills owned and operated Aquatic Interiors. He sold a lionfish to Mr. Davis and installed an aquarium at Mr. Davis's house. The fish died a few days later, and Mr. Davis asked Mr. Mills to replace it. Mr. Mills refused, and Mr. Davis informed Mr. Mills that he would never shop at Aquatic Interiors again.

{¶3} Many months later, Mr. Mills arrived at his store early in the morning and discovered a scene of destruction. The fish tanks had been smashed, draining water, along with the fish, onto the floor. Patrick the parrot's cage had been thrown into a pond, and Patrick had sustained an injury to his eye that made him "look[ ] like Marty Feldman." Mr. Mills testified that "everything was totally destroyed."

{¶4} Looking around the store, Mr. Mills noticed that one of the windows, which was approximately six feet off the ground, had been broken. Items on the windowsill had been moved around, leading him to believe that this was the way the intruder had entered the store. According to Mr. Mills, he called his wife and then the police. Mrs. Mills arrived at the store and proceeded to call some of Mr. Mills's friends to help with the clean up. Mr. Mills testified that many people came to help and that some of them cut themselves on the glass.

{¶5} After the police examined the broken window, Mr. Mills called a window repair service to have it replaced. According to him, the repair service employee noticed blood on the glass after removing it from the frame. Mr. Mills called the police, and Detective William Bosak returned and took samples of the blood on the glass.

{¶6} Detective Bob Lehman handled the investigation. According to Detective Lehman, after he received the analysis report of the blood from the Bureau of Criminal Identification and Investigation, he asked Mr. Mills if he recognized a picture of Mr. Davis. Mr. Mills testified that he remembered his prior dealings with Mr. Davis after Detective Lehman revealed Mr. Davis's address. Mr. Mills then signed charges against Mr. Davis, and an arrest warrant was issued.

{¶7} Mr. Davis turned himself in to the police, and Detective Lehman interviewed him. According to Detective Lehman, when he asked Mr. Davis if he knew why he was there, Mr. Davis responded that it was because Mr. Mills had broken his own merchandise in an attempt to commit insurance fraud. Detective Lehman asked Mr. Davis to elaborate. Mr. Davis claimed to have been driving past the store at 6:30 a.m. and saw Mr. Mills outside with his head in his hands. He stopped, saw the damage, and started to help Mr. Mills clean up. Detective Lehman relayed that Mr. Davis claimed to have cut himself on some coral and dripped blood on the ground outside the store's broken window. According to Detective Lehman, he told Mr. Davis that the police had not found any blood on the ground under the broken window but had found some on the window itself. Detective Lehman testified that Mr. Davis did not respond.

{¶8} Officer Thomas Donahue testified that, as he drove home from his shift, he saw a car turning out of Donzell's Flower Garden Center. He testified that this was unusual because it was after 3:00 a.m, the car's headlights were not on, and there were shrubs hanging out of the open trunk. He called the dispatcher to request that an on-duty officer stop the car and followed it as the driver attempted to elude him by getting on and off the freeway until Officer Robert Zarembka stopped him.

{¶9} Officer Zarembka testified that, after he stopped the car, he arrested the driver, who turned out to be Mr. Davis. After arresting Mr. Davis, he searched the car and discovered, in addition to the shrubs in the trunk, plants in the passenger compartment. The tags on the plants indicated that they had come from Donzell's, so Officer Zarembka arranged to have the plants transported back to the garden center. Wayne Kolman, the general manager of Donzell's, identified the plants found in Mr. Davis's car as being from Donzell's. Mr. Davis, however, denied having stolen the shrubs. According to Officer Zarembka, Mr. Davis told him that a man named Mark, whom he had met at a bar a few nights earlier, had offered to get Mr. Davis "cheap" bushes.

SUFFICIENCY OF THE EVIDENCE

{¶10} Mr. Davis's second assignment of error is that the trial court erred in not granting his motions for acquittal under Rule 29 of the Ohio Rules of Criminal Procedure. Mr. Davis's third assignment of error is that his conviction for breaking and entering was based on insufficient evidence. Under Rule 29(A), a defendant is entitled to an acquittal "if the evidence is insufficient to sustain a conviction . . . ." As his second and third assignments of error are both sufficiency of the evidence claims, we will consider them together.

{¶11} 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. When reviewing a sufficiency of the evidence argument, we must determine whether, when viewed in a light most favorable to the prosecution, the evidence could have convinced the average finder of fact of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶12} The jury convicted Mr. Davis of violating Section 2911.13(A) of the Ohio Revised Code by breaking and entering Aquatic Interiors and of violating Section 2913.02(A)(1) of the Ohio Revised Code by committing theft. Under Section 2911.13(A), "[n]o person by force, stealth, or deception, shall trespass 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." Under Section 2913.02(A)(1), "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services . . . [w]ithout the consent of the owner or person authorized to give consent."

{¶13} Mr. Davis has argued that the State provided insufficient evidence to convince an average finder of fact that he trespassed in an unoccupied structure with the intent to commit theft. Lynda Eveleth, a forensic scientist at the Bureau of Criminal Identification and Investigation, testified that she tested the blood found on the broken window in Mr. Mills's store. The blood matched Mr. Davis's blood. Mr. Mills testified that items were stolen from his store. Viewing the evidence in a light most favorable to the State, it presented sufficient evidence that Mr. Davis trespassed by force with intent to commit theft.

{¶14} Mr. Davis has argued that the state failed to present sufficient evidence that the store was as an "unoccupied structure." "Although the Revised Code does not define the phrase 'unoccupied structure,' a court may look to [Section] 2909.01 [of the Ohio Revised Code for the] definition of the phrase 'occupied structure' for guidance in determining whether a structure constitutes an 'unoccupied structure' for purposes of the breaking and entering statute . . . ." *State v. Shawhan*, 9th Dist. No. 24244, 2009-Ohio-1986, at ¶8 (citing *State v. Carroll*, 62 Ohio St. 2d 313, 314-15 (1980)). Section 2909.01(C) defines "occupied structure" as "any house, building . . . or any portion thereof, to which any of the following applies: (1) It is maintained as

a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present. (2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present. (3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present. (4) At the time, any person is present or likely to be present in it."

{¶15} It is undisputed that Aquatic Interiors is a business. It was not maintained as a permanent or temporary dwelling, was not occupied as the permanent or temporary habitation of any person, and was not adapted for the overnight accommodation of any person. Further, all evidence presented at trial indicated that, except for the person who broke the window, no one was present at Aquatic Interiors at the time of the break-in. The only remaining possibility for Aquatic Interiors to be considered an "occupied structure" is if it was likely that a person would be present. R.C. 2909.01(C)(4).

{¶16} According to Mr. Davis, because Mr. Mills had access to his business 24 hours a day, 7 days a week, Aquatic Interiors could not be considered an "unoccupied structure" as Mr. Mills could have been there. Mr. Davis has argued that the State had to prove beyond a reasonable doubt that Mr. Mills "didn't have unlimited 24 hour access and never went into the business at times other than normal business hours." Essentially, according to Mr. Davis's proposed definition, a structure could only be considered unoccupied during periods when no one could possibly be inside. Under his proposed definition, it is unlikely that any building could ever be defined as an "unoccupied structure" as someone, somewhere could have authority to access the interior of the structure.

{¶17} In support of his limited definition, Mr. Davis has pointed to *State v. Johnson*, 188 Ohio App. 3d 438, 2010-Ohio-3345, and *State v. Charley*, 8th Dist. No. 82944, 2004-Ohio-3463.

In *Johnson*, the Court concluded that the evidence was insufficient to support a conviction for breaking and entering because it did not demonstrate that the house was an "unoccupied" structure. *Id*. at ¶20. The Court reasoned that, "[u]nder division (A) of the section, all dwellings are classed as occupied structures, regardless of the actual presence of any person. Whether or not the dwelling is used as a permanent or temporary home is immaterial, so long as it is maintained for that purpose." *Id*. at ¶18 (quoting *State v. Bock*, 16 Ohio App. 3d 146, 149 (1984)). Accordingly, the Court concluded that, although no one currently lived in the house while it was under renovation, the mere absence of a resident did not render it unoccupied. *Id*. at ¶20. Further, "nothing in the record . . . show[ed] that the house [was] being renovated for some use of a different character or type other than as a residence." *Id*. In *Charley*, the Court concluded that a jury could find that a house that was being renovated in order to complete a sale was an occupied structure. *Charley*, 2004-Ohio-3463 at ¶72. As with *Johnson*, the Court's analysis focused on the fact that the house was intended to be a residence. *Id*. at ¶68-72.

{¶18} As a structure must be either occupied or unoccupied, demonstrating that a structure does not meet any of the definitions of an occupied structure is sufficient to prove that it is unoccupied. It is undisputed that Aquatic Interiors is a business, not a residence. Nothing in the record indicates that it was maintained, occupied, or adapted to serve as a dwelling. Even Mr. Davis testified that it was a store. Accordingly, the definitions in Sections 2909.01(C)(1)-(3) of the Ohio Revised Code do not apply to Aquatic Interiors. Section 2909.01(C)(4) requires that a person be present or that a person is "likely to be present" in order for a structure to be deemed occupied. The mere possibility that someone could be present does not render a structure occupied under the Ohio Revised Code.

{¶19} Mr. Mills testified that he opened his store at noon every day of the week except Sunday and closed at six o'clock in the evening every weekday and four o'clock on Saturdays. On days he was open, he usually arrived at work at approximately 6:30 in the morning before going out to perform maintenance on aquariums he had installed. Given his work schedule and that he was the sole proprietor and employee of Aquatic Interiors, it would be unlikely any person would be present at Aquatic Interiors overnight. Viewing the evidence in a light most favorable to the State, there was sufficient evidence to convince the average finder of fact beyond a reasonable doubt that it was unlikely that anyone would be present in Aquatic Interiors over night and, therefore, that it was an unoccupied structure at the time it was broken into.

{¶20} There was sufficient evidence before the trial court to convince an average finder of fact beyond a reasonable doubt that Mr. Davis committed breaking and entering at Aquatic Interiors. Accordingly, the trial court did not err by denying Mr. Davis's motion for acquittal under Rule 29 of the Ohio Rules of Criminal Procedure.

{¶21} Mr. Davis has also argued that the State failed to establish the elements of theft from Donzell's because Mr. Davis testified he intended to receive stolen goods, not steal them. Additionally, Mr. Davis has argued that the State failed to provide sufficient evidence that the value of the shrubs was between the five hundred and five thousand dollars required to enhance the theft to a fifth-degree felony. R.C. 2913.02(B)(2). Officer Donahue testified that he saw Mr. Davis driving away from Donzell's, and Officer Zarembka and Mr. Kolman testified that the items found in Mr. Davis's car were stolen from Donzell's. Mr. Kolman testified that the plants were worth between $1100 and $1200. Viewing the evidence in a light most favorable to the State, there was sufficient evidence to convince an average finder of fact that Mr. Davis committed theft. Accordingly, the trial court did not err in denying his motion for acquittal on

the charge of theft under Rule 29 of the Ohio Rules of Criminal Procedure. As the evidence, when viewed in a light most favorable to the State, is sufficient to convince an average finder of fact that Mr. Davis committed breaking and entering and theft, his second and third assignments of error are overruled.

MANIFEST WEIGHT

{¶22} Mr. Davis's first assignment of error is that his convictions are against the manifest weight of the evidence. When a defendant argues that his convictions are against the manifest weight of the evidence, 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[s] must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶23} The jury convicted Mr. Davis of violating Section 2911.13(A) of the Ohio Revised Code by breaking and entering at Aquatic Interiors. Under Section 2911.13(A), "[n]o person by force, stealth, or deception, shall trespass 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."

{¶24} Mr. Davis has argued that his conviction for breaking and entering is against the manifest weight of the evidence because the scene had been contaminated. He has pointed to testimony indicating that up to 19 people were present at the scene either helping Mr. Mills clean up or investigating the crime. While the attempts of Mr. Mills and his friends to clean up the mess may have destroyed some evidence in the shop, nothing in the record suggests that the broken window where the blood was found was contaminated.

{¶25} According to Mr. Davis, it is not credible that two detectives missed the blood on the glass only to have the service person replacing the window notice it. Detective Bosak testified that, when he looked at the broken window, it was in an open position. He said that could have been why he missed the blood during his initial examination. Basically, he admitted to making a mistake, and the jury was entitled to believe his testimony.

{¶26} Additionally, Mr. Davis has argued that the police should have collected and tested more evidence from the scene. According to Mr. Davis, the police should have collected samples of blood found inside the store, a latex glove found near the scene should have been tested, and a putter Mr. Mills kept in the store should have been dusted for finger prints or touch DNA should have been collected from it. While the police may have been able to recover more evidence, the evidence or lack thereof collected from the inside of the shop does not alter the fact that Mr. Davis's blood was found on the broken window.

{¶27} Mr. Davis testified that he had stopped to help Mr. Mills and had cut himself when he climbed up to look at the broken window. Mr. Mills, however, testified that he had not seen Mr. Davis since the lionfish incident. He repeatedly said that Mr. Davis definitely did not stop by to help him clean up. Further, Detective Lehman testified that Mr. Davis, during an interview with police, had said that he had cut his hand on some coral while helping Mr. Mills. According to Detective Lehman, Mr. Davis claimed that he had dripped blood on the ground outside the window. Detective Lehman testified that, when he told Mr. Davis that no blood had been found beneath the window but that blood had been found on it, Mr. Davis did not respond. We cannot say that, in choosing to not believe Mr. Davis's testimony, the jury lost its way.

