[Cite as *State v. Khomkalov*, 2011-Ohio-327.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94600

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VLADIMIR KHOMKALOV

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515597

BEFORE: Jones, J., Sweeney, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: January 27, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Vladimir Khomkalov ("Khomkalov"), appeals his conviction for burglary. Finding no merit to the appeal, we affirm.

{¶ 2} In August 2008, Leslie Braidech ("Braidech") returned to her house in Cleveland Heights after performing at Blossom Music Center. She was downstairs feeding her cats when she heard a loud thump. She thought the noise could have been from next door and proceeded to phone a friend.

Braidech's cordless phone was not getting good reception, so she went upstairs to her music studio to talk on another house phone.

{¶ 3} Braidech was talking to her friend on the phone and checking her email when she heard a cough coming from behind her. She told her friend not to hang up, turned around, and saw Khomkalov come out of her closet. Khomkalov was dressed in black clothing, wearing a black hat, and had painted his face black. Braidech screamed and Khomkalov ran out of her studio.

{¶ 4} Braidech's friend called the police. When the police arrived, they noted a window screen in Braidech's upstairs porch was open. Braidech testified that she did not leave the window open before she left for her concert and never leaves the porch windows open for fear her cats would jump out.

{¶ 5} Braidech provided the police with a description of the intruder and police developed a photo line-up. When the detective returned to Braidech's house the next day and showed her the line-up, Braidech immediately identified Khomkalov as the intruder. She stated that she knew it was him due to his distinct eyes. The detective then asked Braidech if she remembered the man that broke into her house three years prior. Braidech stated that she only remembered that the man who broke into her house in 2005 turned out to be her newspaper carrier. She then made the connection and realized that Khomkalov was the same man who had broken into her house in 2005. She testified that she did not make the connection until the detective told her, because the man who broke into her house the night before "looked so old."

{¶ 6} Khomkalov testified that he was at home the night of the break-in, working on his computer. He admitted to breaking into Braidech's house in 2005 and also admitted to several other burglaries. Khomkalov's mother testified that her son was home the evening of the break-in, but conceded her son was not in her presence the entire night.

{¶ 7} The trial court convicted Khomkalov of burglary and sentenced him to two years in prison. Khomkalov now appeals, raising two assignments of error, which will be combined for review:

> "I. The evidence was insufficient to sustain a finding of guilty as to burglary under R.C. 2911.12(A)(2) as the state failed to introduce any evidence pertaining to a necessary element of the crime.
>
> "II. The verdict was against the manifest weight of the evidence."

{¶ 8} A motion for acquittal under Crim.R. 29(A) is governed by the same standard used for determining whether a verdict is supported by sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶37. "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. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." (Citations and quotations omitted.) Id.

{¶ 9} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a

reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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." (Internal citations and quotations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶81.

{¶ 10} Khomkalov was convicted of burglary, in violation of R.C. 2911.12(A)(2), which provides that "[n]o person, by force, stealth, or deception, shall * * * [t]respass 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."

{¶ 11} Khomkalov maintains that the state provided insufficient evidence that he trespassed in Braidech's house with the purpose to commit a criminal offense because she testified that the intruder took nothing from her house. But the actual commission of a theft is irrelevant. *State v. Colegrove* (1998), 123 Ohio App.3d 565, 704 N.E.2d 645. It is necessary only that the defendant had the purpose to commit the theft. Id.; see, also, *State v. Cook* (July 1, 1993), Cuyahoga App. No. 62981; *State v. McDougall* (Dec. 18, 1997), Cuyahoga App. No. 71276. Moreover, proof of guilt may be made by circumstantial evidence, real evidence, and direct evidence, or any combination of the three, and all three

have equal probative value. *State v. Nicely* (1988), 39 Ohio St.3d 147, 529 N.E.2d 1236. “Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph two of the syllabus. Indeed, “[c]ircumstantial evidence * * * may also be more certain, satisfying and persuasive than direct evidence.” *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

{¶ 12} In this case, Khomkalov entered Braidech’s house through a second-story window. He was dressed in all black and had painted his face black. Thus, even though Braidech testified that she did not think anything was missing from her home, we find the state presented sufficient evidence to show that Khomkalov’s purpose was to commit a criminal offense.

{¶ 13} We also find that Khomkalov’s conviction was not against the manifest weight of the evidence. Khomkalov again argues that his purpose in entering Braidech’s house was unknown; therefore, the trial court should have acquitted him of burglary. But as discussed above, there was ample evidence to show that Khomkalov’s purpose was to commit a criminal offense. In addition to how Khomkalov was dressed, we note that Khomkalov admitted to a prior break-in at the same house and to at least nine other home invasions.

{¶ 14} Thus, we find the state presented sufficient facts to support Khomkalov’s conviction for burglary and, relying upon these facts, we cannot say

the trial court lost its way in convicting Khomkalov of burglary. Khomkalov's first and second assignments of error are overruled.

{¶ 15} Accordingly, judgment is affirmed.

It is ordered that appellee recover of 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.

LARRY A. JONES, JUDGE

JAMES J. SWEENEY, P.J., and
KENNETH A. ROCCO, J., CONCUR