

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Patricia A. Delaney
Plaintiff - Appellee	:	Hon. John W. Wise
	:	Hon. Craig R. Baldwin
-VS-	:	
	:	
DEANO MCCORT	:	Case No. CT2016-0019
	:	
Defendant - Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas, Case No. CR2015-0365
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT:	February 6, 2017
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APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
D. MICHAEL HADDOX Prosecuting Attorney	DAVID A. SAMS Box 40 W. Jefferson, Ohio 43162
By: GERALD V. ANDERSON II Assistant Prosecuting Attorney Muskingum County, Ohio 27 North Fifth Street, P.O. Box 189 Zanesville, Ohio 43702-0189	

Baldwin, J.

{¶1} Defendant-appellant Deano McCort appeals his conviction from the Muskingum County Court of Common Pleas on one count of burglary. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On December 3, 2015, the Muskingum County Grand Jury indicted appellant on one count of burglary in violation of R.C. 2911.12(A)(3), a felony of the third degree, one count of theft (less than \$1,000.00) of an elderly victim in violation of R.C. 2913.02(A)(1), a felony of the fifth degree, and one count of possession of criminal tools in violation of R.C. 2923.24(A), a felony of the fifth degree. The burglary charge related to a burglary at the home of Wilma Good, who was at all relevant times living in a nursing home. At his arraignment on December 9, 2015, appellant entered a plea of not guilty to all of the charges.

{¶3} Subsequently, a jury trial commenced on February 23, 2016. The jury, on the same date, found appellant guilty of all of the charges. As memorialized in an Entry filed on April 5, 2016, appellant was sentenced to thirty-six (36) months in prison.

{¶4} Appellant now raises the following assignment of error on appeal:

{¶5} I. THE CONVICTION FOR BURGLARY WAS NOT SUSTAINED BY SUFFICIENT PROOF OF AN ‘OCCUPIED STRUCTURE’.

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{¶6} Appellant, in his sole assignment of error, argues that his conviction for burglary is against the sufficiency of the evidence because there was not sufficient proof of an “occupied structure” as required by R.C. 2911.12(A)(3). We disagree.

{¶17} The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held as follows: “An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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.”

{¶18} Appellant was convicted of burglary in violation of R.C. 2911.12(A)(3). A conviction for burglary pursuant to R.C. 2911.12(A)(3) requires the State to prove that appellant, by force, stealth, or deception, and with the intent to commit any criminal offense, entered an occupied structure with the purpose to commit in the structure a criminal offense. Appellant maintains that there was not sufficient evidence that Wilma Good's house was an “occupied structure” because Good, who is elderly, has been residing in a nursing home since June of 2014. Appellant notes that while Good's son testified at trial that Good intended to move back into her home, her son, who has a power of attorney, testified that she would not be returning to her home. All of Good's furniture, clothing and belongings remain in the house and her son testified at trial that he intends to sell the same.

{¶19} R.C. 2909.01(C) defines an “occupied structure” as “any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

{¶10} (1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.”

{¶11} (2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

{¶12} (3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

{¶13} (4) At the time, any person is present or likely to be present in it.

{¶14} As noted by the court in *State v. Johnson*, 188 Ohio App.3d 438, 2010-Ohio-3345, 935 N.E.2d 895 at paragraph 18:

“A structure which is dedicated and intended for residential use, and which is not presently occupied as a person's habitation, but, which has neither been permanently abandoned nor vacant for a prolonged period of time, can be regarded as a structure ‘maintained’ as a dwelling within the meaning of R.C. 2909.01(A). That definition includes a dwelling house whose usual occupant is absent on a prolonged basis or is receiving long-term care in a nursing home, a summer cottage, or a residential rental unit which is temporarily vacant.” *State v. Green* (1984), 18 Ohio App.3d 69, 18 OBR 234, 480 N.E.2d 1128, at paragraph one of the syllabus. “ ‘Under division (A) of the section, all dwellings are classed as occupied structures, regardless of the actual presence of any person. Whether or not the dwelling is used as a permanent or temporary home is immaterial, so long as it is maintained for that purpose.’ ” *State v. Bock* (1984), 16 Ohio App.3d 146, 16 OBR 154, 474 N.E.2d 1228, quoting R.C. 2909.01 Committee

Comment. Even homes undergoing major renovations have been found to be occupied structures. *443 *State v. Woodruff*, Lucas App. No. L-04-1125, 2005-Ohio-3368, 2005 WL 1532611, at ¶ 7-8; *State v. Charley*, Cuyahoga App. No. 82944, 2004-Ohio-3463, 2004 WL 1472745, at ¶ 68-72 (owner was in nursing home, and house was empty and undergoing renovation, but nonetheless it was an occupied structure); *Green*, 18 Ohio App.3d at 71-72, 18 OBR 234, 480 N.E.2d 1128 (term “maintained” “alludes more to the character or type of use for which the dwelling is intended to be subjected”).

{¶11} The court in *State v. Calderwood*, 8th Dist. No. 95269, 2011 -Ohio- 2913 at paragraph 15 noted that “the relevant inquiry in determining whether a structure is occupied concerns the residential purpose of the dwelling, rather than the presence or absence of an occupant.”

{¶12} In the case sub judice, although Wilma Good was no longer living in her house, the house was not abandoned and all of her belongings, clothing and furniture remained in the house. There was testimony that she intended to move back into the house. As noted by appellee “[r]egardless of whether her health made her moving back likely or not, she did not abandon her home, was in a nursing home for long-term care, and her son testified that he had intentions of preparing the house for sale.” We find that the house maintained its residential purpose.

{¶13} Based on the foregoing, we find that there was sufficient evidence that the house was an “occupied structure” and that appellant’s conviction for burglary is not against the sufficiency of the evidence.

{¶14} Appellant’s sole assignment of error is, therefore, overruled.

{¶15} Accordingly, the judgment of the Muskingum County Court of Common Pleas is affirmed.

By Baldwin, J.

Delaney, P.J. and

Wise, J. concur.