[Cite as *State v. Jackson*, 2012-Ohio-4219.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-06-096
	:	O P I N I O N
- vs -		9/17/2012
	:	
LORENZO P. JACKSON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-03-0370

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YOUNG, J.

{¶ 1} Appellant, Lorenzo P. Jackson, appeals his convictions in the Butler County Court of Common Pleas for burglary, breaking and entering, theft, attempted safecracking, and two counts of safecracking. For the reasons stated below, we affirm the decision of the trial court.

{¶ 2} On April 11, 2007, the manager of Fairfield Tavern arrived at work to discover

that someone had broken into the business through the front door. Once inside, the manager observed that a large plasma television, an ATM, and a safe were missing. Moreover, a jukebox and a change machine were moved from their original locations and a petty cash box had been rifled. Approximately one month later, on May 21, 2007, the owner of Fairfield Lanes entered into his business and found two men inside. Upon asking how they entered, the men pointed to a smashed glass door and then walked calmly out of the building. A video surveillance camera captured the men attempting to pry an ATM from the floor.

{¶ 3} On March 11, 2009, appellant was indicted for burglary, breaking and entering, grand theft, two counts of safecracking, and one count of attempted safecracking. Several months later, the trial court denied appellant's motion to dismiss the charges based on a prior plea agreement made with the Hamilton County prosecutor's office. On November 15, 2010, appellant filed a motion to suppress evidence of certain items recovered during a search of his residence. The trial court denied this motion. After a jury trial, appellant was found guilty as charged on all counts, but for grand theft in which he was convicted of the lesser included offense of theft, a fifth-degree felony. Appellant was sentenced to an aggregate term of ten years in prison.

{¶ 4} Appellant now appeals, raising the following assignments of error:

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ABUSED ITS DISCRETION TO THE PREJUDICE OF APPELLANT BY OVERRULING HIS MOTION TO DISMISS BASED ON A PREVIOUS PLEA AGREEMENT WITH THE STATE OF OHIO.

{¶ 7} In appellant's first assignment of error, he argues that the trial court erred in overruling his motion to dismiss. Specifically, appellant argues that the Butler County prosecutor was barred from bringing criminal charges against him due to a plea agreement

appellant made with the Hamilton County prosecutor.

{¶ 8} This court reviews a trial court's decision to dismiss de novo. *State v. Gaines*, 193 Ohio App.3d 260, 2011-Ohio-1475, ¶ 14 (12th Dist.). A de novo standard of review affords no deference to the trial court and we independently review the record. *Id.*

{¶ 9} This district has not decided whether a plea agreement entered into by one county prosecutor prohibits a prosecutor from another county from indicting the defendant. However, several other Ohio districts have resolved this issue and found that a county's plea agreement does not prevent criminal charges in other counties when the criminal acts do not constitute allied offenses of similar import. *State v. Barnett*, 124 Ohio App.3d 746 (2nd Dist.1998); *State v. Billingsley*, 11th Dist. Nos. 2010-P-0030, 2010-P-0031, 2011-Ohio-1586; *State v. Dumas*, 5th Dist. No. 02CA60, 2003-Ohio-4117. In analyzing this issue, courts have looked to whether the present prosecutor had actual, apparent, or contractual authority to bind the prosecutor in another county. *Barnes* at 752; *Billingsley* at ¶ 16.

{¶ 10} Actual authority arises when it is expressly granted to an agent by the principal or when it is implicitly granted as is reasonably necessary to carry into effect the power expressly conferred. *WashPro Express, L.L.C. v. VERwater Envtl., L.L.C.*, 12th Dist. No. CA2006-03-069, 2007-Ohio-910, citing *Damon's Missouri, Inc. v. Davis*, 63 Ohio St.3d 605, 608 (1992). In *Barnett*, the Second District found that the Warren County prosecutor did not have actual authority to bind the Montgomery County prosecutor because "the county prosecutor's agency authority extends to the county line when investigating and prosecuting crimes." *Id.* at 755. "Thus, the county prosecutor is an agent of the state with respect to crimes committed in his county." *Id*. Additionally, the court reasoned that the Montgomery County prosecutor's office did not give the Warren County prosecutor's office authority to bind it to a plea agreement by consenting to the arrangement. *Id.* at 754.

{¶ 11} The court in *Barnett* also found that the Warren County prosecutor did not have

apparent authority to bind the Montgomery County prosecutor. In order to establish apparent authority, "the evidence must show that the principal held the agent out to the public as possessing sufficient authority to act on his behalf and that the person dealing with the agent knew these facts, and acting in good faith had reason to believe that the agent possessed the necessary authority." *Ohio State Bar Assn. v. Martin*, 118 Ohio St.3d 119, 2008-Ohio-1809, ¶ 41. (Internal citations omitted.) In *Barnett*, the court reasoned that the state of Ohio had not held out county prosecutors as agents able to plea bargain offenses that are committed outside their counties because neither the laws of Ohio nor the conduct of the state of Ohio support this inference. *Id.* at 755.

{¶ 12} Lastly, courts have analyzed whether prosecutors are bound by other counties' prosecutor's plea agreements under contact law. Generally, a plea agreement is contractual in nature and subject to contract law principles. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4852, ¶ 50. When a county prosecutor is not a party to a plea agreement, he or she is not bound by the terms of that agreement. *Billingsley*, 11th Dist. Nos. 2010-P-0030, 2010-P-0031, 2011-Ohio-1586 at ¶ 17.

{¶ 13} In the present case, appellant entered into a plea agreement with the Hamilton County prosecutor regarding several break-ins committed in Hamilton County. The plea agreement provided that in exchange for appellant's information regarding every breaking and entering he was engaged in prior to August 7, 2007, the state would agree to a one-year prison sentence and would not charge him for any of the offenses that he admitted to. Appellant performed pursuant to this agreement and was sentenced to imprisonment of one year for the Hamilton County offenses. Notably, the Butler County prosecutor's office was not mentioned in the Hamilton County plea agreement.

{¶ 14} Subsequently, Fairfield police investigated several breaking and enterings that occurred in Butler County. Appellant became a suspect in these offenses when Fairfield

Detective Ryan Fleenor uploaded surveillance video onto a website in which other police officers throughout southwest Ohio could view the video and identify possible suspects. Appellant was then identified as a suspect by Springfield Detective Eric Catron. Following an investigation, appellant was indicted in Butler County for several charges related to these break-ins. Thereafter, the trial court denied appellant's motion to dismiss the charges based on his prior plea agreement he made with Hamilton County.

{¶ 15} We find that the trial court did not err in denying appellant's motion to dismiss. We agree with the rationale expressed in *Barnett* and hold that a county prosecutor does not have "actual" or "apparent" authority to bind prosecutors in other counties for crimes that are not allied offenses of similar import. In this case, the Butler County prosecutor was not bound by the plea agreement entered into by the Hamilton County prosecutor as the Hamilton County prosecutor did not have any authority to bind any other county. Lastly, we also find that the Butler County prosecutor's office is not contractually bound by the terms of the plea agreement as it was not a party to this agreement. Thus, the trial court did not err in denying appellant's motion to dismiss.

{¶ 16} Appellant's first assignment of error is overruled.

{¶ 17} Assignment of Error No. 2:

{¶ 18} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY NOT GRANTING THE MOTION TO SUPPRESS EVIDENCE RECOVERED FROM HIS RESIDENCE.

{¶ 19} In appellant's second assignment of error, he argues that the trial court erred in denying his motion to suppress the evidence seized from his residence. Specifically, he maintains that the affidavit in support of the search warrant contained an intentionally false statement and therefore the affidavit lacked probable cause to support the issuance of the warrant.

{¶ 20} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Davenport*, 12th Dist. No. CA2008-01-011, 2009-Ohio-557, ¶ 6, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. An appeals court must accept a trial court's factual determinations from the suppression hearing "so long as they are supported by competent credible evidence." *Id.* However, when examining an affidavit in support of a search warrant, a reviewing court is only required to ensure that the issuing judge had a "substantial basis" for concluding that probable cause existed. *State v. Cobb*, 12th Dist. No. CA2007-06-153, 2008-Ohio-5210, ¶ 24. In turn, a judge properly issues a search warrant if the totality of the circumstances establishes a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983), syllabus. Therefore, the trial court's finding of probable cause should be given great deference and any "doubtful or marginal cases should be resolved in favor of upholding the warrant." *State v. George*, 45 Ohio St.3d 325 (1989), paragraph two of the syllabus.

{¶ 21} The Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Generally, evidence obtained as a result of an illegal search or an illegal search warrant that is not based on probable cause will be excluded. *State v. Dubose*, 12th Dist. No. CA2008-01-007, 2008-Ohio-5933, ¶ 12. The exclusionary rule, while not an express mandate found in the Fourth Amendment, is inherent in its protective language and "operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Cobb* at ¶ 22, quoting *United States. v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405 (1984).

{¶ 22} A police officer establishes probable cause for a search warrant through an

affidavit. Crim.R. 41(C). "To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either intentionally, or with the reckless disregard for the truth." *State v. Waddy*, 63 Ohio St.3d 424, 441 (1992), quoting *Franks v. Delaware*, 438 U.S. 154, 155-156, 98 S.Ct. 2676 (1978). "'Reckless disregard' means that the affiant had serious doubts of an allegation's truth." *Waddy*, citing *United States v. Williams*, 737 F.2d 594, 602 (7th Cir.1984). This court has recognized that search warrants are often made in haste and "the law does not require the information in the supporting affidavits to be perfect." *State v. Mobley*, 12th Dist. No. CA88-08-063, 1989 WL 53604, *3 (May 22, 1989).

{¶ 23} A search warrant is valid even though it is based on an affidavit containing false statements or omissions made intentionally or recklessly, unless, after excluding the false material, "the affidavit's remaining content is insufficient to establish probable cause." *Waddy* at 441.

{¶ 24} Hearsay information contained in an affidavit is relevant to a probable cause determination "provided that there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished." Crim.R. 41(C)(2). Observations of fellow law enforcement officers "are plainly a reliable basis for a warrant applied for by one of their number." *State v. Young*, 12th Dist. No. CA2005-08-074, 2006-Ohio-1784, ¶ 21, quoting *State v. Taylor*, 82 Ohio App. 3d 434, 442 (2nd Dist.1992).

{¶ 25} At the suppression hearing, Detective Catron testified that he wrote an affidavit in support of a search warrant for appellant's residence. The affidavit contained 44 paragraphs which described several breaking and enterings and appellant's and others' connections to these offenses. Contained in the affidavit were descriptions of several instances in which police officers observed appellant acting suspiciously in locations that

were subsequently broken into. The affidavit also recounted numerous occasions in which police officers found appellant with tools that are commonly used in thefts. Moreover, the affidavit stated that a surveillance video captured appellant committing a breaking and entering at Fairfield Lanes. A recorded phone call between appellant and one of his friends in which appellant admitted that he was fleeing an area which was subsequently broken into moments earlier was also described in the affidavit.

{¶ 26} Additionally, Catron testified regarding a mistake in one of the paragraphs of the affidavit. Catron stated that the affidavit contained several names of suspects that were involved in a string of breaking and enterings. As Catron was writing the 44-paragraph affidavit, he accidentally wrote appellant's name in one of the paragraphs in which he meant to name a different suspect. This paragraph stated that appellant was captured on video in a gas station that was close to a store that was broken into moments earlier. Catron stated that this was accidental and that all the remaining portions of the affidavit were correct.

{¶ 27} We find that appellant did not prove that Catron made a false statement in the affidavit intentionally or with reckless disregard. As stated above, Catron testified that he accidentally used appellant's name incorrectly in one of the paragraphs of the affidavit but that the remaining portions were correct. Additionally, Catron denied that the incorrect information was provided to mislead the magistrate who authorized the warrant. Appellant has offered no evidence that Catron intentionally or with reckless disregard falsely named appellant in the affidavit. Thus, the trial court did not err in overruling appellant's motion to suppress based on a false statement in the affidavit.

{¶ 28} Thus, appellant's second assignment of error is overruled.

{¶ 29} Assignment of Error No. 3:

{¶ 30} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY GIVING ADDITIONAL DEFINITIONS DURING JURY INSTRUCTIONS OF "VAULT" AND

"SAFE" WHEN THOSE WORDS ARE NOT DEFINED BY STATUTE.

{¶ 31} In appellant's third assignment of error, he argues that the trial court erred when it instructed the jury as to the definitions of "safe" and "vault." Specifically, appellant contends that the trial court erred when it defined these terms by definitions not contained in the statute.

{¶ 32} We review a trial court's jury instructions for an abuse of discretion. *State v. Standifer*, 12th Dist. No. CA2011-07-071, 2012-Ohio-3132, ¶ 52. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 130. An appellate court may not reverse a conviction in a criminal case due to jury instructions unless "it is clear that the jury instructions constituted prejudicial error." *State v. Campbell*, 12th Dist. No. CA2009-08-208, 2010-Ohio-1940, ¶ 13.

{¶ 33} A trial court must fully and completely give jury instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as fact finder. *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus. *See* R.C. 2945.11. In a criminal case, if the proposed instructions for the jury are correct, pertinent and timely presented, the trial court must include it, at least in substance, in the general charge. *State v. Guster*, 66 Ohio St.2d 266, 269 (1981), citing *Cincinnati v. Epperson*, 20 Ohio St.2d 59 (1969), paragraph one of the syllabus. However, the trial court is not required to give a proposed jury instruction verbatim. The court may use its own language to communicate the same legal principles. *State v. Sneed*, 63 Ohio St.3d 3, 9 (1992).

{¶ 34} When words are not defined in a statute, they are to be given their plain and ordinary meaning absent a contrary legislative intent. *State v. Conyers*, 87 Ohio St.3d 246, 249-50 (1999). Courts have used dictionary definitions to determine the plain and ordinary meaning of a statutory term. *Roush v. Brown*, 12th Dist. No. CA2008-11-275, 2009-Ohio-

2446, ¶ 25; *State v. Kendall*, 4th Dist. No. 10CA26, 2011-Ohio-2475, ¶ 14. The First District has defined "vault" as a "room for the safekeeping of valuables and commonly built of steel" and "safe" as "a place or receptacle to keep articles safe or a metal box or chest sometimes built into a wall or vault to protect money or other valuables against fire or burglary." *State v. Glover*, 67 Ohio App.3d 384, 386 (1st Dist.1990).

{¶ 35} After the state's and defense counsel's closing arguments, the trial court read aloud instructions to the jury. Appellant was charged with two counts of safecracking at Fairfield Tavern and one count of attempted safecracking at Fairfield Lanes. The court stated that to find appellant guilty of safecracking, the jury must find that appellant "with purpose to commit the offense of theft knowingly entered or forced an entrance into or tampered with a vault, safe, or strongbox." Attempted safecracking was explained as conduct that if successful, would have resulted in the offense of safecracking. The court went on to use the Webster's Dictionary to define "vault" as "a room or compartment for the safe storage of valuables." Similarly, the court used the Webster's Dictionary definition for safe and described it as "a metal container usually having a lock and used to store and protect valuables."

{¶ 36} We find that the trial court did not abuse its discretion in including the dictionary definitions of "vault" and "safe" in the jury instructions. The trial court had the duty to fully include all information which is relevant and necessary for the fact finder in its instructions. In this case, the state alleged that appellant had broken into or attempted to break into ATMs at Fairfield Tavern and Fairfield Lanes. Because "vault" and "safe" were important elements in the safecracking offenses and were not defined by the statute, it was reasonable for the court to conclude that the jury would be assisted with the dictionary definitions of these terms. Therefore, the trial court did not abuse its discretion in providing dictionary definitions of "vault" and "safe" in the jury instructions.

{¶ 37} Appellant's third assignment of error is overruled.

{¶ 38} Assignment of Error No. 4:

{¶ 39} THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND/OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO SUSTAIN APPELLANT'S CONVICTIONS * * *.[1]

{¶ 40} In appellant's fourth assignment of error, he argues that the evidence was insufficient to support his convictions and that his convictions were against the manifest weight of the evidence. The state maintains that appellant's convictions were not in error and that appellant waived all but plain error as to our review of the sufficiency of evidence because he failed to renew his Crim.R. 29(A) motion at the close of all evidence.

