[Cite as *State v. Pennington*, 2016-Ohio-2792.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 15CA5
vs.	:	
MICHAEL PENNINGTON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Scott D. Evans, Ironton, Ohio, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and C. Michael Gleichauf, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 4-12-16
ABELE, J.

{¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment of conviction and sentence. A jury found Michael Pennington, defendant below and appellant herein, guilty of burglary in violation of R.C. 2911.12(A)(2).

{¶ 2} Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE EVIDENCE PRESENTED AT TRIAL IS INSUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION, WHICH CONVICTION IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE AND MUST BE REVERSED[.]"

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION IN LIMINE TO THE PREJUDICE OF THE DEFENDANT'S SUBSTANTIAL RIGHTS BY ADMITTING UNDULY PREJUDICIAL EVIDENCE ABOUT OTHER ACTS AND UNCHARGED MISCONDUCT BY THE DEFENDANT, THE ONLY PROBATIVE VALUE OF WHICH WAS TO ESTABLISH THE DEFENDANT'S BAD CHARACTER AND CONDUCT IN CONFORMITY THEREWITH. THE ADMISSION OF THIS EVIDENCE VIOLATED THE DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT."

THIRD ASSIGNMENT OF ERROR:

THE TRIAL COURT FAILED TO COMPLY WITH THE REQUIREMENTS OF [R.C.] 2929.19 BY NOT IMPOSING POST RELEASE CONTROL."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED BY FAILING TO GIVE THE DEFENDANT-APPELLANT CREDIT FOR THE CORRECT NUMBER OF DAYS SERVED WHILE AWAITING TRIAL AND SENTENCING."

{¶ 3} In the Spring of 2014, appellant entered into an informal rental agreement with Donna "Gail" Clifton and her son, whereby appellant would lease a mobile home from the Cliftons in exchange for making certain repairs. After that arrangement apparently failed, appellant was informally evicted.

{¶ 4} On the evening of September 3, 2014, someone knocked on the front door of the Clifton residence to inquire about renting the mobile home that appellant previously occupied. As Jason Clifton spoke with that individual, Gail Clifton (his mother) heard a sliding glass door

open. When she investigated, she found appellant inside the residence. She then screamed for her son who, subsequently, grabbed a shotgun and chased appellant into nearby woods.

{¶ 5} The Lawrence County Grand Jury returned an indictment that charged appellant with the offense of burglary. At the jury trial, the Cliftons both recounted their version of the events. After hearing the evidence, the jury returned a guilty verdict and the trial court sentenced appellant to serve a seven year prison term. This appeal followed.

I

{¶ 6} In his first assignment of error, appellant appears to argue that the jury's verdict is not supported by the sufficiency of the evidence and is against the manifest weight of evidence. Our analysis begins with the observation that these two concepts are related, but conceptually different, legal issues. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶ 23 (sufficiency of evidence is quantitatively and qualitatively different from the weight of the evidence); *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), syllabus.

{¶ 7} When reviewing for the sufficiency of the evidence, an appellate court's inquiry focuses primarily on adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *Thompkins*, 78 Ohio St.3d at 386; *State v. Jenks*, 61 Ohio St.3d 259, 274, 574 N.E.2d 492 (1991). The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in a light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense beyond a reasonable doubt. *Jenks*, 61 Ohio St.3d at 273; *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Furthermore, reviewing courts are not asked to assess if the "state's evidence is to be believed, but whether, if

believed, the evidence against a defendant would support a conviction." *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶ 8} In the case sub judice, after our review of the evidence we conclude that the State satisfied its burden on this issue. R.C. 2911.12(A)(2) prohibits, by stealth or trespass, entry into a permanent habitation where someone else is likely to be present. The statute also requires the burglar be there to commit a "criminal offense." Id.

{¶ 9} Here, the evidence reveals that Gail Clifton and her son resided at 7724 County Road Five, in Pedro, Ohio, and that appellant's entry into their residence took place in the evening when they, presumably, were expected to be present. It was uncontroverted that Gail Clifton heard a sliding glass door open at her home on the night of September 3, 2014. When she investigated, she found appellant standing in her home.

{¶ 10} Both Cliftons testified that appellant did not have permission to be in their home. Further, Jason Clifton testified that, after appellant's entry into his mother's home, he found a bottle of "Jack Daniels" missing from the residence. This evidence is sufficient for a trier of fact to find all the elements of the offense of burglary. See R.C. 2911.12(A)(2).

{¶ 11} Insofar as appellant's assignment of error asserts that the jury verdict is against the manifest weight of the evidence, an appellate court will not reverse a conviction on that ground unless it is obvious that the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Earle*, 120 Ohio App.3d 457, 473, 698 N.E.2d 440 (11th Dist.1997); *State v. Garrow*, 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814 (4th Dist.1995); *State v. Davis*, 49 Ohio App.3d 109, 113, 550 N.E.2d 966 (8th Dist.1988). Just as we find no merit under appellant's "sufficiency" of the evidence

argument, we likewise find no merit here.[1]

{¶ 12} The Cliftons both testified that appellant had no reason to be in their home, entered their home by stealth and stole a bottle of "Jack Daniels" from Jason Clifton. Appellant's counter-argument appears to assert that the record shows that he entered the residence to find marijuana that he and Jason Clifton produced as a joint venture. Because the marijuana was partly his property, appellant continues, no criminal purpose existed. We are not persuaded.

{¶ 13} The existence of marijuana in the house is largely superfluous. The uncontroverted testimony reveals that after Jason Clifton chased appellant from the Clifton home, Clifton noticed that his bedroom had been ransacked and a bottle of Jack Daniels was missing. The logical conclusion is that appellant took it, regardless of whether his stated intention was to check the status on his jointly owned property.

{¶ 14} Jason Clifton also testified that "[i]f there was an allegation that this all started" because he and appellant were growing marijuana together, that would be "incorrect." Obviously, the jury believed Clifton's testimony regarding both the Jack Daniels and the marijuana issues.

{¶ 15} Generally, the evidence weight and witness credibility are issues that the trier of fact must determine. *State v. Dye*, 82 Ohio St.3d 323, 329, 695 N.E.2d 763 (1998); *State v. Williams*, 73 Ohio St.3d 153, 165, 652 N.E.2d 721 (1995). The rationale for this proposition is

[1] Although we have concluded the verdict is supported by sufficient evidence, a "sufficiency" question is subsumed within a "manifest weight" challenge. That is to say, if the jury's verdict is supported by the manifest weight of the evidence, that verdict is, ipso facto, supported by sufficient evidence. *State v. Gravely*, 188 Ohio App .3d 825, 2010–Ohio–3379, 937 N.E.2d 136, at ¶46 (10th Dist.); *State v. Green*, 10th Dist. Franklin No. 11AP–526, 2012-Ohio-950, at ¶7.

that the jury, as the trier of fact, is in the best position to view the witnesses and to observe their demeanor, gestures and voice inflections and to use those observations to weigh their credibility. *Myers v. Garson*, 66 Ohio St.3d 610, 615, 614 N.E.2d 742 (1993); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273, 1276 (1984). Moreover, a trier of fact may believe all, part or none of the testimony of any witness who appears before it. *State v. Nichols*, 85 Ohio App.3d 65, 76, 619 N.E.2d 80 (4th Dist., 1993); *State v. Caldwell*, 79 Ohio App.3d 667, 679, 607 N.E.2d 1096 (14th Dist., 1992). That is why reviewing courts are reluctant to second-guess the trier of fact when issues of credibility arise. *State v. Riggs*, 4th Dist. Washington No. 02CA74, 2013-Ohio-1711, at ¶13. Here, appellant offers no reason why we should question the trier of fact in this case, and we have found no such reason in our own review of the record.

{¶ 16} Accordingly, we hereby overrule appellant's first assignment of error.

II

{¶ 17} In his second assignment of error, appellant asserts that the trial court erred by denying his motion in limine (filed January 12, 2015), that asked that his statement to law enforcement officers not be entered into evidence. The trial court overruled that motion prior to the jury's voir dire.[2]

{¶ 18} First, we note that those statements to law enforcement were, apparently, included on a CD played during trial, but were not transcribed into the January 12, 2015 transcript.

[2] Appellant's wording of the assignment of error in his "statement of the assignments of error" is different than what is set out in the argument portion of his brief. See App.R. 16(A)(3). The former couches the error in terms of denying his motion in limine, whereas the latter couches the error in terms of allowing inadmissible evidence at trial. Given that appeals are to be determined on the basis of the assignments of error required App.R. 16 (see App.R. 12(A)(1)(b)), we will review the assignment of error as worded in the statement of the assignments of error. Nevertheless, as we discuss in the text of this decision, we would also have found no merit to a claim that the trial court improperly admitted the evidence at trial.

Appellant does not address whether this complies with App.R. 9, which describes the record on appeal. However, we need not do so here as his challenge to admission of this evidence fails to meet another, well-established procedural rule.

{¶ 19} If a trial court denies a motion in limine, such a decision is simply a tentative, interlocutory ruling as to whether certain evidence is admissible. See *State v. Grubb*, 28 Ohio St.3d 199, 201, 503 N.E.2d 142 (1986); also see e.g. *Gable v. Gates Mills*, 103 Ohio St.3d 449, 816 N.E.2d 1049, 2004-Ohio- 5719, at ¶35. To properly preserve an objection to that specific evidence for purposes of appeal, an objection to the court's ruling must be made when the evidentiary issue arises at trial. *State v. Hall*, 57 Ohio App.3d 144, 145, 567 N.E.2d 305 (8th Dist.1989); *State v. Jackson*, 4th Dist. Washington No. 12CA16, 2013-Ohio-2628, at ¶19; *State v. Hafer*, 4th Dist. Hocking No. 87CA21, 1988WL118700 (Nov. 3, 1998).

{¶ 20} In the case sub judice, appellant did not show in the trial transcript an objection to the playing of this CD. The transcript does show that counsel asked to approach the bench shortly before the CD was played, but does not reveal what transpired at that time. An appellant has the burden to preserve any arguable error that a trial court allegedly makes when it admits exhibits or testimony into evidence. Again, to the extent that appellant contends that the trial court improperly admitted this evidence, we find no objection in the record. Thus, appellant has waived all but plain error. See Crim.R. 52(B); Evid.R. 103(A)(1)&(D). Generally, appellate courts take notice of plain error under Crim.R. 52(B) with the utmost caution, only under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, at ¶78; *State v. Patterson*, 4th Dist. Washington No. 05CA16, 2006-Ohio-1902, at ¶13. Plain error should be noticed if the

error seriously affects the fairness, integrity or public reputation of judicial proceedings. *State v. Bundy*, 4th Dist. Pike No. 11CA818, 2012-Ohio-3934, 974 N.E.2d 139, at ¶66. The Ohio Supreme Court has stated that appellate courts should conservatively apply plain-error review, and notice plain error in situations that involve more than merely theoretical prejudice to substantial rights. *State v. Steele*, 138 Ohio St.3d 1, 2013-Ohio-2470, 3 N.E.3d 135, at ¶30.

{¶ 21} In the case sub judice, we do not know the exact content of the CD. Thus, we cannot determine whether the trial court plainly erred by admitting that evidence. However, in light of the trial testimony of the Cliftons, it is certainly plausible that any alleged error in the admission of the CD constitutes harmless pursuant to Crim.R. 52(A).

{¶ 22} Accordingly, for these reasons, we hereby overrule appellant's second assignment of error.

III

{¶ 23} In his third assignment of error, appellant asserts that the trial court failed to comply with R.C. 2929.19 by not imposing post-release control. However, page two of the January 16, 2015 sentencing entry shows that the court did impose post-release control. That entry also states that the court advised appellant of that imposition at the sentencing hearing held the previous day.[3] The State, however, concedes in its brief that appellant was not informed about post release control at the sentencing hearing. After our review of the transcript from that proceeding, we reluctantly come to the same conclusion.