{¶28} Mr. Davis has also argued that the State failed to prove that he had the purpose to commit theft in the Aquatic Interiors incident. He has pointed to the fact that nothing Mr. Mills

reported stolen was recovered at his house and that he was never charged with theft in connection with the fish store incident. There was, however, testimony that items were stolen from the store. Blood placed Mr. Davis at the scene, and his explanation for how the blood got there was contradicted by other witnesses. The jury could have easily inferred that Mr. Davis took the items that were reported missing. Additionally, the fact that Mr. Davis was not indicted for theft is not relevant to whether the manifest weight of the evidence supports the jury's finding that he committed breaking and entering.

{¶29} Mr. Davis has also argued that he had no motive to commit this crime as it had been months since his dispute with Mr. Mills and that had ended peacefully. While motive may be helpful in demonstrating intent, lack of motive does not overcome other evidence of a crime. Further, Mr. Davis's lawyer presented the issue of motive, or lack thereof, to the jury, allowing it to weigh whether he had a motive to vandalize the store. As motive is not one of the elements of breaking and entering, the State did not have to prove it beyond a reasonable doubt.

{¶30} Blood on the window that was used to enter Aquatic Interiors linked Mr. Davis to the crime. His testimony that he had stopped to help and his explanation of how his blood ended up on the window was contradicted by Mr. Mills's and Detective Lehman's testimony. As the break-in occurred during the night at a business, it is not likely that any person would have been present at the time of the break-in. Items were taken from the store. We cannot say that the jury lost its way in finding that Mr. Davis committed breaking and entering. His conviction for breaking and entering is not against the manifest weight of the evidence.

{¶31} Mr. Davis has argued that his conviction for theft from Donzell's is against the manifest weight of the evidence because the jury did not convict him of breaking and entering Donzell's and because he admitted to receiving stolen goods, but testified that he did not steal

them himself. He has pointed to the fact that he testified that he bought the shrubs from a man named Mark and that no witness testified that Mr. Davis had personally taken the merchandise.

{¶32} Officer Donahue saw Mr. Davis drive out of Donzell's early in the morning with his car full of shrubs. Mr. Kolman and Officer Zarembka determined that these shrubs had been stolen from Donzell's. While Mr. Davis testified that he did not steal them, the jury was not required to believe his testimony. We cannot conclude that the jury lost its way in finding that a man driving away from the scene of a theft with a car full of the stolen items committed the theft. Accordingly, Mr. Davis's conviction for theft is not against the manifest weight of the evidence.

{¶33} As neither Mr. Davis's conviction for breaking and entering the fish store nor his conviction for theft from Donzell's is against the manifest weight of the evidence, his first assignment of error is overruled.

JURY INSTRUCTIONS

{¶34} Mr. Davis's fourth assignment of error is that the trial court committed plain error by failing to instruct the jury on the definition of "unoccupied structure." He has argued, citing *State v. Johnson*, 188 Ohio App. 3d 438, 2010-Ohio-3345, that the term "unoccupied" has a much narrower legal meaning than it does in common usage. According to Mr. Davis, if the jury had been properly instructed regarding the meaning of "unoccupied," it could have reached a different verdict.

{¶35} In order to prevail on a claim of plain error, the defendant must show that, "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Murphy*, 91 Ohio St. 3d 516, 532 (2001) (quoting *State v. Campbell*, 69 Ohio St. 3d 38, 41 (1994)); see *State v. Johnson*, 46 Ohio St. 3d 96, 102 (1989) ("In examining the comment made by the prosecutor, the issue is whether but for the prosecutor's misconduct the verdict would have been

otherwise.") As discussed above, there was sufficient evidence to find that Aquatic Interior qualified as an unoccupied structure at the time of the break-in. Further, Mr. Davis's conviction for breaking and entering was not against the manifest weight of the evidence. There is nothing in the record indicating that, if the jury had been apprised by the trial court of the legal meaning of unoccupied, the jury would not have convicted Mr. Davis. His fourth assignment of error is overruled.

CONCLUSION

{¶36} Mr. Davis's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence; the trial court did not err by denying his Rule 29 motion for acquittal nor did it commit plain error when it did not instruct the jury on the legal definition of "unoccupied structure." The judgment of the Summit 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 Summit, 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

CARR, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

LEE A. SCHAFFER, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.