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STATE OF OHIO :
 Plaintiff : **CASE NO. 2018 CR 00470**
 vs. : **Judge McBride**
 PAUL WAYNE BOWLES : **DECISION/ENTRY**
 Defendant :

STATE OF OHIO :
 Plaintiff : **CASE NO. 2018 CR 00471**
 vs. : **Judge McBride**
 RICHARD R. DELLER : **DECISION/ENTRY**
 Defendant :

Carol A. Rowe, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

John D. Treleven, counsel for the defendant Paul Wayne Bowles, 810 Sycamore Street, 2nd Floor, Cincinnati, Ohio 45202.

Richard G. Wendel, II, counsel for the defendant Richard R. Deller, 3573 Columbia Parkway, Cincinnati, Ohio 45226.

These consolidated cases came before the court for a bench trial on February 20, 2019. At the conclusion of the trial, the court took the issues raised in the cases under advisement.

The defendant Paul Wayne Bowles was indicted in Case No. 2018 CR 00470 on August 23, 2018, on one count of breaking and entering, in violation of R.C. 2911.13(A), a felony of the fifth degree.

The defendant Richard R. Deller was indicted in Case No. 2018 CR 00471 on August 23, 2018, on one count of breaking and entering, in violation of R.C. 2911.13(A), a felony of the fifth degree.

Upon consideration of the record of the proceedings, the evidence presented for the court's consideration, the oral arguments of counsel, and the applicable law, the court now renders this written decision.

PROCEDURAL BACKGROUND

On August 23, 2018, the defendant Paul Wayne Bowles was indicted in Case No. 2018 CR 00470 on one count of breaking and entering, in violation of R.C. 2911.13(A), a felony of the fifth degree. On the same date, the defendant Richard R. Deller was indicted in Case No. 2018 CR 00471 on one count of breaking and entering, in violation of R.C. 2911.13(A), a felony of the fifth degree.

The court consolidated these two cases on December 4, 2018, along with the cases of *State of Ohio v. Ashley Spears*, Case No. 2018 CR 00472, and *State of Ohio v. Michael L. Blount*, Case No. 2018 CR 00476.

On January 22, 2019, Bowles submitted a waiver of his right to a jury trial. On that same date, during a hearing, the court found Bowles to have knowingly, intelligently, and voluntarily waived his right to a jury trial. On January 24th, Deller submitted a waiver of

his right to jury trial. On that same date, during a hearing, the court found Deller to have knowingly, intelligently, and voluntarily waived his right to a jury trial.

The court held a bench trial on February 20, 2018. Michael Blount did not appear on the date of the bench trial, and therefore the court held the trial as to the other three defendants in these consolidated cases. Upon a Crim.R. 29 motion by Spears's defense counsel, the court acquitted Spears. At the conclusion of the trial, the court took the issues that pertain to defendants Bowles and Deller under advisement.

FINDINGS OF FACT

The above charges stem from an incident that occurred on May 24, 2018 at 251 North Front Street in Williamsburg, Ohio, which is in Clermont County. There is a warehouse located at that address, situated on nearly three acres of property. The warehouse has three stories and takes up approximately 90,000 square feet. It houses restaurant business equipment. There is also a considerable amount of equipment items located all throughout the yard surrounding the warehouse building.

The property is fenced in. There is a short stretch of property along North Second Street that has a chain link fence frame, but it does not have the chain links.¹ There are several gates on the property, which the owner keeps locked. There are also no trespassing signs posted. Further, the building's owner, Rick Pike, has an alarm system in place. There are approximately eight alarms, which are motion activated, located both inside of the building and in the yard. When an alarm is activated, the security company

¹ State's Exs. 1 and 2.

controlling the alarms calls Pike. He then can decide whether to have the company alert the police. Occasionally, there have been false alarms activated in the yard.

On May 24th, Pike was in Indiana. He had been to the property the day before and had done a walkabout. At that time he found the gates and doors were all locked. On the morning of May 24th, Pike received a call from his security company. He chose not to have the company call the police because only one alarm had been activated. However, approximately a half an hour later, Pike received another two calls from the company. Alarms were activated at multiple levels of the building, which indicated to Pike that multiple people were inside of the building. At that point, he had the security company contact law enforcement.

At approximately 8:25 a.m., Corporal Jon Adamson with the Williamsburg Police Department was dispatched to the property for a possible burglary. He arrived just two minutes later and saw a black Lincoln Navigator parked at a side entrance to the property on North Second Street. The side entrance was situated so that the warehouse building was to the right and on the left was a grey house. In between the two was part of the warehouse building's yard. Upon arriving on the scene, Michael Blount was near the grey house and approached Corporal Adamson. He told Corporal Adamson that he was going down the street to get some weight lifting equipment someone did not want as well as some "scrap."

Blount walked down the street to another residence. While running the license plates on the Lincoln Navigator, Deller and Bowles emerged from the property through

the fence carrying two five gallon buckets of metal and tools. Bowles was also carrying a power tool.² They had to stoop down to get underneath the bars of the fence.

When Corporal Adamson saw the defendants, he exited his police cruiser. The defendants saw him, and the defendants fled towards the back of the property. The defendants then hid in overgrown brush on the property. Corporal Adamson called out for the defendants to come back, but they did not.

Corporal Adamson next called for assistance to locate the defendants. At the same time, he noticed Ashley Spears sitting in the front, passenger seat of the Lincoln Navigator. She was nodding off and was only somewhat coherent. Corporal Adamson spoke with her.

Meanwhile, Deputy John Schaefer and Corporal Dan Cooper, both of the Clermont County Sherriff's Office, arrived at the scene to assist Corporal Adamson. They arrived approximately four minutes after Corporal Adamson had called the dispatcher for assistance. Deputy Schaefer and Corporal Cooper entered the property and searched for the defendants. Deputy Schaefer called out for the defendants to come out of the overgrown brush. The defendants then exited the brush, still on the property, appearing slightly nervous.

The officers on the scene noticed that a door at the top of a fire escape appeared to be kicked in and that a garage door to the building had been slightly rolled up.³ Both of these doors had been secured and locked the day before. Officers did not enter the building because the fire escape did not look safe. Equipment from inside the warehouse had been placed on the dock. Pike, upon returning to the property, found that numerous

² State's Ex. 3.

³ State's Exs. 5 and 6.

other items had been taken from inside the warehouse. Pike also testified that he had not given the defendants permission to enter his property or the warehouse building.

STANDARD OF REVIEW

In a criminal case, it is the state's burden to prove the defendant's guilt beyond a reasonable doubt.⁴ R.C. 2901.05(E) describes reasonable doubt as follows:

"Reasonable doubt' is present when the [triers of fact], after * * * carefully consider[ing] and compar[ing] all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs."

Further, "[i]t is axiomatic that the state must prove each and every element of an offense * * *."⁵

As the trier of fact, the court " * * * makes the determinations of credibility and the weight to be given to the evidence."⁶ The trier of fact is in the best position to take into

⁴ R.C. 2901.05(A).

⁵ *State v. Jones*, 91 Ohio St. 3d 335, 347, 744 N.E.2d 1163 (2001). See *State v. Brown*, 12th Dist. Warren No. CA2006-10-120, 2007-Ohio-5787, ¶ 29 ("The state has a duty to present evidence, beyond a reasonable doubt, as to each and every element of the crime as set forth in the indictment.")

⁶ *State v. Burrell*, 12th Dist. Fayette No. CA2016-04-005, 2016-Ohio-8454, ¶ 22, citing *State v. Clements*, 12th Dist. Butler No. CA2009-11-277, 2010-Ohio-4801, ¶ 20. See *State v. Shaver*, 12th Dist. Butler No. CA90-12-241, 1991 WL 170164, *3 (Sept. 3, 1991), citing *State v. Thomas*, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982) (stating that "it is the accepted rule in Ohio that the weight to be given evidence and the credibility of the witnesses in a criminal proceeding are primarily for the trier of fact.").

account any inconsistencies of evidence, "along with manner and demeanor to determine witness credibility," and is free to believe or disbelieve all or any of the testimony.⁷

LEGAL ANALYSIS

R.C. 2911.13(A) criminalizes breaking and entering. It provides: "No 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."⁸ Breaking and entering is a felony of the fifth degree.⁹

Ohio courts have defined "stealth" to mean any secretive, sly, or clandestine act to gain entrance.¹⁰ "A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature."¹¹

Any "theft offense" for purposes of R.C. 2911.13 includes theft.¹² Further, the state is not required to show that the defendant actually stole something in order to convict him of breaking and entering under R.C. 2911.13(A).¹³ Additionally, breaking and entering is

⁷ *State v. Cope*, 12th Dist. Butler No. CA2009-11-284, 2010-Ohio-6430, ¶ 47, citing *State v. Johnson*, 10th Dist. Franklin No. 10AP-137, 2010-Ohio-5440, ¶ 18.

⁸ R.C. 2911.13(A).

⁹ R.C. 2911.13(C).

¹⁰ *State v. Hibbard*, 12th Dist. Butler No. CA2001-12-276, 2003-Ohio-707, ¶ 30, citing *State v. Ward*, 85 Ohio App.3d 537, 540, 620 N.E.2d 168 (3d Dist. 1993).

¹¹ R.C. 2901.22(A).

¹² *State v. Jackson*, 12th Dist. Butler No. CA2011-06-096, 2012-Ohio-4219, ¶ 54, citing R.C. 2913.01(K)(1).

¹³ *State v. Maxwell*, 5th Dist. Richland No. 2016 CA 0044, 2017-Ohio-1327, ¶ 24, citing *State v. Russell*, 12th Dist. Butler No. CA2012-08-156, 2013-Ohio-3079, ¶ 38.

committed at the time of the entry, "and the accused is guilty thereof whether he commits the intended felony or not. The actual commission of the intended felony is not an element of the offense of breaking and entering."¹⁴

Both defendants in the instant case have argued that the state did not meet its burden of proof because the fenced area around the warehouse building was not an unoccupied structure, and the state does not have enough evidence to show that the defendants trespassed into the building itself. However, the Twelfth District Court of Appeals found in the case of *State v. Russell*, 12th Dist. Butler No. CA2012-08-156, 2013-Ohio-3079, that a fenced in area, even with a hole in it, constituted an unoccupied structure for purposes of R.C. 2911.13(A). In *Russell*, the defendant argued on appeal that his conviction under R.C. 2911.13(A) was against the manifest weight of the evidence because the unoccupied structure he was convicted of breaking and entering into was a fenced in yard that had a large hole cut into it, which had been there for as many as 13 years.¹⁵ As such, the defendant posited that "the hole in the fence surrounding JP Transportation [the victim-business] placed the fence in such a state of disrepair that it could not qualify as an unoccupied structure."¹⁶

The Twelfth District Court of Appeals noted that the term "unoccupied structure" is not defined in the Revised Code.¹⁷ An occupied structure, on the other hand, is defined in relevant part as "any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof * * *."¹⁸ The court

¹⁴ *Boyer v. Maxwell*, 175 Ohio St. 318, 319, 194 N.E.2d 574 (1963).

¹⁵ *Russell*, 2013-Ohio-3079 at ¶ 29.

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 24.

¹⁸ *Id.* at ¶ 23, citing R.C. 2909.01(C).

then examined two cases that were inapposite to one another from the Eleventh District and Eighth District Courts of Appeal, which dealt with whether fenced yards were unoccupied structures.¹⁹ Ultimately, the court found the Eighth District Court of Appeals decision more compelling and resolved: "While the fence may not have been sufficient to keep everyone out of the premises, it nevertheless provided some degree of protection for the buildings and equipment that are kept on the premises. Therefore, we conclude that the fenced-in premises at JP Transportation constituted an 'unoccupied structure' for purposes of the breaking and entering statute in R.C. 2911.13(A) * * *."²⁰

In turning to the present case, the court finds that both Deller and Bowles are guilty beyond a reasonable doubt of using stealth to trespass into an unoccupied structure with purpose to commit theft in contravention of R.C. 2911.13(A). The court believes that Deller and Bowles were being secretive, sly, or clandestine in entering the property through the bars of a gated and locked fence along the side entrance of the property.

Additionally, the defendants did not have permission to enter the property, the gates were locked, and there were no trespass signs on the property. As such, the defendants were trespassing. Moreover, the fenced property is an unoccupied structure, per *Russell*, even though a limited portion of it had open bars that a person could duck underneath to enter through. Like the fence with a large hole in *Russell*, the fence in the present case may have been insufficient to keep everyone out of the premises, but it nevertheless provided some degree of protection for the warehouse building and equipment kept on the property.

¹⁹ See *State v. Chambers*, 8th Dist. Cuyahoga No. 87221, 2006-Ohio-4889 and *State v. Barksdale*, 11th Dist. Lake No. 12-117, 1987 WL 32733 (Dec. 31, 1987).

²⁰ *Russell*, 2013-Ohio-3079 at ¶ 30.

Furthermore, the court finds that the defendant's trespassed with the purpose to commit theft. At the time Corporal Adamson saw the defendants on the property, they were each holding a five gallon bucket full of metal and tools, and Bowles was holding a power tool. The fact that the defendants fled when they saw Corporal Adamson is a further indication of their guilt.²¹ It is immaterial that the defendants were not successful in leaving with the targeted items. Accordingly, the court finds the defendants guilty of breaking and entering beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the court finds as follows:

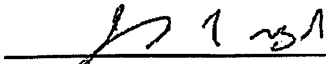
- (1) The state has proven the defendant Paul Wayne Bowles guilty beyond a reasonable doubt of committing breaking and entering, in violation of R.C. 2911.13(A), a felony of the fifth degree in Case No. 2018 CR 00470.
- (2) The state has proven the defendant Richard R. Deller guilty beyond a reasonable doubt of committing breaking and entering, in violation of R.C. 2911.13(A), a felony of the fifth degree in Case No. 2018 CR 00471.

Counsel shall, within three business days of the date of this Decision, call the Assignment Commissioner in order to schedule a sentencing hearing, which shall be held within 4-6 weeks of the date of this Decision.

²¹ *State v. Grindstaff*, 12th Dist. Clermont No. CA2013-09-074, 2014-Ohio-2581, ¶ 22, citing *State v. Eaton*, 19 Ohio St.2d 145 (1969), paragraph six of the syllabus ("Evidence of flight is admissible to show consciousness of guilt.").

IT IS SO ORDERED.

DATED: 4-23-19



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Decision/Entry have been provided on this 19th day of April 2019 by e-mail to Carol Rowe, Assistant Prosecuting Attorney, at crowe@clermontcountyohio.gov, to John Treleven, Attorney for the Defendant Paul Wayne Bowles, at john@trelevenlaw.com, and Richard G. Wendel II, Attorney for the Defendant Richard R. Deller, at rich@richwendel.com. Printed copies have been provided to the Prosecuting Attorney's Office and the Probation Department, and printed copies have been mailed by regular U.S. Mail to Richard G. Wendel II, 3573 Columbia Parkway, Cincinnati, Ohio 45226, and to John Treleven, 810 Sycamore Street, 3rd Floor, Cincinnati, Ohio 45202.



Judicial Assistant to Judge McBride