

[Cite as *State v. Davis*, 2009-Ohio-2539.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

MICHAEL L. DAVIS

Defendant-Appellant

Appellate Case No. 22780

Trial Court Case No. 07-CR-5201

(Criminal Appeal from
Common Pleas Court)

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OPINION

Rendered on the 29th day of May, 2009.

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BROGAN, J.

{¶ 1} This case is before the court on the appeal of Michael L. Davis from a trial court's decision that overruled a Crim.R. 29(A) motion for judgment of acquittal. In support of the appeal, Davis contends that the state failed to present sufficient evidence to prove that he was without privilege to enter the home he was convicted of burglarizing. We conclude that the evidence is sufficient. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 2} In January 2008, Davis was indicted on one count of burglary, violating R.C. 2911.12(A)(3). The following April his case was tried to a jury. At trial, Gloria Hedges, Davis's mother, testified for the prosecution. She said that on December 22, 2007, she drove past the home of Mattie Davis (Mattie), Hedges's mother and thus Davis's grandmother, to check on it, because Mattie was often at Hedges's home. Hedges noticed that the board that covered one of the basement windows had been pulled away. Two days before, Hedges's brother had nailed the board there after an unknown burglar had broken in through that window. Hedges continued driving down the street to an aunt's house, and she called the police. Hedges picked up her aunt and drove back to Mattie's house. Soon after Hedges arrived, she saw someone, whom she believed to be Davis, run away from the house carrying two pillowcases. The prosecutor asked Hedges, "To our [sic] knowledge, did Michel [sic] Davis have permission to be there [in the home]?" Hedges answered, "No, he didn't." (Tr. 116).

{¶ 3} Mattie also testified for the prosecution. She said that Davis lived with her in her home sporadically from 1994 to 2002, but that he has not lived there since. Someone

called her in September 2007, Mattie said, and asked if Davis could live with her again, but she refused. She agreed that Davis had some personal property remaining in an extra bedroom that he used during those eight years. Mattie testified that Davis did not have a key to her home, had never known the home's alarm code, had never paid rent or bills, and did not receive mail at her home. The prosecutor asked Mattie, "[O]n December 22, 2007, did he [Davis] have permission to be in your residence?" She answered, "No. No. No." (Tr. 101).

{¶ 4} The final witness for the prosecution was Officer Josh Frisby. He said that the police caught Davis later the same day that Hedges had seen him. The officer also said that Davis admitted that he broke into the home, because he was looking for items that he could sell or trade to feed his crack addiction. (Davis moved to suppress these statements before trial, but the court overruled the motion.)

{¶ 5} When the prosecutor rested the state's case, Davis orally moved for a judgment of acquittal, pursuant to Crim.R. 29(A), arguing that the state did not produce sufficient evidence to find him guilty of burglary. The trial court summarily overruled the motion. Davis rested without presenting any evidence. He was found guilty and sentenced to three years in prison.

{¶ 6} Davis now appeals from the decision to overrule his Crim.R. 29(A) motion.

II

{¶ 7} Davis's sole assignment of error reads:

{¶ 8} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY OVERRULING HIS MOTION FOR A JUDGMENT OF ACQUITTAL DESPITE

INSUFFICIENT EVIDENCE TO PROVE GUILT BEYOND A REASONABLE DOUBT.”

{¶ 9} Davis contends that the state failed to present sufficient evidence to conclude that he trespassed. Specifically, he contends that the state failed to prove that he was without privilege to enter his grandmother’s home.

{¶ 10} If the evidence that supports a material element of an offense is insufficient, the defendant must be acquitted of that offense. Criminal Rule 29(A) states the rule: “The court * * * shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses.” The evidence is legally sufficient if “reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.” *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263. All the evidence must be regarded in the light most favorable to the prosecution. *Id.* at 263-264.

{¶ 11} Trespass is an essential element of burglary. See R.C. 2911.12(A)(3) (“No person, by force, stealth, or deception, shall * * * (3) Trespass * * *.”) A person trespasses when he, “without privilege to do so,” enters or remains on the land or premises of another. R.C. 2911.21(A)(1). “Privilege” means “an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of statute, position, office, or relationship, or growing out of necessity.” R.C. 2901.01(A)(12). The broad concept of privilege also embraces permission to enter premises. *State v. Clelland* (1992), 83 Ohio App.3d 474, 490.

{¶ 12} In his brief, Davis argues two failures of evidence. First, tacitly conceding that

he did not have his grandmother's permission to enter her home at the time of the incident, Davis claims that the evidence fails to show that he knew this. He lived in the house from 1994 to 2002, so he must have had a privilege, at that time, to enter, Davis notes. But the evidence fails to show that anyone told him that his grandmother had terminated this privilege. Second, Davis claims that the state failed to prove conclusively that no one who could have granted him permission to enter the house, did not do so. Davis refers here to people to whom his grandmother gave permission to enter, like his uncle, but who did not testify or present affidavits that they, in turn, did not give Davis permission. The question, then, is simply whether, based on the evidence presented by the state, reasonable minds can conclude beyond a reasonable doubt that Davis knew that he was without privilege, and that no one gave him permission to enter.

{¶ 13} There is little evidence in the record about the six years Davis lived with his grandmother. Mattie, his grandmother, testified that he stayed with her off and on from 1994 to 2002, so the last time he stayed in her home was five years ago. She said that, during this time, Davis used an extra bedroom, which still contains some of his personal things. But she also testified that Davis never knew the code to the home's alarm, never paid rent, never paid bills, and never received mail. She also testified that Davis did not have a key to her house, but it is unclear whether she was referring to the time he lived with her or to the time he broke in. In addition, there is evidence that Davis forcibly entered the home through a basement window. Evidence of forcible entry into a residence, we have said, permits the reasonable inference that the defendant did not have permission to enter. See *State v. Hart*, Montgomery App. No. 19556, 2003-Ohio-5327, at ¶43 (stating that the evidence showed that the front door to the residence had been forcibly broken down, and

kicked in). See, also, *State v. Kimbrough*, Stark App. No. 2003CA00143, 2003-Ohio-6404, at ¶26 (stating that Appellant's assertion that he had a privilege to enter the house was belied by police officer's testimony that the screen door had been removed and the front door appeared to have been damaged). Finally, Gloria Hedges said that she believed Davis did not have permission to enter, and his grandmother said categorically that he did not have permission to be in her home.

{¶ 14} This is sufficient evidence from which to conclude that, on December 22, 2007, Davis was without privilege to enter the home. Viewing the evidence in the light most favorable to the state (and setting aside the question of whether the state was required to prove knowledge), reasonable minds can conclude beyond a reasonable doubt both that Davis, when he broke in, knew that he was without privilege, and that no one else had given Davis permission to enter.

{¶ 15} Upon review of the record, the state's evidence is sufficient to support the conclusion that Davis trespassed. Therefore, Davis's conviction for burglary was not based on insufficient evidence.

III

{¶ 16} The trial court did not err by overruling the motion for judgment of acquittal, and the sole assignment of error is overruled. The trial court's judgment is Affirmed.

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DONOVAN, P.J., and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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