[Cite as *State v. McClain*, 2014-Ohio-1306.]

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

State of Ohio — Court of Appeals No. L-13-1014

Appellee — Trial Court No. CR0201202748

v.

Robert E. McClain, III — **DECISION AND JUDGMENT**

Appellant — Decided: March 28, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Charles R. McDonald, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

JENSEN, J.

{¶1} Following a jury trial, defendant-appellant, Robert E. McClain, III, appeals the January 14, 2013 judgment of the Lucas County Court of Common Pleas finding him guilty of burglary, a violation of R.C. 2911.12(A)(1) and (D). For the reasons that follow, we affirm the trial court judgment.

I. Background

{¶2} On October 10, 2012, McClain allegedly burglarized a home located at 272 East Lake Street in Toledo, Ohio. According to evidence presented by the state at trial, at approximately 3:00 a.m., McClain, who goes by the nickname "Moo Moo," broke into the home of Betty Pearson through a bathroom window. Pearson, 78 years old, was inside the home along with her sons Ivan McCaskill and Jonathan McCaskill ("McCaskill"), who goes by "Joe Joe," "Joe Nathan," or "Joe Nay." The home was described as a duplex, with Pearson occupying one floor and her sons occupying the other.

{¶3} Pearson and McCaskill testified at trial. Pearson claimed that McClain knocked on her bedroom door. She asked who was there and he replied "Buzz." When she opened the door, McClain asked her for "a couple dollars" and she told him that she did not have any money. McClain then told Pearson that he was not supposed to be there because Pearson's son was angry with him. Pearson told him that she agreed that he should not be in their house. She called for McCaskill, who was asleep in his bedroom, and he told his mother to let McClain out. She did not know how McClain entered the home, but she walked him out through the front door. About an hour later, she went into the bathroom and found that the window had been pried out and the curtains and shade were on the ground. She awoke McCaskill to show him. McCaskill discovered at that

point that a ring and some cash he had left on the table in his room were missing. He claimed he had two $50 bills, two $5 bills, and a $10 bill.

{¶4} Pearson had a doctor appointment the next morning and did not report the incident to police until she returned. Detective Andre Cowell, one of the detectives who investigated the burglary, testified that Pearson called 9-1-1 around 2:00 p.m., but because the incident had a low priority relative to other incidents being investigated, police did not respond until around 6:40 p.m. While at the home, Detective Cowell looked around the bathroom window for fingerprints but there were none. He explained that fingerprints were not important, however, because Pearson and McCaskill knew McClain and were able to identify him. They also selected him from a photo array. Moreover, McClain had already been arrested and was carrying $103—which included two $50 bills—and some jewelry.

{¶5} The state presented audiotapes from three phone calls, as well as the transcripts from those calls. The calls were allegedly made by McClain from the Lucas County Correction Center ("LCCC"). Captain John Sylvester, the director of jail security, testified that LCCC issues prisoners a personal identification number ("PIN") which the prisoner must enter before making a phone call. The calls came from McClain's PIN and he identified himself during the calls as "Moo Moo." Phone calls made from LCCC begin with an automated message informing the caller that the call may be monitored or recorded.

{¶6} In the first call, McClain asks the woman with whom he is speaking who pressed charges against him. She tells him that "Joe Nay was talkin' 'bout his mom was." She asks him if he still has "the hundred" and McClain instructs her to tell Joe Nay that he will get it to him when he "get[s] out." In the second call, McClain instructs the woman to have "Larry" tell Joe Nay that McClain will get him his money when he gets out. He contemplates giving him $50 right away and another $50 later. In the third call, McClain tells the woman to tell Joe Nay to skip a court appearance so that McClain's case will be dismissed and that McClain will then give him his money and apologize to him.

{¶7} McClain presented no witnesses at trial, but in his defense, he highlighted the discrepancy between what was reported to the police as stolen and what McCaskill claimed at trial had been stolen. While McCaskill claimed at trial that McClain had taken a ring, two $50 bills, two $5 bills, and a $10 bill, he reported to Officer Douglas Rasik only that two $50 bills were missing. There was no mention of the missing ring, $10 bills, or five dollar bills. McClain also argued that no one calls McClain "Buzz," as Pearson testified the perpetrator identified himself, there was nothing unique about the $50 bills to identify them as having come from McCaskill, there were no fingerprints implicating McClain as the perpetrator, and identifications by victims can sometimes be incorrect.

{¶8} The jury ultimately found McClain guilty of burglary and he was sentenced to seven years' incarceration. He appeals the jury's verdict and assigns the following errors for our review:

I. THE JURY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]

II. THE STATE FAILED TO PROVE ALL ESSENTIAL ELEMENTS OF BURGLARY[.]

II. Law and Analysis

{¶9} In his first assignment of error, McClain claims that the jury verdict was against the manifest weight of the evidence. In his second assignment, he claims that the state failed to prove all essential elements of burglary. Because they are related, we will consider both assignments together.

{¶10} R.C. 2911.12(A)(1) provides that "No person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure * * * when another person * * * is present, with purpose to commit in the structure * * * any criminal offense." The state presented evidence that McClain (1) broke through the bathroom window of the Pearson/McCaskill home (2) without Pearson's or the McCaskills' permission (3) while Pearson and the McCaskills were home (4) in search of money, and (5) stole items of value from the home. This evidence addresses each of the essential elements of burglary.

{¶11} McClain argues that the state failed to establish that he entered the home with intent to commit a criminal offense. We disagree. McClain indisputably entered the home for the purpose of obtaining money, as evidenced by his conversation with Pearson that night. He was arrested with two $50 bills in his possession and made phone calls from jail during which he discussed a plan for returning McCaskill's money. This evidence was sufficient to establish that McClain entered the home for the purpose of committing a criminal offense. We, therefore, find McClain's second assignment of error not well-taken.

{¶12} Turning to McClain's first assignment of error, a challenge to the manifest weight of the evidence questions whether the state has met its burden of persuasion. The appellate court sits as a "thirteenth juror" and may review the entire record, weigh the evidence, make all reasonable inferences, and consider witness credibility. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). The appellate court determines whether the trier of fact "lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and new trial ordered." *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172,175, 485 N.E.2d 717 (1983). Manifest weight errors are found only in exceptional cases where the evidence weighs heavily against conviction. *Id.*

{¶13} McClain concedes that he was in the Pearson/McCaskill home, but denies that he stole anything. He denies that he had access to McCaskill's bedroom and he

argues that McCaskill's varying reports of what items had been stolen casts doubt on McCaskill's credibility. He questions why it took 16 hours for Pearson to report the crime and he points out that he was arrested in an area ten minutes away from the home even though the crime had reportedly occurred an hour-and-a-half earlier.

{¶14} The state presented evidence addressing many of McClain's challenges. For instance, it presented evidence that McCaskill was asleep when McClain entered the home and did not hear any of what transpired until his mother called to him to wake him. The jury could have inferred that McClain quietly entered McCaskill's room without being detected. As for the delay in reporting the crime, Pearson, an elderly woman, testified that she was very concerned about making it to her medical appointments. Detective Cowell testified that it was a relatively low priority crime and that the victims actually reported it at 2:00 p.m., but police were unable to respond until after 6:30 that evening. The responding detective did not find it unusual that it was not reported immediately.

{¶15} Finally, we acknowledge that McCaskill claimed at trial that in addition to the two $50 bills that he initially reported as stolen, a ring and an additional $20 were also taken. We conclude that this presented a credibility issue that the jury was better situated to resolve. *See, e.g.*, *State v. Fell*, 6th Dist. Lucas No. L-10-1162, 2012-Ohio-616, ¶ 14 (acknowledging that special deference must be extended to jury's credibility determinations because jury has the benefit of seeing witnesses testify, observing facial

expressions and body language, hearing voice inflections, and discerning qualities such as hesitancy, equivocation, and candor). In any event, during three separate phone calls made from LCCC, McClain made statements that the jury could have viewed as admissions that he stole money from McCaskill that night.

{¶16} This case is different from *State v. LaFrance*, 6th Dist. No. WD-04-024, 2005-Ohio-4882, cited by McClain. In *LaFrance*, the defendant entered a woman's dorm room thinking it was the dorm room of a friend with the same last name. The last name was posted on the door, the two room numbers were similar, the defendant was a visitor to the campus and was not a student there, and he was extremely intoxicated. Almost all of the witnesses to the incident believed that the defendant had simply made a mistake in entering the wrong room. This court reversed the jury's verdict convicting him of burglary. We concluded that the overwhelming evidence was consistent with the defendant's explanation of events.

{¶17} The same is not true here. Between the testimony of Pearson and McCaskill, the fact that McClain was found not far from the Pearson/McCaskill home with two $50 bills in his possession, and the incriminating statements he made during the recorded jailhouse phone calls, we find the jury's verdict to be reasonable. We, therefore, find McClain's first assignment of error not well-taken.

III. Conclusion

{¶18} The state provided evidence going to each of the essential elements of burglary and the jury's verdict was not against the manifest weight of the evidence. We, therefore, find McClain's two assignments of error not well-taken and affirm the January 14, 2013 judgment of the Lucas County Court of Common Pleas. The costs of this appeal are assessed to appellant 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

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE