[Cite as *State v. Phillips*, 2015-Ohio-632.]

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

State of Ohio — Court of Appeals No. L-14-1061

Appellee — Trial Court No. CR0201302772

v.

John J. Phillips — **DECISION AND JUDGMENT**

Appellant — Decided: February 20, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Laurel A. Kendall, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, John Phillips, appeals the judgment of the Lucas County Court of Common Pleas, sentencing him to a total of 11 years in prison following a jury's guilty verdict on one count of burglary and one count of robbery. We affirm.

A. Facts and Procedural Background

{¶ 2} On October 7, 2013, appellant entered into a residence located at 2023 Woodford, Lucas County, Ohio. The property owner, an elderly man named Alex Kekes, was inside the home at the time. Without permission to do so, appellant walked into the home through the front door, which was unlocked at the time. Upon entering, appellant made his way into the room where Kekes was standing. Appellant then proceeded to shove Kekes to the floor while demanding that Kekes hand over his money. Thereafter, appellant placed his hand into Kekes' pocket, removed $250 in cash, and ran out the door and down the alley adjacent to Kekes' house.

{¶ 3} After appellant departed, Kekes walked to his neighbor's, Paula Escareno, house. Upon entering Escareno's backyard, Escareno's daughter observed Kekes visibly shaken and crying. She alerted Escareno, who then took Kekes inside to determine what had happened. Once inside Escareno's residence, Kekes informed Escareno of the robbery, and Escareno contacted the police.

{¶ 4} A short time later, two Toledo police officers, Matthew Kovacs and Doug Rasik, arrived on the scene. Upon arrival, Kovacs noticed that Kekes was "hunched over, very scared, and visibly shaking and crying." He proceeded to question Kekes regarding the details of the incident. According to Kovacs's testimony, Kekes indicated that the man who committed the robbery was wearing a gray hooded sweatshirt, camouflage

shorts, and green shoes.[1] Kekes also informed the officers that the man who robbed him had approached him once before. Kekes then provided the officers with a nearby address where he suspected the man lived.

{¶ 5} After his interview with Kekes, Kovacs called Detective Rick Molnar to the scene. Kovacs, Rasik, and Molnar proceeded to the address provided by Kekes. Upon arrival, the officers were greeted by the resident of the home, Holly Brown. Brown consented to a search of the premises, and appellant was subsequently discovered hiding in the basement under a pile of clothes. Appellant was then escorted outside. Notably, appellant was not wearing camouflage shorts or a gray hooded sweatshirt at the time. Moreover, the $250 that was reported stolen was not found on appellant's person.

{¶ 6} After apprehending appellant, Molnar went back to Kekes' residence and obtained a physical description of the suspect that matched appellant's description. Consequently, Molnar escorted Kekes to the location where appellant was being detained and asked Kekes to identify appellant. Kekes identified appellant as the man who committed the robbery.

{¶ 7} Appellant was subsequently arrested and taken to the police station for questioning. During the interview between appellant and Molnar, which was recorded and played back at trial, appellant changed his version of the events several times. Appellant began the interview by insisting that he was not the perpetrator. He stated that

[1] At trial, Kekes testified that the robber was wearing brown pants. He denied ever informing the police that the robber was wearing camouflage shorts or a gray hooded sweatshirt.

another man, Rob, was the actual perpetrator of the crimes. However, appellant was unable to provide a last name for Rob, and Molnar was unable to locate a person named Rob that matched appellant's description. Upon further questioning, appellant admitted that he entered Kekes' home without permission to do so and demanded that Kekes hand over his money.

{¶ 8} On October 16, 2013, appellant was indicted on one count of burglary in violation of R.C. 2911.12(A)(1), a felony of the second degree, and one count of robbery in violation of R.C. 2911.02(A)(3), a felony of the third degree. Additionally, a repeat violent offender specification was attached to the burglary count pursuant to R.C. 2941.149. A jury trial was held, after which appellant was found guilty of both counts. The repeat violent offender specification was subsequently dismissed prior to sentencing.

{¶ 9} At sentencing, the court imposed a prison term of 8 years on the burglary count and 36 months on the robbery count, ordering the sentences to be served consecutively. In arriving at its sentence, the court highlighted appellant's criminal history, which includes 10 prior felony convictions and 28 prior misdemeanor convictions.

B. Assignments of Error

{¶ 10} Appellant has timely appealed the trial court's judgment, assigning the following errors for our review:

> [I.] The decision of the trial court was insufficient and against the manifest weight of the evidence.

[II.] The court abused its discretion by sentencing appellant to two consecutive maximum sentences in violation of R.C. 2929.14(B)(2)(c).

II. Analysis

A. Sufficiency and Manifest Weight

{¶ 11} In his first assignment of error, appellant contends that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence.

{¶ 12} When evaluating whether the evidence was sufficient to sustain a conviction, we must determine whether the evidence admitted at trial, "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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.E.2d 560 (1979); *see also State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Therefore, "[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997), citing *Jenks* at paragraph two of the syllabus.

{¶ 13} Here, the state introduced evidence as to every element of the offenses of burglary and robbery. The elements of burglary under R.C. 2911.12(A)(1) require the state to prove that the defendant (1) by force, stealth, or deception (2) trespassed in an

occupied structure when another person other than an accomplice was present (3) with the purpose to commit any criminal offense therein. The elements of robbery under R.C. 2911.02(A)(3) require the state to prove that (1) the defendant, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, (2) threatened the immediate use of force against another.

{¶ 14} During its case-in-chief, the state established that appellant opened the front door of Kekes' home and entered through the doorway while Kekes was inside. Further, during Kekes' testimony, he stated that he did not consent to appellant's entrance into the home. Notably, appellant admitted that he entered Kekes' home without permission to do so during his interview with Detective Molnar, which was admitted into evidence at trial. During that interview, appellant indicated that he entered the home in order to secure cash so that he could purchase food. We conclude that the foregoing evidence is sufficient to support appellant's conviction for burglary. *See State v. Knight*, 6th Dist. Lucas No. L-13-1066, 2014-Ohio-2222, ¶ 12 ("A burglary is complete once the perpetrator enters the occupied residence with the intent to commit a crime.").

{¶ 15} Regarding appellant's conviction for robbery, Kekes testified that, once appellant entered the home, he demanded that Kekes hand over his cash. When Kekes refused, appellant shoved him to the ground and removed the money from his pocket. Such evidence is sufficient to support appellant's conviction for robbery. *See id.* ("Robbery occurs after entry into the home when the perpetrator encounters the victim inside the home and steals something from him or her by force or threat of force.").

{¶ 16} Having concluded that each of appellant's convictions were supported by sufficient evidence, we now turn to appellant's argument that the convictions were against the manifest weight of the evidence.

{¶ 17} When reviewing a manifest weight claim,

> The court, 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 jury 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. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220.

{¶ 18} In support of his manifest weight argument, appellant notes that, when he was discovered hiding under a pile of clothes in the basement, he was not wearing a gray hooded sweatshirt or camouflage pants as described by Kekes. Appellant also contends that the officers did not find $250 in cash on his person when they apprehended him. Further, appellant references Kekes' report to the police that the robber walked with a limp, noting that he does not walk in such a manner. Given these details, appellant argues that the jury's determination of guilt was against the manifest weight of the evidence. Moreover, appellant urges this court to discard Kekes' face-to-face identification of appellant shortly after the robbery, arguing that the identification was

unreliable given Kekes' age and the fact that Molnar told Kekes that appellant was a "suspect."

{¶ 19} Having reviewed the record in its entirety, we cannot agree with appellant that this is the exceptional case in which the evidence weighs heavily against the conviction. Appellant's arguments concerning his clothing and the $250 in cash are explainable in light of the amount of time that passed between the robbery and appellant's arrest. Indeed, appellant was found buried underneath a pile of clothes, a fact that could lead one to conclude that he changed his clothes after committing the robbery. Furthermore, appellant acknowledged that he needed the money to purchase food during his interview with Molnar. He also indicated that he had a problem with drug abuse. Thus, one could infer that appellant had already spent the cash that was stolen from Kekes. Concerning Kekes' report that the robber walked with a limp, we agree with appellant that such testimony seems to refer to someone other than appellant. Nonetheless, given Kekes' unequivocal identification of appellant as the robber on the day of the crime, coupled with appellant's admissions, we find that appellant's convictions were not against the manifest weight of the evidence. We further find no merit to appellant's inference that the "standard procedures" used by the police in this case rendered Kekes' identification unreliable or "legally insufficient."

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

B. Allied Offenses of Similar Import

{¶ 21} In his second assignment of error, appellant argues that the trial court abused its discretion by sentencing appellant to two consecutive maximum sentences in violation of R.C. 2929.14(B)(2)(c). Further, appellant contends that the court erred when it failed to merge the robbery and burglary offenses as allied offenses of similar import.

{¶ 22} At the outset, we note that appellant has conceded his original argument that the trial court's sentence violated R.C. 2929.14(B)(2)(c), which pertains to sentences for repeat violent offenders. Since the state dismissed the repeat violent offender specification prior to sentencing, R.C. 2929.14(B)(2)(c) is inapplicable.

{¶ 23} Concerning appellant's merger argument, R.C. 2941.25 provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 24} As set forth in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the test for whether offenses are allied offenses of similar import under

R.C. 2941.25 is two-fold. First, the court must determine "whether it is possible to commit one offense *and* commit the other with the same conduct." (Emphasis sic.) *Id.* at ¶ 48. Second, the court must determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Id.* at ¶ 50.

{¶ 25} In *Knight*, *supra*, we examined a similar merger issue concerning convictions for robbery and burglary, ultimately concluding that the offenses were not allied offenses of similar import where the defendant pushed his way into an occupied residence and proceeded to order the victim to lie still while the defendant and his accomplice stole a laptop computer and an X-Box video game system. *Knight*, 6th Dist. Lucas No. L-13-1066, 2014-Ohio-2222, at ¶ 3-4. In reaching our conclusion, we reasoned that

> The burglary [Knight] committed was complete once he forced his way into the victim's home with the intent to steal something. The robbery occurred when [Knight] stole property after he bodily restrained the victim, inflicted physical harm and threated more physical harm. Thus, in the context of [Knight's] actions that led to his conviction on these counts, robbery and burglary were not allied offenses of similar import and the trial court did not err in failing to merge them. *Id.* at ¶ 13.

{¶ 26} Likewise, in this case, we find that the trial court did not err in failing to merge appellant's robbery conviction with his burglary conviction. Here, appellant committed a burglary when he opened the front door and entered into Kekes' residence while Kekes was inside with the intent to commit a felony. He then committed a robbery by shoving Kekes to the ground and removing his money from his pocket. Since the two offenses were not committed by a single act with a single state of mind, they are not allied offenses of similar import.

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

III. Conclusion

{¶ 28} In light of the foregoing, 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

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE