[Cite as *State v. Smith*, 2010-Ohio-1655.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91715

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD SMITH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-469680

BEFORE: Dyke, J., Gallagher, A.J., and Boyle, J.

RELEASED: April 15, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Margaret Amer Robey, Esq.
Robey & Robey
14402 Granger Road
Maple Hts., Ohio 44137

ATTORNEYS FOR APPELLEE

William D. Mason, Esq.
Cuyahoga County Prosecutor
By: Steven E. Gall, Esq.
Assistant County Prosecutor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant-appellant, Richard Smith ("appellant"), appeals his conviction for burglary. For the reasons provided below, we affirm.

{¶ 2} On August 22, 2005, the Cuyahoga County Grand Jury indicted appellant on two counts: count one alleged burglary in violation of R.C. 2911.12 and included numerous notices of prior convictions and repeat violent offender specifications, and the second count charged theft in violation of R.C. 2913.02 and included an elderly specification. Appellant pled not guilty to the charges.

{¶ 3} On June 28, 2006, the case proceeded to a jury trial. At trial, the evidence established that during the early afternoon of July 25, 2005, Sylvia Coleman, a 91 year old woman, was shutting off the sprinkler in her front yard on West 140th Street in Cleveland, Ohio when she was approached by Cynthia Drake. As Drake engaged Coleman in a conversation, she placed her hand on her shoulder and led the elderly woman down the driveway, directing her attention from Coleman's house.

{¶ 4} At this time, appellant began walking back and forth in front of Coleman's house. When Drake raised her arm behind Coleman's back, appellant immediately turned around and walked up the driveway of Coleman's house. He then entered the house.

{¶ 5} Coleman's neighbor, Sandra Schreiber, witnessed the aforementioned events and became suspicious. Therefore, she telephoned the police.

{¶ 6} Lieutenant Louis Pipoly arrived in a police vehicle within minutes and

found Drake speaking with Coleman in the front yard. He immediately placed Drake in the back of the police vehicle.

{¶ 7} Detective Matt Baeppler then pulled into the driveway of the house and witnessed appellant exiting the side door of Coleman's house. Baeppler yelled at appellant "police" and he responded by running in the opposite direction into Lieutenant Pipoly. Appellant fell to the ground and the police found a woman's green handbag, a brown paper bag covered by a white plastic bag, latex rubber gloves, cash, and numerous coins in appellant's pocket.

{¶ 8} After the state rested its case, appellant moved for acquittal on all charges pursuant to Crim.R. 29(A). The trial court denied his motion and he rested his case.

{¶ 9} On July 7, 2006, the jury found appellant guilty of all charges in the indictment. At a later date, the trial court found him not guilty of all of the specifications and notices contained in the indictments.

{¶ 10} On May 29, 2008, the trial court sentenced appellant to six years imprisonment for the burglary conviction and one year for the theft offense. The court ordered these sentences to run concurrent to each other for a total of six years. The court further ordered three years of postrelease control.

{¶ 11} Appellant now appeals and presents four assignments of error for our review. His first states:

{¶ 12} "The state produced insufficient evidence to justify the denial of motion for judgment of acquittal and to support the conviction of second degree

felony burglary when there was no evidence that a person was 'present or likely to be present' in the house."

{¶ 13} Crim.R. 29(A) governs motions for acquittal and provides for a judgment of acquittal if the evidence is insufficient to sustain a conviction. Pursuant to Crim.R. 29, a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt. A Crim.R. 29(A) motion for acquittal "should be granted only where reasonable minds could not fail to find reasonable doubt." *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394; *State v. Jordan*, Cuyahoga App. Nos. 79469 and 79470, 2002-Ohio-590.

{¶ 14} The standard for a Rule 29 motion is virtually identical to that employed in testing the sufficiency of the evidence. *State v. Thompkins*, supra. In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, the Ohio Supreme Court set forth the following standard of review to be applied by an appellate court when reviewing a claim of insufficient evidence:

{¶ 15} "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 a 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

{¶ 16} The essential elements of burglary are provided in R.C. 2911.12(A)(2), which states in relevant part, as follows:

{¶ 17} "(A) No person, by force, stealth, or deception, shall do any of the following:

{¶ 18} "* * * (2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is 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, with purpose to commit in the habitation any criminal offense; * * *."

{¶ 19} Here, appellant argues that the state failed to present sufficient evidence that someone was "present or likely to be present" in the home at the time of the incident, a necessary element for the crime of burglary, because the evidence presented merely established that the victim was outside on the lawn at the time he entered the house. For the reasons that follow, we find appellant's argument unpersuasive.

{¶ 20} In *State v. Frock*, Clark App. No. 2004 CA 76, 2006-Ohio-1254, the Second District Court of Appeals discussed the "likely to be present" element of the offense of second-degree felony burglary and stated "[a]lthough the term 'likely' connotes something more than a mere possibility, it also connotes something less than a probability or reasonable certainty. A person is likely to be present when a

consideration of all the circumstances would seem to justify a logical expectation that person could be present." *State v. Green* (1984), 18 Ohio App.3d 69, 72, 480 N.E.2d 1128. Courts have determined that the evidence is insufficient for the "likely to be present" element when the occupant of the home was absent for an extended period, such as on vacation and no one else was regularly checking on the house. On the other hand, the "likely to be present" element is met "where the structure is a permanent dwelling house which is regularly inhabited, the occupants were in and out of the house on the day in question, and the occupants were temporarily absent when the burglary occurred." *State v. Kilby* (1977), 50 Ohio St.2d 21, 23, 361 N.E.2d 1336.

{¶ 21} In this case, Coleman was merely outside on her lawn speaking with Drake at the time appellant was inside the house stealing her belongings. She was not on vacation and actually had been inside the house minutes before appellant entered the home. She also was likely to return within minutes had she not been thwarted by the deception of Cynthia Drake. Accordingly, she was "present" and then lured away during the course of criminal conduct. In light of the foregoing, we find sufficient evidence demonstrating that Coleman was not only "likely to be present" but actually "present" at the time of the burglary. Appellant's first assignment of error is without merit.

{¶ 22} His second assignment of error provides:

{¶ 23} "The trial court committed reversible error in denying appellant's motion to charge the jury on the lesser included offense of third-degree felony

burglary."

{¶ 24} In the instant matter, appellant was charged with burglary in the second degree. He argues that the trial court erred in refusing to charge the jury on the lesser included offense of third-degree felony burglary. He maintains that the jury could have reasonably concluded that no one was "present or likely to be present" inside the victim's home and that he was therefore guilty of third degree, but not second degree, burglary.

{¶ 25} Although third degree burglary is a lesser included offense of second degree burglary, the fact that an offense is a lesser included offense does not automatically entitle a defendant to such an instruction. A charge on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus.

{¶ 26} In the case sub judice, we have already determined that the state presented sufficient evidence satisfying the "present or likely to be present" element of the second-degree crime of burglary. As such, the evidence presented at trial would not reasonably support an acquittal on the second degree charge and appellant is not entitled to an instruction of the lesser included offense of third degree burglary. Appellant's second assignment of error is overruled.

{¶ 27} His third assignment of error reads:

{¶ 28} "Appellant's right to confront the witnesses against him was violated

when hearsay statements of the deceased victim were introduced through the detectives testimony."

{¶ 29} Appellant claims that the trial court committed reversible error when it permitted Detective Diaz to testify about the statements that the victim, deceased at the time of trial, made to him concerning the objects taken from her home.

{¶ 30} Evid.R. 801(C) defines hearsay as the following:

{¶ 31} "Hearsay. 'Hearsay' is a statement, other than one made by declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

{¶ 32} "Where an out-of-court statement is offered without reference to its truth, it is not hearsay." *State v. Lewis* (1970), 22 Ohio St.2d 125, 132-133, 258 N.E.2d 445. Accordingly, statements that explain an officer's conduct while investigating a crime and not admitted to prove the truth of the statement are not hearsay. See Evid.R. 801(C); *State v. Blevins* (1987), 36 Ohio App.3d 147, 149, 521 N.E.2d 1105; *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, 400 N.E.2d 401. The probative value of such statements must outweigh any unfair prejudice. Id.; see Evid.R. 403.

{¶ 33} Appellant argues that the trial court erred when it admitted the testimony of Detective Diaz relating to various aspects of his investigation. Namely, Diaz testified that he photographed the inside of Coleman's kitchen because he learned during his investigation that is where she kept her cash. Appellant also complains that Diaz testified that he photographed a statue of Mary

because he learned that is where Coleman normally kept several coins. Appellant also disapproves of Diaz's statements that he photographed a red tray that normally contained silver dollars. Finally, appellant argues that the trial court erred in admitting Diaz's testimony that he learned through the course of his investigation that Coleman did not previously know appellant or Cynthia Drake. These statements were not offered to prove the truth of the matter asserted but rather offered to explain the detective's investigation during this case. When Diaz testified, he never referred to any specific conversation he had with Coleman or any other individual. Rather, he merely indicated his motivation in taking certain photographs and the reason the investigation at the scene was conducted in such a manner.

{¶ 34} Moreover, the probative value was not outweighed by the danger of unfair prejudice. Sandra Schreiber, Lieutenant Popily, and Detective Baeppler each had previously testified that they witnessed appellant carrying the brown paper bag, green handbag, latex gloves, cash, and coins from the house. Furthermore, Schreiber testified that Coleman did not know Drake or appellant and Drake confirmed that she had no prior contact with the victim. Accordingly, Diaz's statements do not constitute hearsay and are admissible.

{¶ 35} Furthermore, the testimony of Detective Diaz does not violate the Confrontation Clause of the United States Constitution. In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the Supreme Court held that it is a violation of the Confrontation Clause to admit "testimonial statements of

a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Id. at 53-54. In this case, Sandra Schreiber, Lieutenant Popily, and Detective Baeppler all confirmed the objects they saw appellant carrying when he exited the house, namely the brown paper bag, green handbag, cash, and coins testified to by Diaz. Additionally, Schreiber and Drake testified that Coleman was not previously familiar with Drake or appellant. Therefore, the Confrontation Clause was not violated because appellant had the opportunity to cross-examine these individuals before the introduction of the duplicative testimony of Diaz. Appellant's third assignment of error is overruled.

{¶ 36} His fourth and final assignment states:

{¶ 37} "The jury's verdict finding the defendant guilty of second-degree felony burglary was against the manifest weight of the evidence."

{¶ 38} In *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541, the Ohio Supreme Court illuminated its test for manifest weight of the evidence as follows:

{¶ 39} "Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but

depends on its effect in inducing belief." Black's Law Dictionary (6 Ed.1990), at 1594.

{¶ 40} 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. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. 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. Id.

{¶ 41} In this assignment, appellant argues that the manifest weight of the evidence establishes that the victim was not "present or likely to be present" at the time of the theft. We find this assignment without merit.

{¶ 42} Sandra Schreiber, Lieutenant Popily, and Detective Baeppler testified, and appellant does not dispute, that Coleman was outside on her lawn when appellant entered the home. Drake confirmed this fact as well. Appellant merely contends that, because Coleman was outside speaking with Drake at the time he entered the home, she was not "present or likely to be present." As we have already determined that her presence outside sufficiently establishes the "likely to be present" element of second-degree burglary in appellant's first assignment of error, we find this argument without merit. Accordingly, as with his other three assignments, is fourth assignment of error is overruled.

{¶ 43} Judgment affirmed.

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 execution of sentence.

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

ANN DYKE, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS IN JUDGMENT ONLY, and
MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY