**[Cite as *State v. Bell*, 2015-Ohio-1294.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 101489**

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## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## KEVIN T. BELL

DEFENDANT-APPELLANT

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**JUDGMENT:**
AFFIRMED

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Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-579522

**BEFORE:** Laster Mays, J., E.A. Gallagher, P.J., and E.T. Gallagher, J.

**RELEASED AND JOURNALIZED:** April 2, 2015

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ANITA LASTER MAYS, J.:

**{¶1}** Defendant-appellant Kevin T. Bell ("Bell") appeals from his convictions for burglary with a notice of prior conviction ("NPC") and a repeat violent offender ("RVO") specification, theft, and criminal damaging.

**{¶2}** Bell presents four assignments of error, claiming that the trial court acted improperly in permitting the state to amend the indictment, that his convictions are not supported by either sufficient evidence or the manifest weight of the evidence, that the state erred in determinig that the structure was an "occupied structure" and that the structure was a permanent or temporary habitation where a person was "present or likely to be present."

**{¶3}** A review of the record demonstrates the trial court committed no error. It also demonstrates that the state presented sufficient evidence of Bell's guilt of the offenses and that his convictions are supported by the manifest weight of the evidence. Consequently, Bell's convictions are affirmed.

**{¶4}** Bell was indicted in this case on three counts. Count 1 charged him with burglary in violation of R.C. 2911.12(A)(2) with an NPC and an RVO, Count 2 charged him with theft in violation of R.C. 2913.02(A)(1), and Count 3 charged him with criminal damaging in violation of R.C. 2909.06(A)(1). Bell elected to try his case to the bench; trial commenced on March 12, 2014.

**{¶5}** The state's first witness was Lila Mahone ("Mahone"). She gave the following testimony.

**{¶6}** Mahone, aged 59, had lived with her husband for approximately 40 years in East Cleveland, Ohio. Mahone's mother, Beulah Berry ("Berry"), resided nearby in what had been Mahone's family home, which was located at 10819 Tacoma Avenue in Cleveland, until Berry's death on September 11, 2012. After Berry's death, Mahone did not cancel any of the utilities for her mother's home, and she initially visited her mother's residence "three or four times a week." During the winter, Mahone went approximately "every two or three weeks." By February 2013, Mahone went nearly daily; her purpose was to "go through things" to determine "what was there" and to dispose of the "unusable" items. The house remained "fully furnished"; Berry kept "a lot of antiques," a "record collection," and "full" cupboards.

**{¶7}** On March 22, 2013, Mahone arrived at the residence to find it was in disarray. Some "things [were] missing" and some were not where she had left them. In particular, her mother's "silver collection of ice buckets," silverware, "assortment of dishes," record collection, and some antiques were gone. Mahone stated that, in the basement, the appliances were "floating" in water and she ultimately had to replace the furnace and the hot water tank because the house's copper plumbing had been removed. She called the police.

**{¶8}** Det. William Wagner ("Wagner") testified that he responded to the house to investigate the incident. He noticed that one of the basement windows had been opened.

Wagner took photos and recovered a cigarette butt on one of the indoor stair steps. Forensic analysis of the saliva obtained from the cigarette butt established that it was Bell's.

**{¶9}** Bell elected to present no evidence in his own defense. After considering the evidence, the trial court found Bell guilty on all counts. The transcript of the sentencing hearing reflects that the trial court sentenced Bell "on the burglary" to a prison term of three years.

**{¶10}** Bell appeals from his convictions with the following four assignments of error.

> I. The convictions are against the manifest weight and the sufficiency of the evidence.
>
> II. The Appellant was unduly prejudiced [by] the amendment of the indictment to include the name of an additional homeowner "Beulah Berry."
>
> III. The trial court erred in determining that the structure at 10819 Tacoma Avenue, Cleveland, Ohio was an occupied structure as identified by the Ohio Revised Code.
>
> IV. The trial court erred in concluding that the structure at 10819 Tacoma Avenue, Cleveland, Ohio was a permanent or temporary habitation where a person is present or likely to be present.

**{¶11}** Bell's assignments of error will be addressed in logical order. He argues in his second assignment of error that the court improperly permitted the state at the conclusion of its case-in-chief to amend the indictment to add as one of the victims of the offenses the deceased homeowner's name. He is incorrect.

**{¶12}** This court rejected an identical argument in *State v. Henley*, 8th Dist. Cuyahoga No. 86591, 2004-Ohio-2728, stating at ¶ 20:

> It is well settled that an amendment to an indictment which changes the name of the victim changes neither the substance nor the identity of the crime charged. *State v. Owens* (1975), 51 Ohio App.2d 132, 149, 366 N.E.2d 1367, citing *In re Stewart* (1952), 156 Ohio St. 521, 103 N.E.2d 551; *Dye v. Sacks* (C.A.6, 1970), 279 F.2d 834, 86 Ohio Law Abs. 476; *see, also, State v. Henize* (Nov. 1, 1999), 12th Dist. No. CA99-04-008, 1999 Ohio App. LEXIS 5123; *State v. Harris* (Mar. 4, 1999), 8th Dist. No. 73921, 1999 Ohio App. LEXIS 820.

**{¶13}** Bell's second assignment of error, accordingly, is overruled.

**{¶14}** Bell's first, third, and fourth assignments of error are related, and will be addressed together. He argues that [none of] his convictions are not supported by either sufficient evidence or the manifest weight of the evidence. This court disagrees.

**{¶15}** In considering a challenge to the sufficiency of the evidence, this court determines "whether, after reviewing the evidence in the 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. Stallings*, 89 Ohio St.3d 280, 289, 731 N.E.2d 159 (2000), quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A sufficiency challenge presents a question of law and does not allow the reviewing court to weigh the evidence. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983).

