[Cite as *State v. McSurley*, 2013-Ohio-2249.]

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

State of Ohio — Court of Appeals No. F-12-003

Appellee — Trial Court No. 11CR000011

v.

Fred McSurley — **DECISION AND JUDGMENT**

Appellant — Decided: May 31, 2013

* * * * *

Scott Haselman, Fulton County Prosecuting Attorney,
and Paul Kennedy, Assistant Prosecuting Attorney, for appellee.

David Klucas, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas, which found appellant guilty of one count of burglary, in violation of R.C. 2911.12, a felony of the fourth degree, and sentenced appellant to a two-year term of

community control. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Freddie McSurley, sets forth the following five assignments of error:

> 1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT EXCUSED TRIAL JUROR SUSAN KUNKLE WITHOUT PROVIDING APPELLANT AN OPPORTUNITY TO QUESTION HER OR TENDER AN ALTERNATIVE REMEDY.
>
> 2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT EXCUSED PROSPECTIVE JUROR PHILLIP EDWARDS FOR CAUSE.
>
> 3. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT INSTRUCTED THE JURY ON THE MATERIAL ELEMENT OF FORCE.
>
> 4. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT INSTRUCTED THE JURY ON THE CULPABLE MENTAL STATE OF KNOWINGLY AND THE AFFIRMATIVE DEFENSE OF INVOLUNTARY INTOXICATION.
>
> 5. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DECLINED TO INSTRUCT THE JURY ON THE LESSER OFFENSE OF CRIMINAL TRESPASS.

{¶ 3} The following undisputed facts are relevant to this appeal. On January 27, 2011, a Swanton, Ohio couple was asleep in their bedroom on the second floor of their home. Prior to going to bed, the exterior doors of the home were fully closed such that anyone attempting to gain entry into the occupied residence would have been required to forcibly open one of the closed, exterior entry doors of the home.

{¶ 4} At approximately 3:00 a.m., the couple was awoken by their barking dog. The startled couple discovered appellant standing in their bedroom doorway. Appellant, a resident of Holland, Ohio, and unknown to the couple, stated that he was a looking for a lost dog, walked out of the bedroom, and shut the bedroom door.

{¶ 5} Faced with an intruder in his home in the middle of the night, the husband got out of bed and discovered appellant now down the hall looking into the bedroom of one of the couple's sleeping children. The husband instructed appellant that he needed to leave the home, went to an entry door of the home, opened it, and had appellant leave the home. Upon appellant's departure, the homeowner called the police.

{¶ 6} When the police arrived at the scene, they discovered appellant located across the street from the victims' home. The responding officers found appellant to be calm and effectively communicating, but evasive. Appellant conceded to having unlawfully entered the victims' closed residence in the middle of the night, and now claimed to have been looking for a cat. The responding officers observed that appellant was not exhibiting any indicia of intoxication or other mind altering substance usage.

Appellant was not in possession of any substances, lawful or unlawful, at the time of his arrest.

{¶ 7} On March 1, 2011, appellant was indicted on one count of burglary, in violation of R.C. 2911.12(A)(4), a felony of the fourth degree. On October 6, 2011, the matter proceeded to jury trial. At trial, appellant again acknowledged entering the closed residence of strangers in Swanton, Ohio, in the middle of the night and walking throughout both floors of the home. Appellant conveyed that he was diagnosed as bipolar in 1996. Appellant asserted that during the course of the evening prior to the incident he took an extra dosage of his prescribed bipolar medication. The record reflects that appellant's suggestion that his claimed extra dosage somehow compromised his legal culpability for his actions did not comport with any of the direct observations of the responding police officers or the victims.

{¶ 8} Following a jury trial, appellant was found guilty of the one count of burglary. On January 3, 2012, appellant was sentenced to a two-year term of community control. In addition, appellant was sentenced to 104 days of incarceration, with credit for the 104 days of incarceration that appellant had already served. Thus, no additional incarceration was imposed at sentencing. Lastly, appellant was ordered to undergo a mental health assessment and comply with all treatment recommendations. This appeal ensued.

{¶ 9} In the first assignment of error, appellant contends that the trial court abused its discretion in excusing a juror due to a family medical emergency and replacing her

with an alternate juror. In support, appellant contends that the trial court erred in executing this juror replacement without providing an opportunity to question the excused juror or explore options other than excusal.

{¶ 10} In the instant case, the relevant juror discovered that her husband sustained serious injury in a farming accident necessitating surgery to occur on the second day of the trial. The juror notified the trial court of the unexpected family medical emergency. Given the inevitable interference of the pending emergency medical surgery involving the juror's seriously injured spouse, the trial court acknowledged the inability of this juror to continue to serve on the jury and replaced her with the alternate juror. Based upon the timing of these events transpiring outside of the regular courthouse hours, neither party had the opportunity to directly question the dismissed juror. Appellant claims this constituted prejudicial error. We do not concur.

{¶ 11} It is well-established by Ohio law and related Ohio criminal rules that a trial judge possesses not only the discretion, but also the express authority, to determine that a juror is unable to continue to jury service and replaced that juror with an alternate.

{¶ 12} Crim.R. 24(G) explicitly authorizes the court to undertake the disputed course of action. It directs in relevant part, "Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." While this section does require that alternate jurors be subject to the same examination as original jurors in the course of the initial selection, it clearly does not direct that the juror found to

have become disqualified submit to a second round of examination by the parties in conjunction with the disqualification and removal from the jury. In conjunction with this, an Ohio appellate court faced with a similar situation to the instant case succinctly found, "the trial court is not required to examine a reportedly disabled juror personally, nor is it required to offer counsel and opportunity to do so, before replacing a seated juror with an alternate." *State v. Shields*, 15 Ohio App.3d 112, 472 N.E. 2d 1110 (1984), paragraph 3 of the syllabus.

{¶ 13} We find that the record clearly reflects that the trial court acted properly in promptly replacing a juror upon discovering that her husband was undergoing emergency medical surgery following severe injuries sustained in a farming accident. Appellant has failed to establish any reversible error caused by these actions. We find appellant's first assignment of error not well-taken.

{¶ 14} In appellant's second assignment of error, he contends that the trial court abused its discretion in excusing one of the prospective jurors during the course of voir dire. In support, appellant argues that because the prospective juror had fully served his prison sentence for a felony that the prospective juror had previously been convicted of, he should not have been removed for cause. We do not concur.

{¶ 15} The record shows that during the course of voir dire it came to the attention of the court that one of the prospective jurors had previously received a felony drug conviction in Williams County, Ohio. Even more significant to suitability for jury service, during direct questioning by the trial judge, the prospective juror acknowledged

that he possessed no documentation verifying that his rights had been restored and the prospective juror clearly stated to the trial judge that he felt that he had been treated unfairly by both the police officers and the judicial system itself.

{¶ 16} Crim.R. 24(C)(1) expressly permits a challenge for cause to be triggered by a situation in which, "the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury." Notably, the prospective juror furnished no evidence that his felony disqualification had been addressed such that he was restored to eligibility for service. We find that given both the prospective juror's prior felony conviction and his stated distrust of law enforcement and the judicial system, the excusal of this prospective juror for cause was wholly proper. It was not prejudicial to appellant. We find appellant's second assignment of error not well-taken.

{¶ 17} In the third assignment of error, appellant maintains that the trial court abused its discretion when instructing the jury on the material element of force in connection to the burglary charge. Specifically, appellant asserts that the inclusion of the phrase, "including opening an unlocked door," constituted reversible prejudice. We do not concur.

{¶ 18} The specific material facts of this case entailed an unknown person entering a home in the middle of the night through a closed, unlocked exterior entry door. Accordingly, it was both necessary and proper for the jury to be instructed that it is possible to determine that opening an unlocked entry door constitutes "force" in support of a burglary conviction. Given that a wealth of Ohio caselaw on this point expressly

acknowledges that unauthorized entry into a dwelling through an unlocked but closed door is adequate to prove the "force" element of burglary, the relevant comment to the Ohio Jury Instructions clearly states, "force may properly be defined as effort rather than violence to gain entrance into a residence including opening an unlocked door." 2 *Ohio Jury Instructions,* Section 511.12 (2009). We find that the trial court properly instructed the jury on the "force" element of burglary. We find appellant's third assignment of error not well-taken.

{¶ 19} In appellant's fourth assignment of error, he summarily concludes that the trial court prejudicially erred in its jury instruction on the mental state of "knowingly." Notably, appellant concedes, "much of the trial court's instructions are correct, including the standard O.J.I. instruction on the element of knowingly." Nevertheless, appellant proceeds to maintain that that the jury instructions were somehow allegedly convoluted and prejudicially compromised. We would note that the apparent basis of appellant's contention of a defective portion of the jury instructions is actually prefaced upon a segment of the instructions requested by appellant as an affirmative defense. Regardless, we have carefully reviewed the record of proceedings and find no prejudicial error. We find appellant's fourth assignment of error not well-taken.

{¶ 20} In appellant's final assignment of error, he asserts that the trial court committed prejudicial error in declining to submit a jury instruction on the lesser included offense of criminal trespass. The underlying crux of this argument is substantively analogous to the "force" argument which we rejected in response to

appellant's third assignment of error. Again, it is well-established in Ohio that unauthorized entry into a residence through a closed and unlocked door constitutes "force" for purposes of consideration of a burglary offense. Accordingly, the trial court did not abuse its discretion in declining to instruct the jury on the lesser offense of criminal trespass. We find appellant's fifth assignment of error not well-taken.

{¶ 21} Wherefore, we find that substantial justice has been done in this matter. The judgment of the Fulton County Court of Common Pleas is hereby 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

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE