

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87981

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MOUSTAPHA THIAM

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART;
REVERSED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas

Case No. CR-468567

BEFORE: Rocco, J. Celebrezze, A.J., Dyke, J.

RELEASED: January 25, 2007

JOURNALIZED:

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KENNETH A. ROCCO, J.:

{¶1} Defendant-appellant Moustapha Thiam appeals from his convictions on two counts of burglary, asserting that the evidence was insufficient and that his convictions contravened the manifest weight of the evidence. We find the evidence was sufficient to support one charge of burglary, but not two, and that

appellant's conviction of that one charge was not against the manifest weight of the evidence. Therefore, we affirm in part and reverse in part.

Procedural History

{¶2} Appellant was charged in a five count indictment filed July 22, 2005, with two counts of aggravated burglary and one count each of domestic violence, violating a protective order, and theft. Each of the five charges carried one- and three-year firearms specifications. Appellant entered a not guilty plea to each of the charges.

{¶3} A jury trial began on January 10, 2006. At trial, the jury heard the testimony of Ousmane Samba, a friend of appellant, and Alicia DeJesus-Thiam, appellant's wife, as well as the testimony of Cleveland Police detective Zenar Delk and patrolman John Patton. At the conclusion of the trial, appellant moved for a directed verdict. The court granted the motion as to the domestic violence charge only. The prosecution dismissed the charge of violating a protective order. The jury found appellant not guilty of theft or aggravated burglary, but guilty of two counts of burglary, lesser included offenses of the aggravated burglary charges. The court subsequently sentenced him to 36 months of community control with intensive special probation supervision. Appellant was subject to electronic home monitoring for 180 days and was required to perform 300 hours of community service. He was further required to submit to random drug testing, to maintain verifiable employment, and to successfully complete

batterer's intervention and anger management programs. He was also required to obtain personal counseling and was prohibited from having any contact with the victim.

Facts

{¶4} Ousmane Samba, a Mauritanian citizen and permanent resident of the United States, is a tailor who resides in Baltimore, Maryland. He testified that he is friends with appellant, and sells clothing through a store owned by appellant's wife, Alicia DeJesus. One day, he was outdoors at Alicia DeJesus's house, helping her to move. A mechanic was also there, working on her automobile. A third person was also present. Appellant walked past Samba and entered the house. He threatened to kill both Samba and DeJesus, and he had one or two guns in the waistband of his pants. Ms. DeJesus was in the house, in the bathroom. Samba heard appellant and DeJesus arguing. Samba then called police.

{¶5} Appellant came out of the house and walked away. Samba entered the house to check on Ms. DeJesus. He found that she was frightened and angry. Police arrived fifteen or twenty minutes later.

{¶6} Ms. DeJesus testified that she married appellant in November 2002. She has a barber shop in which she also sells clothing. Appellant accused her of having relationships with the men who came to her shop. DeJesus and appellant fought; their arguments became physical. Ms. DeJesus moved out of

her home with appellant and into her own home. She made more than 70 police reports, and obtained a civil protective order in 2003 which she claimed was still in effect. The prosecutor subsequently reported to the court that the protection order expired before the events in this case, and the jury was so informed.

{¶7} Ms. DeJesus testified that she knew Ousmane Samba through appellant. Samba is a tailor who lives in Baltimore but comes to Cleveland to sell clothes. When he comes to Cleveland, he stays at her house.

{¶8} On July 11, 2005, Ms. DeJesus was barbecuing and preparing to move. Her mechanics and Mr. Samba were at her house. She went inside the house to take a shower. Before she did so, she asked the men if they needed to use the bathroom.

{¶9} DeJesus testified that when she went into the house, the front door was closed, and she locked the back screen door. When she had been in the shower for about three minutes, she heard aggressive voices in the yard through the open bathroom window. About one minute later, someone knocked on the bathroom door. She asked who it was, and appellant answered. She got out of the shower and grabbed her clothing. She then unlocked the bathroom door and opened it. When she saw appellant, she tried to close the door again, but appellant pushed it open. He told her he was looking for a CD.

{¶10} Ms. DeJesus squeezed past appellant in the doorway, and felt a gun. He never took the gun out, but she could see it under his white tee shirt. She

went to the dining room, asking him why he was at her house. One of the mechanics came to the screen door and asked if she was OK. He silently indicated to her that the police were coming.

{¶11}Ms. DeJesus said she had locked the screen door, but appellant “apparently snatched it open” because the latch was off the hook. She also noticed that her purse was open and that an envelope which contained her rent money was tilted up. Appellant ran out of the house, through the front door. She chased him, believing he had her rent money. He ran to his car and drove away.

{¶12}Appellant called her three times after he left. The second time he called, the police were there and instructed her to be calm, talk to him nicely and keep him on the line. She asked for her rent money and he told her she would have to “work for it.” This meant that she would have to give him sex in exchange for her money. She agreed to meet him at her shop. Police officers went to her shop and met appellant there.

{¶13}Ms. DeJesus indicated that she only saw one gun. Appellant also had a cellular telephone on a string around his neck, and a clip or holster for a cell phone at his waist. She testified that appellant did not have permission to enter her house.

{¶14} Officer Patton testified that he arrested appellant at West 98th Street and Lorain Avenue, where Ms. DeJesus had agreed to meet appellant. Appellant had two cellular telephones, but no gun.

Law and Analysis

{¶15} Appellant first argues that the evidence was insufficient to support his convictions. His second assignment of error asserts that his convictions contravene the manifest weight of the evidence. Although different standards of review apply, we review these two issues together because the evidence applies equally to both.

{¶16} A challenge to the sufficiency of the evidence requires the appellate court to determine whether the State has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52. The court must assess whether, if believed, the evidence against the defendant would support a conviction. *Id.*; *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶17} On the other hand, in evaluating the manifest weight of the evidence a court sits as the thirteenth juror, considering the credibility of the witnesses and determining whether, in evaluating 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. *Thompkins*, at 387.

{¶18} Appellant was convicted of two counts of burglary in violation of R.C. 2911.12(A)(4), which provides: “(A) No person, by force, stealth, or deception, shall do any of the following: * * * (4) 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.” “Force” is defined by R.C. 2901.01(A) as “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.” There was evidence that the front door was closed and locked and the back screen door was also locked, so that appellant had to exert some violence upon one of the doors to enter the house while Ms. DeJesus was inside. This evidence was sufficient to support appellant’s conviction for burglary. Appellant has not presented any reason why the jury should have disbelieved her testimony. Therefore, we find the evidence was sufficient to support appellant’s conviction of burglary and his conviction was not against the manifest weight of the evidence.

{¶19} Although appellant does not raise this issue, we find it was plain error for the court to enter two convictions for burglary. The evidence showed only one trespass into Ms. DeJesus’s house. Cf. *State v. Powers*, Cuyahoga App. No. 86365, 2006-Ohio-2458, ¶¶8-15 (burglary of one structure in which there were two different victims constituted a single offense). Therefore, we vacate the second conviction for burglary and remand for the court to enter a corrected journal entry reflecting a single conviction.

Affirmed in part; reversed in part.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for correction of the judgment entry and for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
ANN DYKE, J., CONCUR