{¶ 24} Unfortunately, this case is yet another example of the ever changing felony

[3] The January 16, 2015 sentencing entry notes that this case came on for sentencing on January 15th, but the transcript that hearing included in the record states that the hearing was held on January 14th. It does not affect our ruling in any way, but we use the trial court's date set forth on the sentencing entry.

sentencing law and the only constant appears to be its perpetual complexity. In *State v. Jordan*, 104 Ohio St.3d 21, 817 N.E.2d 864, 2004-Ohio-6085, at ¶¶23&26, the Ohio Supreme Court noted that the failure to give the required notice of community control at a sentencing hearing rendered the sentence contrary to law and, thus, void. The proper remedy for a void sentence, the court held, is a remand for re-sentencing. Id. at ¶29. Effective July 11, 2006, the General Assembly enacted R.C. 2929.191 as a remedial procedure to correct deficiencies in sentencing like the one at issue in *Jordan*. See Am. Sub.H.B. 137, 2006 Ohio Laws File 132. Subsections (A)&(B) of this new law allowed for a trial court to issue a corrective judgment (i.e., a nunc pro tunc judgment) for deficient sentences imposed prior to its effective date. In *State v. Singleton*, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, at ¶23, the Court acknowledged that this statute applied to several circumstances, including "those [in which one] did not receive notice at the sentencing hearing that they would be subject to post[-]release control."

{¶ 25} In short, we agree with appellant and the State that appellant did not receive the proper notice at the sentencing hearing concerning post-release control. However, rather than declare the trial court's judgment void, we remand the case for further remedial action consistent with R.C. 2929.191. To anyone who argues that this is a waste of judicial resources, we readily agree. Appellant received notification in the previous sentencing entry, and it is difficult to perceive how appellant has been prejudiced by the failure to include such warning at his sentencing hearing. Nevertheless, we must follow the directives of the Ohio Supreme Court. *Akron National Bank and Trust Company v. McSweeney Mill and Mine Service, Inc.*, 4th Dist. Lawrence No. 1464, 1980WL351102 (Oct. 21, 1980). We must also follow the statutes enacted by the General Assembly.

{¶ 26} For these reasons, we sustain appellant's third assignment of error and remand this case for further proceedings consistent with R.C. 2929.191.

IV

{¶ 27} In his fourth assignment of error, appellant argues that the trial court failed to credit him with the correct number of days that he was incarcerated prior to his sentencing.

{¶ 28} The trial court's January 16, 2015 judgment specifies that appellant is to be "granted credit" for time served of "127 days." That allowance, however, is based on the court's specification that appellant was incarcerated from September 9, 2014 to December 14, 2014. It appears that this specification is in error because appellant's conviction and sentence were not handed down until 2015. Thus, appellant contends that the number of days credited is correct, but the dates are in error.

{¶ 29} On February 13, 2015, the trial court issued an amended judgment that purported to correct that error. However, the court did not correct the dates in question.[4] Instead, the court kept those dates but reduced jail time credit from 127 days (as set forth in the original sentencing entry) to 97 days (as set forth in the amended sentencing entry). However, the State concedes that appellant is entitled to credit for 127 days incarceration.

{¶ 30} In light of the fact that we are not presently in command of all of the facts regarding appellant's incarceration, and considering that both parties agree that the trial court erred insofar as the credit afforded to appellant for days served, appellant's argument is well-taken and we hereby sustain the fourth assignment of error.

[4] Both the January 16, 2015 entry and the February 13, 2015 amended entry specify the dates for which appellant is to be given credit is "09-09-14 to 12-14-14."

{¶ 31} Therefore, having sustained appellant's third and fourth assignments of error, we affirm, in part, and reverse, in part the trial court's judgment. Thus we affirm appellant's conviction, but reverse his sentence and remand the case for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED, IN PART, REVERSED, IN PART, AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered the judgment be affirmed, in part, reversed, in part, and the matter be remanded for further proceedings consistent with this opinion. Appellant to recover of appellee the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, J.: Concurs in Judgment & Opinion
McFarland, J.: Concurs in Judgment Only

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.