[Cite as *State v. Austin*, 2009-Ohio-6258.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1011

Appellee — Trial Court No. CR-200802775

v.

Terry D. Austin — **DECISION AND JUDGMENT**

Appellant — Decided: November 20, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
James E. Vail, Assistant Prosecuting Attorney, for appellee.

Nicole I. Khoury, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Terry Austin, appellant, appeals a December 22, 2008 judgment of the Lucas County Court of Common Pleas convicting him of the offense of burglary, a

violation of R.C. 2911.12(A)(2) and (C) and a second degree felony, and sentencing him to serve four years imprisonment for the offense.[1]

{¶ 2} Under an August 6, 2008 indictment, Austin had been charged with two counts of burglary, for offenses allegedly occurring on July 11 and 29, 2008. He stood trial on the charges in December 2008. A jury returned guilty verdicts on both counts. The trial court granted a Crim.R. 29(C) motion by appellant and dismissed the July 11, 2008 count. This appeal concerns the conviction and sentence on the July 29, 2009 burglary charge for an offense occurring at 1716 Schomberg Street in Toledo, Ohio.

{¶ 3} Austin asserts two assignments of error on appeal:

{¶ 4} "1. The conviction was against the Manifest Weight of the Evidence.

{¶ 5} "2. The Trial Court Abused its Discretion by Imposing a Sentence that was not the shortest authorized."

{¶ 6} In appeals, where it is claimed that a verdict is against the manifest weight of the evidence, an appellate court acts as a "thirteenth juror," reweighs the evidence, and may disagree with a factfinder's conclusions on conflicting testimony. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387; *State v. Lee*, 6th Dist. No. L-06-1384, 2008-Ohio-253, ¶ 12. "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in

[1]The trial court amended the judgment by a nunc pro tunc order on March 13, 2009, to meet the requirements of a final appealable order pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330.

resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and new trial ordered." *Thompkins* at 387, quoting with approval, *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Reversals on this ground are granted "only in the exceptional case in which the evidence weighs heavily against conviction." Id.

{¶ 7} Dwayne DeLeon testified at trial that on the morning of July 29, 2008, he resided across the street from 1716 Schomberg Street and that he was outside. He saw appellant ride a bicycle south on Schomberg looking to the left and right as he rode. DeLeon testified that what caught his attention at the time was the fact that there was a door "wide open" across the street. The exterior door to the house was open, but an interior screen door was closed.

{¶ 8} DeLeon testified that he saw appellant return northbound on Schomberg and ride the bike into the driveway across the street. He saw appellant walk to the open door. According to DeLeon, appellant "jiggled the screen door," looked to his left and right, and then entered the house. Concerned, DeLeon called police. DeLeon testified that it was a "good five minutes" until police arrived after he called.

{¶ 9} Officer Charles Hymore and Sergeant Oscar Morales of the Toledo Police Department responded to a dispatch reporting a burglary at the Schomberg address. Both testified at trial that they found appellant hiding in a closet in one of the bedrooms in the residence when they arrived and searched the house.

{¶ 10} Gina Alessandrini testified that she and her children reside at 1716 Schomberg. She was at work at the time police apprehended appellant at her residence on July 29, 2008. Her children were engaged in 4-H Club activities elsewhere. Alessandrini testified that it was not unusual for her daughter Megan to come home for something and return to 4-H during the day. Alessandrini had not given appellant permission to be in her residence.

{¶ 11} Ms. Alessandrini testified that she rushed home after she received a telephone call from a neighbor. Police were there when she arrived. At that point appellant was there with police. The home "looked like somebody had gone through some things quickly." She saw that dresser drawers in her sons' room were opened. Nothing was taken from the home.

{¶ 12} Detective Andre Cowell of the Toledo Police Department burglary unit also testified at trial. He testified concerning a waiver of rights executed by appellant and statements that appellant made to Cowell afterwards. According to Detective Cowell, appellant stated that he went to the Alessandrini residence after a call from a man named Josh who stated that he was interested in buying some property that appellant had. This property was described by appellant to Cowell as "some hot stuff." Appellant told Cowell that he and Josh were to meet at the Schomberg address.

{¶ 13} Appellant was convicted of a violation of R.C. 2911.12(A)(2) and (C). R.C. 2911.12 provides in pertinent part:

{¶ 14} "2911.12 Burglary

{¶ 15} "(A) No person, by force, stealth, or deception, shall do any of the following:

{¶ 16} "* * *

{¶ 17} "(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;

{¶ 18} "* * *

{¶ 19} "(C) Whoever violates this section is guilty of burglary. A violation of division (A)(1) or (2) of this section is a felony of the second degree. * * *"

{¶ 20} Appellant argues that his conviction is against the manifest weight of the evidence with respect to proof of two elements of the offense: proof that he used "force, stealth, or deception" to enter the residence and proof that he acted with a purpose to commit a criminal offense in the residence. He has not claimed that the evidence at trial was insufficient to support a conviction.

{¶ 21} Appellant argues that the witnesses at trial testified that the door to the premises was unlocked and that there was no sign of forced entry into the house. Appellant asserts that his conviction is against the manifest weight of the evidence

because proof of entry by force, stealth, or deception is lacking in the record. The state contends in response that entry to the house was gained only through opening a closed, but unlocked, screen door and that the force requirement was met by proof that appellant gained entry through the screen door.

{¶ 22} Ohio decisions recognize that unauthorized entry into a residence through use of an unlocked, closed door is sufficient to prove the force element for a conviction of burglary. *State v. Harris*, 8th Dist. No. 90699, 2008-Ohio-5873, ¶ 24; *State v. Austin*, 2nd Dist. No. 20445, 2005-Ohio-1035, ¶ 17; *State v. Tomak*, 10th Dist. No. 03AP-1188, 2004-Ohio-6441, ¶ 15; *State v. Lane* (1976), 50 Ohio App.2d 41, 46. Here, entry to the house was gained through use of a closed but unlocked screen door.

{¶ 23} Appellant also argues that his conviction was against the weight of the evidence because the state failed to show that he purposely intended to commit a criminal offense while trespassing in the home. Appellant argues that such evidence was lacking because appellant had no criminal tools with him, had nothing with him to hurt anyone or to damage any property, and because nothing was taken from the house.

{¶ 24} The state argues that proof of criminal intent was established through the testimony of Gina Alessandrini that "it looked like somebody had gone through something quickly" and that her sons' dresser drawers were opened. Alternatively, the state argues that appellant admitted criminal purpose by admitting a criminal purpose for

entering the house—to meet someone in order to sell stolen property in violation of R.C. 2913.51.

{¶ 25} Here, appellant was apprehended by police soon after he entered the house. There was little time for him to commit overt acts inside the premises to demonstrate criminal intent. Ohio cases have recognized that an inference can arise of criminal intent under such circumstances: "[T]here is a reasonable inference that one who forcibly enters a dwelling, or a business place, does so with the intent to commit a theft offense in the absence of circumstances giving rise to a different inference." *State v. Flowers* (1984), 16 Ohio App.3d 313, 315; *State v. Plachko,* 8th Dist. No. 91358, 2009-Ohio-1687,¶ 15; *State v. Levingston* (1995), 106 Ohio App.3d 433, 436; *State v. Beebe* (Mar. 13, 1992), 6th Dist. No. L-91-151.

{¶ 26} We have reviewed the record. In our view a jury could reasonably conclude that appellant had been cruising the neighborhood looking for open doors to present an opportunity to commit a theft offense and that he chose to take the opportunity presented by an open exterior door to the Alessandrini house. Additionally, appellant demonstrated a concern over whether he was being observed by others as he entered the house. Dresser drawers in one bedroom were opened and "it looked like someone had gone through something quickly." Finally, appellant was found hiding from police in a bedroom closet -- an admission by appellant of his own consciousness of guilt. See *State*

v. Eaton (1969), 19 Ohio St.2d 145, 160. In our view there was ample evidence to conclude that appellant entered the house with the intent to commit a theft offense.[2]

{¶ 27} In our view the jury verdict was not against the manifest weight of the evidence either with respect to proof of use of "force, stealth, or deception" to commit the burglary or with respect to proof of purpose to commit a criminal offense in the residence. Appellant's Assignment of Error No. 1 is not well-taken.

{¶ 28} Under Assignment of Error No. 2, appellant claims the trial court abused its discretion by not imposing the minimum sentence for the burglary offense. The trial court sentenced appellant to a four year prison term. The minimum sentence for a second degree felony is two years. R.C. 2929.14(A)(2). The maximum sentence is eight years. Id.

{¶ 29} After the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at paragraph seven of syllabus. Sentencing courts, however, remain required to "carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in

[2]We express no opinion on the state's alternative argument that the element of criminal intent was met by appellant's admission that he was meeting someone to sell stolen property.

considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶ 30} The standard of review on appeal of felony sentencing is set forth in the Ohio Supreme Court's decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26.[3] Appellate courts "must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Id.

{¶ 31} Appellant argues that his sentence fails the second prong of the *Kalish* standard. He claims that his four year sentence was an abuse of discretion. "An abuse of discretion is '"more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable."' *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144." *State v. Kalish* at ¶ 19.

{¶ 32} Appellant argues that his sentence is not supportable under either R.C. 2929.11 or 2929.12. Counsel for appellant, both at sentencing and on appeal, have argued also that a lesser sentence was appropriate due to the fact that appellant suffered a

[3]The *Kalish* decision is a plurality decision.

serious head injury in the past and that the injury has affected his abilities. Appellant did not offer expert opinion testimony or evidence at sentencing to support his contention that the head injury has affected his conduct.

{¶ 33} At the sentencing hearing the trial court stated that it had considered the record, oral statements, a victim impact statement, and appellant's presentence investigation report in deciding sentence. It also indicated that it had considered "the principles and purposes of sentencing under [R.C.] 2929.11" and "balanced the seriousness and recidivism factors under [R.C.] 2929.12."

{¶ 34} The trial court discussed with appellant at sentencing the fact that he had not been pressured into committing this offense by anyone, that he had acted alone, and that while the court understood that appellant has suffered health problems from an injury in the past, that appellant nevertheless needed to learn to make better choices. The court also stated that it considered appellant's past record in determining sentence. Appellant has a record of a prior conviction for burglary in 2003.

{¶ 35} In view of the foregoing and after a review of the record, this court finds that the trial court's imposition of a four year prison term as sentence in this case is not contrary to law and does not constitute an abuse of discretion. Appellant's second assignment of error is not well-taken.

{¶ 36} On consideration whereof, this court finds that substantial justice was done the party complaining. We affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay costs, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Richard W. Knepper, J. _____
CONCUR.
JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.