

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2005-04-016
 :
 - vs - : OPINION
 : 6/19/2006
 :
 THOMAS WILLIAMS, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 20030264 CRI

David B. Bender, Fayette County Prosecuting Attorney, 110 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

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WALSH, J.

{¶1} Defendant-appellant, Thomas Williams, appeals his convictions in Fayette County Court of Common Pleas for burglary and felony theft. We affirm the judgment for the reasons outlined below.

{¶2} Appellant was charged with the offenses of burglary and theft after it was alleged that he broke into the house of his former employer ("victims") and stole a number of valuables. Included in the items stolen were personal checks, one of which was cashed by appellant's relative at a local bank branch.

{¶3} Appellant's case was tried to a jury, which found appellant guilty on both counts. After sentencing, appellant instituted the instant appeal, presenting the following assignment of error:

{¶4} "THE DECISION OF THE COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE JURY'S VERDICT WAS INCONSISTENT WITH THE EVIDENCE AND TESTIMONY PRESENTED AT TRIAL[.]"

{¶5} In determining whether a conviction is against the manifest weight of the evidence, 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 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*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. "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.

{¶6} A unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required to reverse a judgment of a trial court on the weight of the evidence in a jury trial. *Thompkins* at 389.

{¶7} Appellant was charged with the offense of burglary. R.C. 2911.12 states, as pertinent here, that "(A) [n]o person, by force, stealth, or deception, shall do any of the following:

{¶8} "* * * (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[.]"

{¶9} For the offense of theft, R.C. 2913.02 states, in part, that "(A) [n]o person, with

purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either property or services in any of the following ways:

{¶10} "Without the consent of the owner or person authorized to give consent[.]"

{¶11} The following is a summary of the evidence presented at trial by both the state and appellant for purposes of appellant's assignment of error:

{¶12} The first individual to testify for the state told the jury that he ("accomplice") was convicted and sent to prison in connection with this incident. He testified that appellant called him the day of the burglary in December 2003 and told him he needed a ride because "he hit a lick." The accomplice indicated that he thought that comment meant to "rob something." According to the accomplice, appellant told him they were going to a house where appellant knew there would be a "little bit of money" that they could get "real quick."

{¶13} The accomplice testified that he lined up a third party to provide the ride ("driver") because his vehicle was not available. The driver, accomplice, and appellant eventually picked up a fourth person and traveled to the victim's home.

{¶14} Once at the home, the accomplice indicated that appellant knocked on the front door and, receiving no response, walked around the back with the accomplice and forced open the back door with a crowbar. The accomplice and appellant entered and removed several items from inside the home, including a safe, valuables, and some personal checks. Both men left the house and were picked up by the driver.

{¶15} The accomplice testified about the conduct of the four men and their whereabouts immediately after the burglary. The accomplice indicated that later that day he used his own vehicle to pick up appellant and appellant's relative, and proceeded to take them to a bank inside Wal-Mart to cash one of the personal checks removed from the victim's home.

{¶16} The driver, who also indicated that he was convicted of charges associated with

this incident, testified about the events that afternoon. The driver's testimony was not consistent on several aspects, but he told the jury that appellant and the accomplice broke into the house and returned to the car with items from the house.

{¶17} The victim testified that she had previously employed appellant at her restaurant and that appellant knew that the restaurant always closed in the early afternoon. The victim's husband testified that he discovered that some personal checks were missing when he was checking for their belongings in the "ransacked" bedroom after the incident.

{¶18} The victim's neighbor testified that she was familiar with appellant because they both worked at the victim's restaurant several months before the burglary. The neighbor testified that she observed a car, with at least three males inside, moving slowly down the street the afternoon of the burglary. She indicated that she was suspicious about the car and continued to observe its activity.

{¶19} The neighbor testified that she clearly saw one of the backseat passengers in the car. She testified that she was later shown a photo array in which she identified a photograph as that of the backseat passenger. That person was identified as appellant's relative. The neighbor testified that she did not see appellant in the car that day.

{¶20} The state also presented the testimony of two bank employees who worked inside the Wal-Mart. One witness testified that appellant's relative, accompanied by appellant, entered the banking area and cashed a personal check on the victims' account. The other bank employee could not identify the person who came to her workstation to ask questions. The state presented the videotape from the bank that showed appellant and the relative in the bank at the time the victim's check was cashed there.

{¶21} Appellant presented the alibi testimony of his sister who indicated that she could account for appellant's whereabouts and was with him around the time the burglary reportedly occurred.

{¶22} Appellant specifically argues under this assignment of error that the two alleged accomplices who implicated him in their testimony had questionable motives in testifying and therefore, their testimony was not credible. See, e.g., *Davis v. Alaska*, 415 U.S. 308, 316-317, 94 S.Ct. 1105 (the partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony).

{¶23} Appellant asserts that the jury lost its way when it believed the accomplices' testimony and apparently did not believe the identification testimony of the victim's neighbor who had no known bias.

{¶24} After reviewing the testimony presented at trial, we cannot say 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.

{¶25} We must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231; see, also, *In re Markunes*, (Sept. 20, 1996), Montgomery App. Nos. 15601 & 15617 (the strong motive of an accomplice to lie is a credibility issue to be weighed by the trier of fact); *State v. Antill* (1964), 176 Ohio St. 61, 67 (a jury may believe or disbelieve any witness or accept part of what a witness says and reject the rest).

{¶26} The trial court instructed the jury that it must view the testimony of the accomplices with "grave suspicion" and with "great caution." See R.C. 2923.03(D). We will presume that the jury followed the instructions of the trial court. *State v. Lamb*, Butler App. Nos. CA2002-07-071, CA2002-08-192, 2003-Ohio-3870, ¶29.

{¶27} Therefore, we find that it is not a manifest miscarriage of justice when the jury weighed all of the evidence, including the neighbor's testimony that she believed she saw a person later identified as appellant's relative and not appellant, and finds beyond a reasonable doubt that appellant committed the offenses of burglary and theft. See, e.g.,

State v. Pearson, Jefferson App. No. 01-JE-22, 2003-Ohio-1073, ¶7 (manifest weight of evidence supported conviction even where defendant alleges that there was no other link other than accomplice testimony, witnesses' testimony was inconsistent, accomplice testimony was facilitated by plea bargains, and defendant offered an alibi defense).

{¶28} Appellant's sole assignment of error is overruled.

{¶29} Judgment affirmed.

POWELL, P.J., and BRESSLER, J., concur.

[Cite as *State v. Williams*, 2006-Ohio-3084.]