

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

State of Ohio

Court of Appeals No. L-08-1112

Appellee

Trial Court No. CR07-3619

v.

Latron Tall

DECISION AND JUDGMENT

Appellant

Decided: June 11, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

James J. Popil, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Latron Tall, appeals from his conviction in the Lucas County Court of Common Pleas for aggravated burglary, a violation of R.C. 2911.11(A)(1) and a felony of the first degree. For the reasons that follow, we affirm.

{¶ 2} Appellant was indicted on one count of aggravated burglary on December 17, 2007. Following a jury trial, he was convicted and sentenced to serve five years in prison.

{¶ 3} Appellant's original counsel then filed a merit brief pursuant to *Anders v. California* (1967), 386 U.S. 738, requesting leave to withdraw. Counsel's request was granted. However, new counsel was assigned upon this court's finding that meritorious appealable issues existed. *State v. Tall*, 6th Dist. No. L-08-1112. Appellant now appeals setting forth the following assignments of error:

{¶ 4} "I. The conviction against appellant Latron Tall was against the manifest weight of the evidence.

{¶ 5} "II. The conviction against appellant Latron Tall was not supported by the sufficiency of the evidence.

{¶ 6} "III. Appellant Latron Tall was denied the effective assistance of counsel."

{¶ 7} Appellant's first two assignments of error will be considered together. Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency of the evidence is purely a question of law. *Id.* Under this standard of adequacy, a court must consider whether the evidence was sufficient to support the conviction, as a matter of law. *Id.* The proper analysis 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." *State v.*

Williams (1996), 74 Ohio St.3d 569, 576, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 8} In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 387. In making this determination, the court of appeals sits as a "thirteenth juror" and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 9} R.C. 2911.11(A)(1), aggravated burglary, reads as follows:

{¶ 10} "No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶ 11} "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;"

{¶ 12} Christina Black testified that in 2007, she dated appellant. On December 8 of that year, she was in a car with appellant and two other friends, one of whom was

driving. She and appellant began fighting and appellant started hitting her in the head and nose. She testified she had blood running down her face. She asked her friend to drive her home. When they arrived at her house, she jumped out of the car and ran to her front door. Appellant ran after her. Christina Black testified that she tried to shut the door behind her but appellant pushed through and forced his way into the house. Appellant started hitting her again. This prompted Christina Black's father to intervene. He asked appellant to leave the house. Christina Black testified that appellant then began hitting her father. Christina Black's uncle, who also lives at the residence, started hitting appellant with a baseball bat.

{¶ 13} Robert Black testified that he is Christina Black's father and that he owns the home he lives in on Balkan Street in Toledo. On December 8, 2007, he was upstairs in his bedroom when he heard loud noises coming from outside. He turned on his security camera and saw his daughter running out of a car with appellant right behind her. Robert Black testified that he went downstairs and saw appellant holding his daughter down on the sofa. His daughter told appellant to leave and Robert Black told appellant to leave. This prompted appellant to grab Robert Black and throw him against a bookcase. Robert Black testified that appellant did not live at the house, he had no belongings at the house, and did not have a key to the house. Robert Black acknowledged that approximately a month or so before this incident, appellant stayed at the Black residence for three days while he recovered from an injury.

{¶ 14} John Hairisen testified that he is Robert Black's brother-in-law and that he lives at the Black residence on Balkan Street. On December 8, 2007, he was in the basement watching television when he heard his mother and his sister calling him for help. He came upstairs and found appellant assaulting Robert Black. He tried to pull appellant away but he was not strong enough. He then picked up a baseball bat and struck appellant. When appellant saw the police arrive, he attempted to leave through the back door but he could not get it open so he fled to the basement. Hairisen testified that when he saw appellant in the house, he was surprised because it was his understanding appellant was not allowed to be in the house.

{¶ 15} Christina Black's mother, also named Christina Black, testified that she lives at the house on Balkan Street with her family. On December 8, 2007, she was at home when her daughter, bleeding, came running into the house. She watched as her daughter tried to shut the door on appellant. She testified that appellant forced his way inside and refused to leave. Appellant then pinned her daughter on the sofa. Mrs. Black testified that she called her husband and brother for help and then telephoned the police. She testified that appellant never lived at the Balkan Street house, that there were no personal belongings of appellant's in the house, and appellant was not welcome in the house because of his substance abuse problems.

{¶ 16} Toledo Police Officer, Clifford Warstler, testified that he was working on December 8, 2007, when he was dispatched to the Black home to investigate a "fight in progress." When he arrived, he was told that appellant was in the basement hiding

behind the furnace. Officer Warstler went down to the basement and arrested appellant. Warstler testified that appellant, Christina Black and her father, Robert Black, exhibited facial injuries.

{¶ 17} Appellant's mother testified that she believed appellant lived at the Balkan Street house for about a month and a half. Appellant's friend, Antonio Nunn, testified that appellant was living at the Balkan Street house on December 8, 2007. Appellant's friend, Tyler Beebe, testified that appellant often stayed at the Balkan house but he could not identify any particular dates. Ryan Thompson testified that he was the one who drove Christina Black home on December 8 and did not see appellant and Christina fighting in the back of his car.

{¶ 18} Appellant took the stand in his own defense. He testified that he lived at the Black residence for a few weeks before December 8. He testified that he and Christina Black shared one room with a television and a bed. On December 8, 2007, he and Christina Black argued. When Ryan Thompson dropped Christina Black off at her parents' house, appellant went with her hoping to retrieve his personal belongings.

{¶ 19} Appellant testified that Christina Black opened the door of the house and let him inside. He testified that he had a short conversation with Christina Black's grandmother before he and Christina Black started fighting again. Appellant testified that they were fighting about where appellant would be spending the night. Appellant testified that Christina Black had asked him to stay at the Black residence. When her family made it clear they did not want him to stay, he asked for his personal belongings.

He testified that everyone began arguing and the next thing he knew, he was hit with a baseball bat by Hairisen. He got away from Hairisen and ran down into the basement to get his clothes from the dryer. However, because he had to bend down to get his clothes out of the dryer, he became dizzy and passed out on the basement floor where he was found by the police.

{¶ 20} The trier of the facts, in this case the jury, heard evidence that appellant forced his way into an occupied structure and assaulted the residents. It is clear that the jury in this case chose to believe the testimony of the Black family over the testimony of appellant. This is a matter of credibility within the province of the jury. On review, we cannot say that the jury clearly lost its way or perpetrated a manifest miscarriage of justice. Furthermore, we find the state presented sufficient evidence from which, when viewed in a light most favorable to the state, a rational trier of fact could have found appellant guilty beyond a reasonable doubt of aggravated burglary. Appellant's first and second assignments of error are found not well-taken.

{¶ 21} In his third assignment of error, appellant alleges he was denied effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. This standard requires appellant to satisfy a two-prong test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived

errors, the results of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668. This test is applied in the context of Ohio law that states that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶ 22} Appellant contends his counsel was ineffective in failing to request a jury instruction on the lesser included offense of burglary. Also, appellant contends his counsel was ineffective in failing to object to the trial court's failure to instruct the jury on the lesser included offense of burglary.

{¶ 23} The Supreme Court of Ohio has recognized that the "[f]ailure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel." *State v. Griffie* (1996), 74 Ohio St.3d 332, 333. As for counsel's failure to object, absent plain error, the failure to object to improprieties in jury instructions, as required by Crim.R. 30, is a waiver of the issue on appeal. *State v. Underwood* (1983), 3 Ohio St.3d 12, 13. Finding no plain error, that is, no evidence that the outcome of appellant's trial would have been different, we find appellant's third assignment of error not well-taken.

{¶ 24} On consideration whereof, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal 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

Arlene Singer, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