{¶ 41} We will begin by addressing the state's contention that appellant waived all but plain error as to the sufficiency of the evidence. At the jury trial, appellant moved for a judgment of acquittal pursuant to Crim.R. 29(A) at the end of the state's case. However, appellant failed to renew this motion after the presentation of his own case. The state argues that appellant's failure to renew his Crim.R. 29(A) motion at the close of all the evidence waived the issue of sufficiency of the evidence. The state also urges this court to resolve the conflict within our district as to the type of appellate review in these cases.

{¶ 42} In *State v. Blake*, 12th Dist. No. CA2011-07-130, 2012-Ohio-3124, this court resolved the conflict in our district regarding whether a defendant waives the issue of sufficiency of the evidence when he does not renew his Crim.R. 29(A) motion after the presentation of his case during a jury trial. In *Blake*, we held "that a defendant's failure to renew a motion for judgment of acquittal under Crim.R. 29(A) at the close of all evidence

1. We note that appellant has listed the wrong convictions in his assignment of error. However, we assume appellant is challenging his breaking and entering, theft, burglary, safecracking, and attempted safecracking offenses.

does not waive a challenge to the sufficiency of the evidence on appeal." *Id.* at ¶ 50. "Rather, as in a non-jury trial, the defendant preserves his right to object to the alleged insufficiency of the evidence by entering a 'not guilty' plea." *Id.* Therefore, in both a jury and a non-jury trial, as long as a defendant enters a plea of not guilty, this plea serves as a motion for judgment of acquittal and obviates the necessity of renewing a Crim.R. 29(A) motion after the presentation of the defendant's case. *Id.* at ¶ 49.

{¶ 43} Thus, appellant did not waive the issue of sufficiency of the evidence when he did not renew his Crim.R. 29(A) motion at the end of the presentation of his case. We will now turn to whether the evidence was insufficient to support appellant's convictions and whether his convictions were against the manifest weight of the evidence. As this court has previously stated, "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Wilson*, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298, ¶ 35. In turn, while a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, this court's determination that appellant's convictions were supported by the manifest weight of the evidence will be dispositive of the issue of sufficiency. *State v. Rigdon*, 12th Dist. No. CA2006-05-064, 2007-Ohio-2843, ¶ 30, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

{¶ 44} A manifest weight challenge 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. Clements*, 12th Dist. No. CA2009-11-277, 2010-Ohio-4801, ¶ 19. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 39. However, while appellate review includes the responsibility to consider the credibility of

witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide since it is in the best position to judge the credibility of the witnesses and the weight to be given to the evidence. *State v. Gesell*, 12th Dist. No. CA2005-08-367, 2006-Ohio-3621, ¶ 34 citing *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Therefore, the question upon review is 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. *Hancock* at ¶ 39.

{¶ 45} For ease of discussion, we will discuss the convictions by the locations in which they occurred.

Fairfield Lanes

{¶ 46} Appellant was found guilty of burglary at Fairfield Lanes. To be guilty of burglary in violation of R.C. 2911.12(A)(3), the state was required to prove, appellant, "by force, stealth or deception," "trepass[ed] in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separate secured or separately occupied portion of the structure any criminal offense."[2] A burglary of an occupied structure is a third-degree felony. R.C. 2911.12(D). Moreover, commercial businesses can be burglarized. *State v. Ferguson*, 71 Ohio App. 3d 342 (12th Dist.1991).

{¶ 47} An "occupied structure" includes a "building" if "at the time, any person is present or likely to be present in it." R.C. 2909.01(C)(4). In determining whether persons are likely to be present under R.C. 2911.12(A)(2), "[t]he issue is not whether the burglar subjectively believed that persons were likely to be there, but whether it was objectively

2. Since appellant's conviction, R.C. 2911.12 has been amended by 2011 H.B. 86. The amendment to R.C. 2911.12 changed the location of the reference to the definition of "occupied structure" from subsection (B) to subsection (C).

likely." *State v. Pennington*, 12th Dist. No. CA2006-11-136, 2007-Ohio-6572, ¶ 28, quoting *In re Meatchem*, 1st Dist. No. C-050291, 2006-Ohio-4128, ¶ 16. "The significant inquiry is the 'probability or improbability of actual occupancy which in fact exists at the time of the offense, determined by all the facts surrounding the occupancy.'" *Id*.

{¶ 48} Appellant was also found guilty of attempted safecracking in violation of R.C. 2911.31(A) which provides, "[n]o person with purpose to commit an offense, shall knowingly enter, force an entrance into, or tamper with any vault, safe, or strongbox." A conviction of safecracking is a fourth-degree felony. *Id.* at (B). The definition of "safe" includes "a place or receptacle to keep articles safe." *Webster's Third New International Dictionary*, 1998 (1993). The definition of "vault" includes "a room for the safekeeping of valuables and commonly built of steel." *Id.* at 2536. Attempt is defined as when a "person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct, that if successful, would constitute or result in the offense." R.C. 2923.02(A). An attempt to commit a safecracking offense is a fifth-degree felony. *Id.* at (E)(1).

{¶ 49} At trial, the owner of Fairfield Lanes testified that he observed two men in his bowling alley during the early morning of May 21, 2007. He stated that when he arrived in the bowling alley he heard noises and found the alley to be in disarray. Moments later, the owner saw two men walk out of a hallway. Upon asking the men how they got into the building, they pointed to a glass door that was smashed and then they turned around and calmly walked out. The owner also testified that he has owned the bowling alley for 34 to 35 years and his routine is to arrive between 5:15 a.m. to 5:45 a.m.

{¶ 50} Additionally at trial, a surveillance video located in the bowling alley showed two African American men in hooded sweatshirts attempting to pry an ATM machine from the floor. The taller of the two men took off his mask once he unsuccessfully attempted to spray

paint the lens of a surveillance camera. The video shows the taller man wearing black and red shoes consistent with the shoes that were collected during the search of appellant's apartment. The video also shows a third person not involved in the burglary, arriving at the alley and looking around. The surveillance video displayed a time stamp of between 6:10 a.m. to 6:13 a.m. A responding officer at the scene testified that he arrived at Fairfield Lanes at 6:30 in the morning. Lastly, the owner testified that the ATM machine contained cash and that the men were unsuccessful in taking the machine from the bowling alley. The owner also stated that besides those who are authorized to have keys to the bowling alley, no other keys exist for the building.

{¶ 51} Detective Fleenor also testified regarding his investigation of the Fairfield Lanes burglary. Fleenor, a police officer for 15 years, stated that he gathered the surveillance video, a screwdriver, and a bottle of spray paint from the bowling alley. He then posted still pictures from the video on a regional police website where other southwestern Ohio police officers were able to view the pictures and identify the suspect. Using this website, Detective Catron, a Springfield police officer, was able to identify appellant as the suspect at Fairfield Lanes. Fleenor and Catron testified that several months later, appellant confessed to the offenses at Fairfield Lanes and Fairfield Tavern. During his confession, appellant admitted that he was responsible for Fairfield Lanes and stated that he was caught because he was "sloppy" and took off his mask. Fleenor stated that the confession was not tape recorded but that he completed a case report immediately after the interview detailing the confession. Additionally, Catron took notes during the confession.

{¶ 52} We find that appellant's convictions of burglary and attempted safecracking were not against the manifest weight of the evidence. The evidence at trial established that appellant trespassed into Fairfield Lanes by force with the purpose to tamper with a safe or vault. Appellant's confession and the surveillance video affirmatively linked appellant to the

burglary. The video also captured appellant attempting to break into the ATM. We also find that an ATM can be classified as a "safe" under R.C. 2911.31 as an ATM is a receptacle which purpose is to dispense money to customers and to keep the money inside the ATM safe. Thus, we find that appellant's convictions were supported by the greater inclination of evidence.

{¶ 53} Further, we are not persuaded by appellant's argument that his burglary conviction was in error because the state did not prove that Fairfield Lanes was an "occupied structure." Firstly, as demonstrated by the owner's testimony and the surveillance video, the owner was present during the burglary. Secondly, even if the owner was not present, he would have been "likely to be present" at the time of the burglary. As discussed above, the owner of Fairfield Lanes testified that he normally arrives at the bowling alley between 5:15 to 5:45 in the morning. The surveillance video shows that appellant was in Fairfield Lanes around 6:10 a.m. and the responding officer testified that he arrived at the scene around 6:30 a.m. Thus, at the time of appellant's burglary, it was likely that the owner would be present. Therefore, it was not against the manifest weight of the evidence to find Fairfield Lanes constituted an "occupied structure" for purposes of R.C. 2911.12(A)(3).

Fairfield Tavern

{¶ 54} In regards to Fairfield Tavern, appellant was found guilty of breaking and entering. To be guilty of breaking and entering in violation of R.C. 2911.13, the state was required to prove that appellant "by force, stealth, or deception * * * trespass[ed] in an unoccupied structure, with purpose to commit therein any theft offense." A "theft offense" for purposes of R.C. 2911.13 includes safecracking and theft. R.C. 2913.01(K)(1). Breaking and entering is a fifth-degree felony. *Id.* at (C).

{¶ 55} Additionally, appellant was found guilty of theft in violation of R.C. 2913.02(A)(1) which provides that "[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 * * * without the consent of the owner or person authorized to give consent." This offense is a fifth-degree felony if the value of the property stolen is $500 or more and is less than $5,000.[3,4] *Id.* at (B)(2).

{¶ 56} Lastly, appellant was found guilty of two counts of safecracking. As stated above, the offense of safecracking is committed in violation of R.C. 2911.31(A) when a person "with purpose to commit an offense, shall knowingly enter, force an entrance into, or tamper with any vault, safe, or strongbox." A conviction of safecracking is a fourth-degree felony. *Id.* at (B).

{¶ 57} At trial, the manager of Fairfield Tavern testified that she opened the bar the morning of April 11, 2007. She explained that when she arrived at the Tavern, she found that the front glass door had been broken and that a large plasma TV was missing. She also discovered that a jukebox and change machine were moved from their original locations. Additionally the Tavern's ATM was missing as well as a large commercial style safe. She estimated the value of the safe as $2,000, the value of the ATM machine with an unknown amount of cash inside at $3,030, and the television as approximately $3,000.

{¶ 58} Detective Fleenor also testified at trial and explained that he found and photographed shoeprints that he believed were from the suspect. He found a shoeprint on a piece of drywall located in a garage adjacent to the tavern. He stated that it appeared that the footprint was from a kick and that the drywall was prevented from breaking in because of the furniture on the other side of the wall. He also found a similar footprint on the tile floor

3. Appellant was originally charged with grand theft but the jury found him guilty of the lesser included offense, theft.

4. This statute has since been modified. 2011 H. 86. A theft offense is currently a fifth-degree felony if the value of the property is more than $1,000 but less than $7,500. R.C. 2913.02 (B)(2).

inside the building. A month later when the investigation had become inactive, a surveillance video from the Fairfield Lanes burglary identified appellant as the suspect in that case. Fleenor obtained a search warrant and found a similar pair of shoes that the suspect was wearing in the Fairfield Lanes burglary. Fleenor sent these shoes to the crime lab. A forensic scientist testified at trial that the shoes found at appellant's apartment were consistent with the prints left at Fairfield Tavern. The scientist stated that she was unable to identify the shoes as the exact shoes from the Tavern because of the quality of the print impression.

{¶ 59} Lastly, as discussed above, Detectives Fleenor and Catron testified that appellant confessed that he was involved in both the Fairfield Lanes and Fairfield Tavern offenses. Specifically, appellant admitted that he took the plasma television from Fairfield Tavern and sold it for $800. He also stated that he took the safe from the Tavern by himself.

{¶ 60} Upon a thorough review of the record we do not find that appellant's breaking and entering, theft, and two counts of safecracking convictions were against the manifest weight of the evidence. The evidence established that appellant entered Fairfield Tavern by force, with the purpose to crack into the ATM and safe and steal the money inside. Moreover, the evidence established that the value of the property stolen at Fairfield Tavern was at least $500. Lastly, as mentioned above, we find that an ATM can constitute a "safe" under R.C. 2911.31. Therefore, we find that the greater inclination of evidence supports appellant's convictions of breaking and entering, theft, and two counts of safecracking.

{¶ 61} Appellant's fourth assignment of error is overruled.

{¶ 62} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.