

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	
SHAWN A. MILLER	:	Case No. 2009AP120068
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Tuscarawas County,
Court of Common Pleas, Case No.
2009CR010022

JUDGMENT: Affirmed in Part, Sentence Vacated as to
Count 2, and Remanded

DATE OF JUDGMENT ENTRY: September 8, 2010

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Farmer, J.

{¶1} On January 1, 2009, the Tuscarawas County Grand Jury indicted appellant, Shawn Miller, on one count of breaking and entering in violation of R.C. 2911.13, one count of theft in violation of R.C. 2913.02, and two counts of receiving stolen property in violation of R.C. 2913.51.

{¶2} A jury trial commenced on October 6, 2009. The jury found appellant guilty on the two receiving stolen property counts, one in the fourth degree and one in the fifth degree. By judgment entry on sentencing filed December 11, 2009, the trial court sentenced appellant to an aggregate term of eighteen months in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE JURY'S FINDING OF GUILTY AS IT PERTAINS TO THE SECOND COUNT OF RECEIVING STOLEN PROPERTY IS INVALID DUE TO A FAULTY JURY VERDICT FORM."

II

{¶5} "THE TRIAL COURT'S FINDING OF GUILTY IS AGAINST THE MANIFEST WEIGHT OF THE SUFFICIENCY OF THE EVIDENCE."

I

{¶6} Appellant claims the trial court erred in sentencing appellant as to the second count of receiving stolen property as there was no aggravating circumstance or degree of felony indicated on the jury form. Therefore, appellant claims his conviction as to said count should be as a misdemeanor in the first degree. We agree.

{¶7} The state of Ohio concedes this argument. Appellee's Brief at 5-6.

{¶8} R.C. 2945.75 governs degree of offense. Subsection (A)(2) states the following:

{¶9} "When the presence of one or more additional elements makes an offense one of more serious degree:

{¶10} "A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

{¶11} In *State v. Pelfrey*, 112 Ohio St.3d 423, 2007-Ohio-256, syllabus, the Supreme Court of Ohio held the following:

{¶12} "Pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense."

{¶13} A review of the jury verdict sub judice reveals it is not compliant with R.C. 2945.75.

{¶14} The *Pelfrey* court further stated at ¶14:

{¶15} "The express requirement of the statute cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form, or

by showing that the defendant failed to raise the issue of the inadequacy of the verdict form."

{¶16} Upon review, we concur with both parties. The matter is remanded to the trial court for resentencing on the second count of receiving stolen property.

{¶17} Assignment of Error I is granted.

II

{¶18} Appellant claims his convictions were against the sufficiency and manifest weight of the evidence. We disagree.

{¶19} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine 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 jury 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. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶20} Appellant was convicted of two counts of receiving stolen property in violation of R.C. 2913.51(A) which states, "No 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."

{¶21} On October 22, 2008, it was discovered that several units of a storage facility had been broken into and several items had been stolen. Some of the reported items were various pieces of stereo equipment. The stereo equipment was found in a detached garage belonging to Jeff Grove and Angela Robinson. Appellant had recently been staying at the home.

{¶22} Appellant argues there was no evidence tying him to the theft of the subject items. Appellant concedes there was evidence that he was attempting to sell items, however, the brand of stereo equipment he was selling was not the same as those items found in the garage.

{¶23} Sergeant Douglas Hines with the Uhrichsville Police Department investigated the break-ins at the storage facility. T. at 45-46. One of the units had stereo equipment missing. T. at 46. The following day, Uhrichsville Police Patrolman Jeremy Shaver was investigating the theft of two dirt bikes. T. at 47, 102. During the investigation, appellant became a possible suspect. T. at 103. It was learned that appellant could have been staying with Ms. Robinson and Mr. Grove who resided in Dennison. T. at 81, 104. Officers arrived at the residence and with their permission, searched the garage wherein the missing dirt bikes and stereo equipment were found. T. at 48, 105-106. Upon Patrolman Shaver telling appellant he needed to speak with him, appellant blurted out "the bikes are in the garage." T. at 106.

{¶24} The victims of the thefts identified the items found in the garage as those that had been stolen from them. T. at 62-64, 70, 75, 111.

{¶25} Appellant had offered to sell an "amp" to Mr. Grove and identified it as a "Jensen," but Mr. Grove never saw it. T. at 92. The stolen stereo equipment was "Precision." T. at 56.

{¶26} In October of 2008, appellant called a friend, Nathan Halsey, and asked him for help in moving two dirt bikes out of a garage in Dennison. T. at 120.

{¶27} Ms. Robinson and Mr. Grove had no knowledge of the items found in their garage. T. at 96. Neither of them went into the garage very often. T. at 85. They testified that appellant had a key to their garage and he had called them to ask if he could store some dirt bikes in the garage. T. at 84, 91.

{¶28} Although there is direct evidence of appellant's possession of the stolen items, the evidence as to his knowledge that they were stolen was circumstantial. Circumstantial evidence is that which can be "inferred from reasonably and justifiably connected facts." *State v. Fairbanks* (1972), 32 Ohio St.2d 34, paragraph five of the syllabus. "[C]ircumstantial evidence may be more certain, satisfying and persuasive than direct evidence." *State v. Richey*, 64 Ohio St.3d 353, 1992-Ohio-44. It is to be given the same weight and deference as direct evidence. *State v. Jenks* (1991), 61 Ohio St.3d 259.

{¶29} The circumstantial evidence in this case included appellant's spontaneous admission to Patrolman Shaver, his attempt to sell some stereo equipment, his attempt to hide the dirt bikes in the garage in Dennison, and then enlist the help of a friend to move the dirt bikes to an alternative place.

{¶30} Given this evidence, we cannot find that the jury lost its way in returning guilty verdicts on the receiving stolen property counts. Further evidence of the jury's insight was the not guilty finding on the theft count.

{¶31} Upon review, we find the evidence was sufficient to support the verdicts and the jury did not lose its way. We find no manifest miscarriage of justice.

{¶32} Assignment of Error II is denied.

{¶33} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed in part. Sentence on Count 2 is vacated and the matter is remanded for resentencing on said count.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ William B. Hoffman

s/ Patricia A. Delaney

JUDGES

