[Cite as *State v. Gonzales*, 2012-Ohio-1876.]

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

State of Ohio — Court of Appeals No. WD-10-063

Appellee — Trial Court No. 2010-CR-0278

v.

Jamie R. Gonzales — **DECISION AND JUDGMENT**

Appellant — Decided: April 27, 2012

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Aram Ohanian, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Wood County Court of Common Pleas, following a jury trial, convicting appellant Jamie Gonzales of burglary, a felony of the fourth degree, and sentencing him to a prison term of 17 months. We affirm.

A. Facts and Procedural Background

{¶ 2} On June 17, 2010, the Wood County Grand Jury indicted appellant on one count of burglary in violation of former R.C. 2911.12(A)(4), a felony of the fourth degree, and one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree.[1] Appellant pleaded not guilty to the charges, and the matter proceeded to a jury trial on September 24, 2010. The facts giving rise to the charges are largely undisputed.

{¶ 3} On April 18, 2010, at around 11:00 p.m., Stephanie Wilson returned to her apartment in Bowling Green, Ohio. Wilson testified that she entered the house through the back door, proceeded down a hallway, and entered her bedroom. Both the back door and the door to Wilson's bedroom were closed but unlocked. As she proceeded down the hallway she could hear the sound of the television in the living room. When Wilson entered her bedroom, she noticed clothes moving in her closet. When she turned on the light and turned around, she saw appellant standing in her closet.

{¶ 4} Surprised and confused, Wilson confronted appellant. She testified that appellant said something like "Tim sent me here. Told me to come in and scare you." Wilson responded, "I don't know a Tim. * * * I don't know you. Am I suppose [sic] to know you?" To which appellant replied, "I don't think so. I don't think you know me."

[1] R.C. 2911.12 was amended effective September 30, 2011, renumbering R.C. 2911.12(A)(4) to R.C. 2911.12(B). R.C. 2911.12(A)(2) remained unchanged.

{¶ 5} At this point, appellant had come out of the closet and into the bedroom. Wilson testified that although he smelled like alcohol, he was able to answer her questions and he was not stumbling or falling down. Appellant then introduced himself and stuck out his hand to shake hers. Knowing that she heard the television in the other room and that her roommates were home, Wilson said, "I'm going to go to the living room." Appellant followed Wilson into the living room. Upon seeing that Wilson was scared, and realizing that appellant was not supposed to be in the house, Wilson's roommate Autumn Dettmann and her boyfriend, Kevin, told appellant to get out of the house. Initially, appellant said "okay," but did not move. Dettmann then stood up, pointed to the front door, and again asked appellant to leave. Kevin also stood up, went over and opened the front door, and escorted appellant out. One of Wilson's other roommates, Shannon, was arriving just as appellant was leaving, and saw him get on his bicycle and ride away.

{¶ 6} Bowling Green Patrol Officer Kristopher Garman testified that he received a call from dispatch regarding this incident. He responded to the area to look for the man who was in Wilson's apartment, later identified as appellant. Shortly thereafter, Garman saw a man who matched the description riding his bicycle a couple of blocks from Wilson's apartment. Garman pulled in front of the bicycle and blocked the roadway with his patrol car. He testified that appellant rode his bicycle around the patrol car, despite Garman telling him repeatedly to stop. Garman then got his pepper spray out and said, "Jamie, stop or I'm going to spray." Appellant stopped the bike. Garman secured

appellant and conducted a pat down, finding a digital camera in his pocket. A later search of the camera revealed that it did not contain any pictures of Wilson or her residence. Garman then transported appellant to the location of the incident, where Wilson, Dettmann, and Kevin positively identified him.

{¶ 7} Following the close of the state's case, appellant moved for acquittal under Crim.R. 29. The trial court granted the motion as to the count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree, but denied the motion as to the count of burglary in violation of former R.C. 2911.12(A)(4), a felony of the fourth degree.

{¶ 8} Appellant then testified in his own defense. His direct testimony recounted that day's events, and was centered largely on the amount of alcohol he consumed. Appellant testified that he was very intoxicated when he went into Wilson's apartment, and that he might have been looking for a sink to wash out his mouth when he opened the door to Wilson's bedroom and stumbled into Wilson's closet. Appellant contended that because of his drunken stupor, he did not "knowingly" end up in Wilson's apartment.

{¶ 9} After deliberating, the jury found appellant guilty on the remaining count of burglary. The trial court proceeded immediately to sentencing, and sentenced appellant to 17 months in prison.

B. Assignments of Error

{¶ 10} Appellant now timely appeals, asserting three assignments of error:

1. Appellant's Conviction fell against the Manifest Weight of the evidence.

2. The Trial Court erred by allowing a police officer to allude to prior bad acts committed by Appellant.

3. The Trial Court abused its discretion in sentencing Appellant to seventeen months for a felony of the fourth degree.

II. Analysis

A. Manifest Weight

{¶ 11} Appellant argues in his first assignment of error that the jury clearly lost its way in finding him guilty because the evidence at trial failed to establish that he knowingly trespassed into the apartment. To support his argument, appellant points to his testimony that "he could not remember how he ended up inside Wilson's apartment or her bedroom, thinking it was someplace else," and to Wilson's testimony that she thought appellant was not "all there."

{¶ 12} In reviewing a manifest weight of the evidence claim, the appropriate inquiry is whether

> there is *substantial* evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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." (Emphasis sic; internal citations

omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 81.

We note that reversing a verdict and ordering a new trial is appropriate "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "Weight is not a question of mathematics, but depends on its *effect in inducing belief*." (Emphasis sic.) *Id.* Further, we must bear in mind that "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact may believe all, some, or none of what a witness says. *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

{¶ 13} In this case, appellant was convicted of burglary in violation of former R.C. 2911.12(A)(4), which states, "No person, by force, stealth, or deception, shall * * * Trespass in 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." Criminal trespass, in turn, provides, "No person, without privilege to do so, shall * * * Knowingly enter or remain on the land or premises of another." R.C. 2911.21(A)(1). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). "Whether a person acts knowingly can only be determined, absent a

defendant's admission, from all the surrounding facts and circumstances." *State v. Huff*, 145 Ohio App.3d 555, 563, 763 N.E.2d 695 (1st Dist.2001). As such, the test for whether a defendant acted knowingly is subjective, but it is determined by objective criteria. *State v. Elliott*, 104 Ohio App.3d 812, 821, 663 N.E.2d 412 (10th Dist.1995).

{¶ 14} The trial testimony cumulatively indicated that appellant entered the back door of a stranger's residence, proceeded down the hallway past a washer and dryer, opened a closed door, went into an unfamiliar bedroom that had flowers and other decorations on the wall and dresser, and ended up in a closet full of women's clothes. From these facts, we cannot say that the jury lost its way in determining that appellant knowingly trespassed in Wilson's apartment. Further, appellant cannot claim that his intoxication prevented him from acting knowingly because "[v]oluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense." R.C. 2901.21(C); *see also State v. Kelly*, 6th Dist. No. F-11-002, 2011-Ohio-5687; *State v. Stockhoff*, 12th Dist. No. CA2001-07-179, 2002-Ohio-1342. Therefore, we hold that appellant's conviction was not against the manifest weight of evidence. Accordingly, appellant's first assignment of error is not well-taken.

B. Prior Bad Acts

{¶ 15} In his second assignment of error, appellant argues that the trial court erred in allowing Officer Garman's testimony, which he claims gave the jury a basis to infer his prior bad or criminal acts in violation of Evid.R. 404(B). Evid.R. 404(B) provides,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Specifically, appellant takes exception to the following portion of Officer Garman's testimony:

> Q. So what did you do at that point when he went around you?
>
> A. I started to chase after him. *Due to previous experiences, I got my spray out.* I said, "Jamie, if you don't - - "
>
> MR. GOLD: Objection, Your Honor. Very prejudicial his previous experience.
>
> THE COURT: Overruled. (Emphasis added.)

Notably, the court did not give a limiting instruction regarding the officer's statement. Appellant argues that this testimony is highly prejudicial because it showed the jury that (1) "Appellant had a prior criminal history," and (2) "Officer Garman quickly threatened to use the pepper spray on Appellant, letting the jury know that he felt Appellant could easily get out of control." Appellant contends that this testimony tainted the jury's minds and the trial.

{¶ 16} The state, on the other hand, argues that Officer Garman's testimony is not prior bad acts testimony. It contends that because Garman was an eight-year veteran of

the Bowling Green Police Department, his statement "[d]ue to previous experiences" reasonably could be interpreted to refer to his experience in apprehending fleeing offenders. Further, the state argues that even if it is prior bad acts testimony, the testimony is not unfairly prejudicial to appellant because evidence of his prior convictions was properly admitted, without objection, for impeachment purposes under Evid.R. 609.

{¶ 17} We agree with the state. Even assuming it was error to admit this testimony of Officer Garman, such error was harmless beyond a reasonable doubt. Crim.R. 52(A); *State v. DeMarco*, 31 Ohio St.3d 191, 195, 509 N.E.2d 1256 (1987). In addition to the fact that appellant confirmed his prior criminal history on cross-examination, his own direct testimony established that he forcefully, and without permission, entered Wilson's apartment and went into her bedroom while her roommates were present or likely to be present.

{¶ 18} Accordingly, appellant's second assignment of error is not well-taken.

C. Sentencing

{¶ 19} In his third and final assignment of error, appellant argues that the trial court abused its discretion in sentencing him to 17 months in prison. Appellant argues that this incident, which unfolded without any violence, threats, or real resistance from him, and which came about simply because of an apparent alcoholic blackout, does not support a near maximum sentence.

{¶ 20} In reviewing a felony sentence, we apply the two-step analysis set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 4. "First, [we] 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 shall be reviewed under an abuse-of-discretion standard." *Id.* Abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 21} Here, appellant's sentence falls within the statutory range of penalties provided by R.C. 2929.14 in effect at that time. In addition, the judgment entry states that the trial court carefully reviewed "the record, all oral statements, the testimony at trial, * * * [and] the purposes and principles of sentencing as well as the seriousness and recidivism factors." Thus, the sentence is not clearly and convincingly contrary to law, thereby satisfying the first prong of *Kalish*.

{¶ 22} Turning to the second prong, we hold that the trial court did not abuse its discretion by sentencing appellant to serve a 17-month prison term. The trial court noted appellant's long history of criminal convictions including attempted burglary, multiple trespass charges, voyeurism, receiving stolen property, and assault on a peace officer. Further, nothing in the record suggests that the trial court's choice of this sentence was unreasonable, arbitrary, or unconscionable.

{¶ 23} Accordingly, appellant's third assignment of error is not well-taken.

III. Conclusion

{¶ 24} For the foregoing reasons, the judgment of the Wood 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.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE