[Cite as *State v. Johnson*, 2010-Ohio-5440.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 10AP-137
Plaintiff-Appellee,	:	(C.P.C. No. 09CR-06-3535)
v.	:	No. 10AP-138
	:	(C.P.C. No. 08CR-09-6639)
Jeffrey J. Johnson,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 9, 2010

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Thompson Steward Hall, LLP, and *Lisa Fields Thompson*, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Jeffrey J. Johnson ("appellant"), appeals from judgments of the Franklin County Court of Common Pleas convicting him of one count of burglary, a felony of the second degree, in violation of R.C. 2911.12, one count of vandalism, a felony of the fifth degree, in violation of R.C. 2909.05, and two counts of receiving stolen property, one a felony of the fourth degree and one a felony of the fifth degree, both in violation of R.C. 2913.51.

{¶2} The convictions herein are contained in two different case numbers, namely, No. 08CR-09-6639 ("No. 6639"), and No. 09CR-09-3535 ("No. 3535"). On

September 9, 2008, appellant was indicted in case No. 6639 for one count of burglary and one count of vandalism. On June 15, 2009, appellant was indicted in case No. 3535 for three counts of burglary, one count of theft, two counts of receiving stolen property, two counts of tampering with evidence and one count of possessing criminal tools. Though not part of this appeal, appellant was also indicted on May 22, 2009 in case No. 09CR-3101 for one count of attempted burglary and one count of possessing criminal tools.

{¶3} Appellant waived his right to a jury trial, and all three cases were tried to the bench beginning on November 3, 2009. At the conclusion of the bench trial, appellant was found guilty of burglary and vandalism as set forth in case No. 6639 and two counts of receiving stolen property as set forth in case No. 3535. Appellant was found not guilty on all remaining counts. A sentencing hearing was held on January 14, 2010, and appellant was sentenced to an aggregate term of incarceration of six years and six months.

{¶4} The testimony relevant to this appeal which was adduced at trial is as follows. Mamadou Ndiaye rented an apartment at 1842 Brimfield Road ("Brimfield apartment"), to appellant's mother, Crystal Carson, beginning December 15, 2007. According to Mr. Ndiaye, Ms. Carson lived at the Brimfield apartment with appellant and his brother. However, Mr. Ndiaye testified that he had to begin eviction proceedings in February 2008 for failure to pay rent. Mr. Ndiaye testified that it was not until May 3, 2008, that the family moved out. According to Mr. Ndiaye, after Ms. Carson moved out on this date, he went to the apartment with the new tenant, Georgia Minniefield, to

change the locks. After the locks were changed, Mr. Ndiaye testified that he left Ms. Minniefield at the apartment with the new keys.

{¶5} Ms. Minniefield testified that she went to the Brimfield apartment on May 3, 2008, and saw people moving things into a U-Haul truck. Upon inquiry, Ms. Minniefield was told that they would be done moving out by 6:00 p.m. that evening. Therefore, Ms. Minniefield returned to the apartment at approximately 7:00 p.m. with Mr. Ndiaye who changed the locks and gave her the new keys. According to Ms. Minniefield, she stayed at the apartment and cleaned until about 11:00 p.m. that night. However, when Ms. Minniefield returned the next morning, the apartment had been "trashed." Ms. Minniefield testified that bleach had been thrown on the carpet, the drywall had been damaged, the ceiling fan had been damaged, cabinets had been ripped from the walls, and "Fuck you, bitch" had been painted on the basement wall.

{¶6} Cynthia Kerkes testified that on May 3, 2008, she lived next to the Brimfield apartment and saw the residents of the apartment moving their belongings into a U-Haul truck. Ms. Kerkes then saw appellant, his brother, and a girl return to the apartment around 11:30 p.m. that night. Ms. Kerkes testified that she saw the three go to the back of the residence and that at approximately 1:00 a.m., she heard the car leave.

{¶7} Kadia Sesay ("Sesay") testified that on May 3, 2008, she was dating appellant's brother, Chris Jones ("Jones"). Sesay testified that on the night of May 3, 2008, she, Jones, and appellant went to the Brimfield apartment. Sesay explained that appellant entered the property through a window and then let her and Jones in through the door. According to Sesay, they proceeded to tear the place up because appellant and Jones were mad at the landlord for evicting them.

{¶8} In May 2009, Columbus police began investigating a string of burglaries in the area of the Sharon Green apartment complex. Steven E. Tennant testified that on May 29, 2009, he lived at 1373 Bolen Hill Avenue, which was near the Sharon Green complex. According to Mr. Tennant, on this date his home was broken into, ransacked, and several items were taken, such as jewelry, a camcorder, a camera, a laptop, and several firearms, including a .410 shotgun.

{¶9} Holly Frazier testified that she lived at 1320 Sharon Green Drive and that on June 2, 2009, she returned home to find that a brick had been thrown through her window. Additionally, Ms. Frazier found several items missing from her apartment, including two plasma televisions, an Xbox gaming system, a laptop computer, a cell phone, and jewelry.

{¶10} Columbus Police Officer Matthew Springer testified that he was called by Columbus Police Detective Carl Covey to go to the area of 1348 Sharon Green Drive to do surveillance. While waiting for Detective Covey, Officer Springer testified that he saw two males enter 1360 Sharon Green and exit with a television and a bag. As Officer Springer approached the two men, later identified as Matthew Bunting and Donzell Whitaker, they dropped the property and ran. Bunting and Whitaker were apprehended by another officer and returned to the scene. According to Detective Covey, after searching 1348 Sharon Green, they found Ms. Frazier's laptop and Mr. Tennant's shotgun hidden in the basement.

{¶11} Donzell Whitaker ("Whitaker") testified for the state as part of a plea agreement. Whitaker testified that in June 2009 he had no place to live and was therefore staying with appellant and appellant's mother at 1348 Sharon Green. According

to Whitaker, he committed several burglaries with appellant. Whitaker testified that appellant would tell him what places to go to, and, once the burglaries were complete, appellant would call someone who would pay them for the stolen property, and he and appellant would split the profits.

{¶12} Appellant testified on his own behalf. According to appellant, because he felt sorry for Whitaker, he allowed Whitaker to live with him beginning in April 2009. Appellant testified that he had never committed any burglaries with Whitaker or otherwise, nor did he direct anyone to do so. Additionally, appellant testified he did not negotiate any prices for stolen goods, and he was not even aware that there was stolen property in his apartment. With respect to the incident at the Brimfield apartment, appellant testified he was unaware of any eviction proceedings taking place against them. According to appellant, he returned to the Brimfield apartment the night of May 3, 2008, with Sesay and Jones because their new apartment did not yet have the electricity turned on. Appellant testified that he believed he still had possession of the property because he still had a key to the Brimfield property, and he thought they did not have to leave the property until the following Monday. Appellant testified that when they got to the apartment, despite him having a key, Jones entered through a window and then let Sesay and appellant in through the back door. Once inside, appellant testified that he went to sleep in the living room while Sesay and Jones were in the basement. According to appellant, he did not damage anything at the apartment and that the damage about which Ms. Minniefield and Mr. Ndiaye testified was already there prior to May 3, 2008.

{¶13} As stated previously, at the conclusion of the bench trial, appellant was found guilty of burglary and vandalism as set forth in case No. 6639 and two counts of

receiving stolen property as set forth in case No. 3535. Appellant was sentenced to an aggregate term of six years and six months of incarceration. This appeal followed, and appellant brings the following four assignments of error for our review.

> **FIRST ASSIGNMENT OF ERROR**
>
> The trial court violated Jeffrey Johnson's rights to due process and a fair trial when it entered a judgment of guilt against him, when that finding was not supported by sufficient evidence.
>
> **SECOND ASSIGNMENT OF ERROR**
>
> The trial court violated Jeffrey Johnson's rights to due process and a fair trial when it entered a judgment of guilt against him, when that finding was against the manifest weight of the evidence.
>
> **THIRD ASSIGNMENT OF ERROR**
>
> Jeffrey Johnson's attorney provided him with the ineffective assistance of counsel and violated his right to due process and a fair trial where defense counsel failed to call additional witnesses to the stand to testify regarding the eviction process.
>
> **FOURTH ASSIGNMENT OF ERROR**
>
> Jeffrey Johnson was denied his right to due process and a fair trial because of cumulative error.

{¶14} Because they are interrelated, appellant's first two assignments of error will be addressed together. These assigned errors challenge both the sufficiency and weight of the evidence.

{¶15} When reviewing the sufficiency of the evidence, an appellate court must:

> * * * [e]xamine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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.

State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶16} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. Rather, the sufficiency of the evidence test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, when reviewing the sufficiency of the evidence, an appellate court must accept the fact finder's determination with regard to the credibility of the witnesses. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Worrell,* 10th Dist. No. 04AP-410, 2005-Ohio-1521, ¶41 ("In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but, whether, if believed, the evidence against a defendant would support a conviction.").

{¶17} As opposed to the concept of sufficiency of the evidence, "[t]he 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." *State v. Brindley,* 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16, citation omitted. In order for a court of appeals to reverse the judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court must disagree with the fact finder's resolution of the conflicting testimony. *Thompkins* at 387. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses,

and determines whether, in resolving conflicts in the evidence, the jury or the trial court in a bench trial clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶18} A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston,* 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17.

{¶19} Appellant was charged with burglary in violation of R.C. 2911.12, which provides in pertinent part:

> (A) No person, by force, stealth, or deception, shall do any of the following:
>
> * * *
>
> (2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense[.]

{¶20} Appellant was also charged with vandalism in violation of R.C. 2909.05, which provides in relevant part:

> (A) No person shall knowingly cause serious physical harm to an occupied structure or any of its contents.
>
> (B)(1) No person shall knowingly cause physical harm to property that is owned or possessed by another, when either of the following applies:
>
> (a) The property is used by its owner or possessor in the owner's or possessor's profession, business, trade, or occupation, and the value of the property or the amount of physical harm involved is five hundred dollars or more;
>
> (b) Regardless of the value of the property or the amount of damage done, the property or its equivalent is necessary in order for its owner or possessor to engage in the owner's or possessor's profession, business, trade, or occupation.

{¶21} It is appellant's position that his convictions for burglary and vandalism cannot stand because there is insufficient evidence that he committed a trespass, which is an element in both offenses. According to appellant, he believed the Brimfield apartment was still in his family's possession and there was no expectation that anyone was present or likely to be present the night of May 3, 2008. These arguments, however, are premised on a finding that the state's witnesses were not credible. An appellate court

does not weigh credibility in considering an insufficiency of the evidence argument. *State v. Coit*, 10th Dist. No. 02AP-475, 2002-Ohio-7356, citing *Ruta v. Breckenridge Remy Co.* (1982), 69 Ohio St.2d 66, 68-69. Rather, the test is whether the evidence viewed in a light most favorable to the prosecution if believed would convince the average mind of the defendant's guilt beyond a reasonable doubt.

{¶22} According to appellant, because he possessed a key and the eviction process was not complete, he had a legal right to access the Brimfield apartment. In *State v. Johnson* (Oct. 10, 1991), 8th Dist. No. 59096, the defendant, Johnson, argued that because his landlord failed to serve him with an eviction notice, he had a privilege to be at the house out of which he took property, and, therefore, he could not be convicted of aggravated burglary. The Eighth District Court of Appeals held that the notice requirements of landlord/tenant law were not applicable where a tenant voluntarily vacates the premises before his landlord files a complaint for eviction. Because Johnson chose to vacate the premises rather than pay rent, the court held that the moment he vacated the premises, he was no longer a tenant. The *Johnson* court further held that, when Johnson moved his belongings out and the landlord locked the door, Johnson then needed permission to re-enter the premises. The court went on to state that Johnson's "failure to seek permission before entering the house constituted an unconsented and unprivileged entry and was punishable as a trespass." Id.

{¶23} Here, the evidence is sufficient to establish that any property interest held by appellant ended prior to his entry into the Brimfield apartment on the night of May 3, 2008. The evidence established that Mr. Ndiaye began eviction proceedings for Ms. Carson's failure to pay rent. Mr. Ndiaye testified that on May 2, 2008, he was informed

that Ms. Carson would be moving out and that the move would be complete by noon the following day. Therefore, Mr. Ndiaye returned to the Brimfield apartment during the evening of May 3, 2008 to change the locks. After changing the locks, Mr. Ndiaye testified that he gave the keys to the new tenant, Ms. Minniefield, who testified that she remained at the apartment that evening to clean. Ms. Kerkes testified that she saw appellant and his family pack their belongings into a U-Haul truck and leave on May 3, 2008, but that appellant returned with two others at approximately 11:00 p.m. that night. Appellant admitted that he was at the apartment the night of May 3, 2008 with Sesay and Jones and that they gained entry by climbing through a window. Despite appellant's assertion to the contrary, Sesay's testimony established that she, Jones, and appellant caused the damage to the Brimfield apartment and that they did so because appellant and Jones were upset about being evicted. Additionally, Ms. Minniefield testified that the damage she saw in the apartment on the morning of May 4, 2008 was not present when she left the apartment the prior night. Accordingly, we find the record contains sufficient evidence to support appellant's convictions for burglary and vandalism.

{¶24} Appellant was also convicted of receiving stolen property in violation of R.C. 2913.51, which provides that "[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." R.C. 2913.51(A). According to appellant, there is insufficient evidence to support his receiving stolen property convictions since his testimony established that he had no choice but to temporarily store stolen property because Whitaker was living with him at the time. This argument, however, completely disregards Whitaker's testimony that appellant not only took part in

several burglaries, but also was instrumental in organizing burglaries and telling Whitaker where in the apartment to hide the stolen items. Also, according to Whitaker, he and appellant would contact a third party who would pay them for the stolen goods, and then he and appellant would split the profits. If believed, Whitaker's testimony could convince the average mind of appellant's guilt of receiving stolen property beyond a reasonable doubt, and, therefore, we find sufficient evidence to support appellant's convictions of the same.

