[Cite as *State v. Stroud*, 2013-Ohio-1483.]

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

State of Ohio — Court of Appeals No. S-11-015

Appellee — Trial Court No. 10 CR 1359

v.

Walter A. Stroud — **DECISION AND JUDGMENT**

Appellant — Decided: April 12, 2013

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Megan Mattimoe, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas. Appellant was indicted on one count of burglary, in violation of R.C. 2911.12(A)(4), a felony of the fourth degree, and one count of inducing panic, in violation of R.C. 2917.31(A)(2), a felony of the fifth degree. On February 17, 2011, the

case went to jury trial and appellant was found guilty. Appellant was sentenced to serve concurrent terms of incarceration of 11 months for inducing panic and 17 months for burglary.

{¶ 2} Appellant, Walter Stroud, sets forth the following two assignments of error:

> I. APPELLANT'S CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE STATE FAILED TO PROVE EACH ELEMENT OF THE CRIME OF BURGLARY BEYOND A REASONABLE DOUBT. THESE ERRORS VIOLATED APPELLANT'S RIGHT TO DUE PROCESS PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS TEN AND SIXTEEN, ARTICLE I OF THE OHIO STATE CONSTITUTION.
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> II. THE TRIAL COURT ERRED WHEN IT FAILED TO NOTIFY APPELLANT, ON THE RECORD AND IN OPEN COURT, THAT THE COURT ORDERED APPELLANT TO PAY THE COSTS OF PROSECUTION AND THE COST OF APPOINTED COUNSEL. THIS ERROR VIOLATED APPELLANT'S RIGHT TO DUE PROCESS PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS TEN AND SIXTEEN, ARTICLE I OF THE OHIO STATE CONSTITUTION.

{¶ 3} The following undisputed facts are relevant to this appeal. On December 4, 2010, an incident occurred at a home located at 800 Smith Road in the city of Fremont, Ohio. The vacant home was owned by appellant's mother, Gail Stroud. Stroud's health issues had necessitated her moving into an assisted living community. Accordingly, the utilities had been shut off and the home was being prepared for sale.

{¶ 4} Appellant was incarcerated on a separate matter at the time his mother moved into an assisted living community. However, appellant was aware of the situation regarding his mother's home. In addition, appellant's brother testified that the house was unoccupied and empty with the exception of realtors who would occasionally stop by in connection to the pending sale.

{¶ 5} On December 4, 2010, appellant returned to his mother's home several times, leading to the charges underlying this case. Appellant claimed that he was in the home with her permission upon his release from prison in order to retrieve his belongings from the home.

{¶ 6} While appellant was in his mother's home on December 4, 2010, a Fremont police officer came to the door and notified appellant that he did not have permission to be there. The officer called Stroud to ascertain whether appellant had permission to be in her home. Stroud stated that she did not want appellant in her home. The Fremont police then transported appellant to a motel where he claimed to be staying.

{¶ 7} After being dropped off at the motel by the police, appellant realized that he had forgotten an overnight bag at the house. Despite being advised by the police earlier

that day not to reenter the premises, appellant returned to the home. Upon his return, appellant encountered his brother outside the home. A confrontation ensued. Appellant threatened his brother and sister-in-law. In turn, appellant's brother and sister-in-law called 9-1-1 and departed from the premises.

{¶ 8} Appellant then entered the home through a garage window that he apparently broke out. A short time later, the police arrived. Appellant barricaded himself inside a room within the house. Appellant threatened the officers who were also present inside the house. Appellant claimed to be in possession of a "tec-9" machine pistol. Appellant's actions culminated in a standoff with police lasting several hours and involving multiple area police departments. In addition, neighbors were evacuated for safety reasons and the street was closed off to traffic. Fortunately, the incident concluded with no injuries. Appellant was taken to the local hospital for a mental health evaluation. These events culminated in appellant being indicted for felony offenses of burglary and inducing panic.

{¶ 9} At trial, appellant was convicted of one count of burglary, in violation of R.C. 2911.12(A)(4), a felony of the fourth degree, and one count of inducing panic, in violation of R.C. 2917.31(A)(2), a felony of the fifth degree. Appellant was sentenced to a term of 11 months of incarceration for inducing panic and 17 months of incarceration for burglary. The sentences were to be served concurrently.

{¶ 10} Appellant asserts in his first assignment of error that the evidence at trial was insufficient to support the burglary conviction and the burglary conviction was

against the manifest weight of the evidence. The applicable standard of review is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.3d 492 (1991),

> 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.

In conjunction with this, when determining whether a verdict is against the manifest weight of the evidence, the appellate court makes a determination as to whether in resolving conflicts in the evidence, the factfinder "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶ 11} Appellant argues that his burglary conviction should not stand because the state failed to prove a requisite element of burglary beyond a reasonable doubt. Accordingly, we must review and consider the record to determine if any rational factfinder could have found the essential elements of burglary proven beyond a reasonable doubt. *See also State v. Mitchell*, 183 Ohio App.3d 254, 257, 2009-Ohio-3393 (6th Dist.).

{¶ 12} R.C. 2911.12 provided at the relevant time that: "[n]o person, by force, stealth or deception shall * * * [t]respass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or is likely to be present." Appellant maintains that the element of a person being present or likely to be present was not proven under the facts and circumstances of this case.

{¶ 13} The record reflects that appellant clearly used force to trespass into a permanent habitation. The critical issue for our determination is whether any person other than appellant was present or was likely to be present.

{¶ 14} This court has held that "the term likely to be present connotes *something more* than a mere possibility" and "the state must prove that it was *objectively likely* that someone could be present at the time of the break-in." *Mitchell* at ¶ 18. (Emphasis added.)

{¶ 15} Appellee maintains that because appellant's brother was listed on the deed and had been present outside of the home prior to the break-in, it was objectively likely that someone would have been present. However, upon our review of this case, we are not convinced.

{¶ 16} On the contrary, the record reflects that appellant was aware that his mother was no longer residing at the home and the home was vacant. In addition, upon entering his mother's home earlier on the day of this incident, appellant personally observed that the home remained vacant. Notably, appellant's own brother testified that the only time

people were ever present inside the home was on the random occasions that realtors would be present in connection to the home being put up for sale.

{¶ 17} No one was present inside the home when appellant entered it. In conjunction with this, the record is devoid of compelling evidence establishing that it was objectively likely that someone would be present inside the home at the time appellant entered. As such, we find that the element of burglary requiring a showing that a person was present or was likely to be present was not established.

{¶ 18} Given these facts and circumstances, we find the appellant's burglary conviction was not supported by sufficient evidence. An element of the burglary statute was not satisfied. Wherefore, we find appellant's first assignment of error well-taken.

{¶ 19} Appellant's second assignment of error claims the trial court erred by not informing appellant on the record of appellant's obligation to pay court costs and attorney's fees. After a thorough review of the record, there is no indication the court indicated to appellant that he would be required to pay prosecution and appointed counsel fees. Appellant's second assignment of error is found well-taken.

{¶ 20} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is hereby reversed in part, and affirmed, in part. The burglary conviction is vacated, the sentence imposed for the inducing panic conviction is affirmed, and the matter is remanded for costs and fees to be addressed by the trial court. Appellee is ordered to pay the costs of this appeal pursuant App.R. 24.

Judgment reversed, in part,
and affirmed, in part.

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE