[Cite as *State v. Benit*, 2011-Ohio-6832.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-490 (C.P.C. No. 10CR10-5861)
Tahl D. Benit,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 30, 2011

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*, for appellee.

Samuel H. Shamansky Co., LPA, *Samuel H. Shamansky* and *Donald L. Regensburger*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Tahl D. Benit, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

Factual and Procedural Background

{¶2} On July 30, 2010, appellant, who was homeless at the time, had not slept for a number of days and was high on drugs. A friend dropped him off on the near-west side of Columbus. Appellant walked from there to a Wal-Mart in Hilliard, Ohio. Appellant

was trying to make it to a friend's house near Clintonville. It was a hot day and appellant passed out near that store from dehydration. Police woke him up and drove him to Upper Arlington, where they left him with directions to his friend's house. However, a couple hours later, Upper Arlington police found appellant asleep in a front yard. Those officers told appellant to be on his way. Appellant walked a little longer until he saw a big house that was for sale. Tired and hot, appellant attempted to enter the house to escape the heat. He found an unlocked door and went inside the house. Once inside, he ate some candy and drank some pop that he found in the kitchen. He then walked through the mostly vacant house and found a bed. He laid down in the bed and fell asleep.

{¶3} The next day, the homeowner visited his house to mow the grass. When he arrived, he found appellant asleep inside the house and called the police. They arrived and arrested appellant without incident. A Franklin County Grand Jury indicted appellant with one count of burglary in violation of R.C. 2911.12(A)(3). Appellant entered a not guilty plea to the charge and proceeded to a jury trial. After the presentation of evidence, appellant requested a jury instruction on the lesser included offense of criminal trespass. The trial court refused to give the instruction. The jury found appellant guilty of the one count of burglary and the trial court sentenced him accordingly.

{¶4} Appellant appeals and assigns the following error:

> [I.] THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION BY REFUSING TO INSTRUCT THE JURY IN A BURGLARY TRIAL ON THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS.

Assignment of Error—Lesser Included Offense Jury Instruction

{¶5} In this assignment of error, appellant claims the trial court erred by denying his request for a jury instruction on the lesser included offense of criminal trespass. We disagree.

{¶6} The State does not dispute that criminal trespass is a lesser included offense of burglary under R.C. 2911.12(A)(3). *State v. Morris*, 9th Dist. No. 07CA0044-M, 2008-Ohio-3209, ¶7. That concession does not end our analysis. "Even though an offense may be a lesser included offense, a charge on the lesser offense is required 'only where the evidence presented at trial would reasonably support both an acquittal of the crime charged and a conviction upon the lesser included offense.' " *State v. Trimble,* 122 Ohio St.3d 297, 2009-Ohio-2961, ¶192, quoting *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus. In determining whether the evidence reasonably supports the lesser included offense instruction, "[t]he trial court must view the evidence in the light most favorable to the defendant when deciding whether to instruct the jury on a lesser included offense." *Trimble* at ¶ 192. An instruction on the lesser included offense is not warranted, however, every time "some evidence" is presented to support the lesser offense. *State v. Shane* (1992), 63 Ohio St.3d 630, 632. Instead, a court must find "sufficient evidence" to " 'allow a jury to *reasonably* reject the greater offense and find the defendant guilty on a lesser included (or inferior degree) offense.' " (Emphasis sic.) *Trimble* at ¶192, quoting *Shane* at 632–33. We review the trial court's decision not to give a lesser included instruction requested by a defendant for an abuse of discretion. *State v. Marrero*, 10th Dist. No. 10AP-344, 2011-Ohio-1390, ¶67; *State v. Martin*, 10th Dist. No. 02AP-33, 2002-Ohio-4769, ¶47.

{¶7} We first consider whether there was sufficient evidence to allow a jury to reasonably find appellant not guilty of burglary. In order to find appellant guilty of burglary in this case, the jury had to find beyond a reasonable doubt that, by force, stealth, or deception, appellant trespassed 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 separately secured or separately occupied portion of the structure any criminal offense. R.C. 2911.12(A)(3). The state alleged that appellant committed the criminal offense of theft inside the house. Therefore, the jury also had to find beyond a reasonable doubt that appellant, with purpose to deprive the owner of property or services, knowingly obtained or exerted control over either the property or services without the consent of the owner or person authorized to give consent. R.C. 2913.02(A)(1).

{¶8} Appellant does not dispute that he trespassed in the house. Instead, he argues that the jury could have reasonably found him not guilty of burglary because he had implicit consent from the homeowner to take the candy and pop from the house and, therefore, did not commit a theft inside the house. We disagree.

{¶9} The house appellant entered was for sale and had a for sale sign in the yard. Appellant testified that the candy and pop he took were on the kitchen counter next to some home brochures. He argued that the homeowner implicitly consented to his taking the candy and pop because their placement on the counter indicated to him that the candy and pop were complimentary for people who were attending an open house showing. (Tr. 130.) The fallacy in appellant's argument is that he did not enter the house during an open house showing. Nor did he take the candy and pop during an open house

showing. Appellant was a trespasser. Viewing the evidence in a light most favorable to appellant, a jury could not reasonably find him not guilty of burglary because the jury could not have reasonably concluded that the homeowner implicitly consented to appellant taking the candy and pop inside the house. Accordingly, because the evidence does not reasonably support an acquittal for burglary, the trial court did not abuse its discretion by refusing to instruct the jury on the charge of criminal trespass. *State v. Wyatt*, 12th Dist. No. CA2010-07-171, 2011-Ohio-3427, ¶33 (no error refusing lesser included instruction where jury could not have reasonably found defendant not guilty of the greater offense).

{¶10} We overrule appellant's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.