{¶25} Similarly, we cannot say appellant's four convictions are against the manifest weight of the evidence. Appellant's arguments here attack the credibility of each witness, except for himself. A conviction, however, is " 'not against the manifest weight of the evidence simply because the jury believed the prosecution testimony.' " *State v. Moore*, 2d Dist. No. 20005, 2004-Ohio-3398, quoting *State v. Gilliam* (Aug. 12, 1998), 9th Dist. No. 97CA006757. The trial judge, as trier of fact, was fully aware that Whitaker and Sesay were testifying for the state pursuant to their own negotiated plea agreements that arose out of the incidents herein. The trial judge simply did not find appellant's testimony to be credible with respect to either the Brimfield apartment or the stolen goods, and this was clearly within his province as trier of fact.

{¶26} After carefully reviewing the trial court's record in its entirety, we conclude that the trier of fact did not lose its way in resolving credibility determinations, nor did the convictions create a manifest miscarriage of justice. The trier of fact was in the best position to determine the credibility of the testimony presented, and we decline to substitute our judgment for that of the trier of fact. Consequently, we cannot say that appellant's convictions are against the manifest weight of the evidence.

{¶27} Finding that appellant's convictions are not only supported by sufficient evidence but also are not against the manifest weight of the evidence, we overrule appellant's first and second assignments of error.

{¶28} In his third assignment of error, appellant contends he was denied his constitutional right to effective assistance of counsel when his trial counsel failed to call additional witnesses regarding the eviction process. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064. In order to establish a claim of ineffective assistance of counsel**,** a defendant must first demonstrate that his trial counsel's performance was so deficient that it was unreasonable under prevailing professional norms. Id. 466 U.S. at 687, 104 S.Ct. at 2064. The defendant must then establish "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. 466 U.S. at 694, 104 S.Ct. at 2068.

{¶29} According to *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it

> cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. 466 U.S. at 687, 104 S.Ct. at 2064.

{¶30} "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. 466 U.S. at 689, 104 S.Ct. at 2065, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164. A verdict adverse to a criminal defendant is not of itself indicative that he received ineffective assistance of trial counsel. *State v. Hester* (1976), 45 Ohio St.2d 71, 75.

{¶31} It is appellant's contention that, had additional witnesses been called, it would have been established that the eviction process was not complete, and, therefore, the state would not have been able to establish the element of trespass, which would have resulted in a finding of not guilty on the burglary and vandalism charges.

{¶32} The decision whether to call a witness is generally a matter of trial strategy and, absent a showing of prejudice, does not deprive a defendant of effective assistance of counsel. *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, ¶90, citing State *v. Williams* (1991), 74 Ohio App.3d 686, 694. Appellant has not demonstrated that counsel's failure to call additional witnesses was prejudicial. First, appellant does not

direct us to any specific witness that should have been called. Secondly, appellant speculates without any evidentiary support as to what this unidentified witness's testimony may or may not have been if called to testify. Thus, it is pure speculation to conclude that the result of appellant's trial would have been different had any additional witnesses testified. *State v. Williams*, 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶35, citing *State v. Thorne*, 5th Dist. No.2003CA00388, 2004-Ohio-7055, ¶70 (failure to show prejudice without affidavit describing testimony of witnesses not called); *State v. Stalnaker*, 5th Dist. No. 21731, 2004-Ohio-1236, ¶9. This type of vague speculation is insufficient to establish ineffective assistance of counsel. *State v. Wiley*, 10th Dist. No. 03AP-340, 2004-Ohio-1008, ¶30, citing *State v. Bradley* (1989), 42 Ohio St.3d 136. Moreover, even if appellant's speculation regarding the testimony of an unknown, unidentified witness was accurate, it is unlikely that such testimony would have changed the result. As we have already discussed, eviction is not necessarily dispositive to the issue of whether a former tenant has trespassed when that tenant has voluntarily given up his possessory interest in the property. *Johnson*, supra.

{¶33} Accordingly, we reject appellant's argument that his counsel was ineffective and overrule his third assignment of error.

{¶34} In his final assignment of error, appellant contends that the cumulative effect of the errors argued in his first three assignments of error constitute cumulative error such that he was denied his constitutional right to due process and a fair trial. Pursuant to the doctrine of cumulative error, a judgment may be reversed where the cumulative effect of errors deprives a defendant of his constitutional rights, even though the errors individually do not rise to the level of prejudicial error. *State v. Garner* (1995),

74 Ohio St.3d 49, 64, cert. denied (1996), 517 U.S. 1147, 116 S.Ct. 1444; *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. Because we have found no merit to any of appellant's claims of error in this case, the doctrine of cumulative error is inapplicable, and appellant's fourth assignment of error is overruled.

{¶35} For the foregoing reasons, appellant's four assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas are hereby affirmed.

Judgments affirmed.

KLATT and SADLER, JJ., concur.

_____