**{¶16}** In ruling on a challenge to the manifest weight of the evidence, this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence,

the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Martin*. 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.* This is because the weight of the evidence and the credibility of witnesses are matters primarily for the factfinder to assess. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967).

**{¶17}** As a result of the incident that occurred at Mahone's mother's house, Bell was charged in Count 2 with theft in violation of R.C. 2913.02(A)(1), the value of the property being more than $1,000 and less than $7,500, and in Count 3 with criminal damaging in violation of R.C. 2909.06(A)(1). He first asserts that the state's evidence failed sufficiently to establish either the value of the property taken during the incident or that he caused physical harm to any property in the house.

**{¶18}** Pursuant to R.C. 2913.61(D), the value of property or services involved in a theft offense is determined by using, amongst other things, the cost of replacing the property with new property of like kind and quality. "[C]ircumstantial evidence, including photographs of personal property, may be used to prove the value of stolen items in a theft offense." *State v. Pesec*, 11th Dist. Portage No. 2006-P-0084, 2007-Ohio-3846, ¶ 40. *See also State v. Jones*, 5th Dist. Tuscarawas No. 2002-AP-05-0041, 2003-Ohio-445 (finding trial court properly admitted victim testimony regarding value of the stolen property); *State v. Allen*, 5th Dist. Stark No. 2002CA00059, 2003-Ohio-229 (finding trial court properly permitted witnesses to testify to value of

stolen items); and *In re Lame*, 11th Dist. Portage Nos. 96-P-0256, 96-P-0266, and 96-P-0267, 1998 Ohio App. LEXIS 4532 (Sept. 25, 1998) (finding proper replacement value based on trial testimony from theft victims).

**{¶19}** In this case, the state introduced into evidence Mahone's estimate that the items taken from her mother's house had a value of over $3,000, Mahone's testimony that the cost to replace just the water heater came to $2,500, and Wagner's photos that depicted the disarray left inside the house and significant water damage in the basement from the removal of the copper pipes. This sufficiently established the value of the property involved in the incident and the fact that the theft of the copper pipes caused physical damage to the property. *State v. Washington*, 8th Dist. Cuyahoga No. 100994, 2014-Ohio-4978, ¶ 16; *State v. Jennings*, 8th Dist. Cuyahoga No. 99631, 2013-Ohio-5428, ¶ 29.

**{¶20}** Bell also was charged in Count 1 for burglary in violation of R.C. 2911.12(A)(2), which provides in pertinent part:

(A) No person, by force, stealth, or deception, shall * * * :

* * *

(2) Trespass in 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[.]

**{¶21}** Bell also asserts that the evidence proved neither that Mahone's mother's house was an "occupied structure" nor that any person was "present or likely to be present." R.C. 2909.01© defines an "occupied structure," in pertinent part, as "any

house, building, * * * or other structure * * * which * * * is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present."

**{¶22}** Although Bell contends the house was not occupied because its owner had died, the relevant inquiry in determining if a structure is occupied concerns the residential purpose of the dwelling, rather than the presence or absence of an occupant. *State v. Green*, 18 Ohio App.3d 69, 480 N.E.2d 1128 (10th Dist. 1984) (home left vacant after the owners moved to another residence was still an occupied structure because it was being maintained as a dwelling); *State v. Williams*, 8th Dist. Cuyahoga No. 92668, 2009-Ohio-6826 (fact that no one lived in the house for four months was irrelevant in determining whether it was an occupied structure); *State v. Charley*, 8th Dist. Cuyahoga No. 82994, 2004-Ohio-3463 (structure was still occupied despite the fact the owner was in a nursing home, and the daughter was having the house restored); *State v. Sharp*, 8th Dist. Cuyahoga No. 86827, 2006-Ohio-3158 (structure's status as an occupied structure depends on the residential purpose of the dwelling rather than the presence or absence of an occupant).

**{¶23}** In this case, similarly to the above examples, despite the fact that Mahone's mother was deceased, her house was not abandoned. The evidence proved that the house maintained its residential purpose even though it was vacant. Mahone and her husband maintained the property and when the incident occurred, the house was fully equipped with utilities, appliances, a furnace, and furniture. Therefore, the house was an

"occupied structure" within the meaning of R.C. 2909.01(C)(1). *State v. Calderwood*, 194 Ohio App.3d 438, 2011-Ohio-2913, 956 N.E.2d 892 (8th Dist.).

**{¶24}** Additionally, Mahone testified that she visited the house nearly every day in March 2013, but that she had no set schedule for doing so. In determining whether persons are likely to be present under R.C. 2911.12(A)(2), what the defendant knows at the time is irrelevant; rather, the issue is whether it was objectively likely that persons were likely to be there. *State v. Dewitt*, 3d Dist. Allen No. 1-09-25, 2009-Ohio-5903; *State v. Pennington*, 12th Dist. Warren No. CA2006-11-136, 2007-Ohio-6572. "[A] person is likely to be present when a consideration of *all* the circumstances would seem to justify a logical expectation that a person *could* be present." *State v. Cantin*, 132 Ohio App.3d 808, 813, 726 N.E.2d 565 (8th Dist.1999), citing *State v. Green*, 18 Ohio App.3d 69, 480 N.E.2d 1128 (10th Dist.1984) (emphasis added). Thus, this court has held that if the evidence demonstrates that the caretaker in possession of the former occupant's key has the right of access to the home regularly, then there will be sufficient evidence that a person is "likely to be present" for purposes of R.C. 2911.12(A)(2). *State v. Cochran*, 8th Dist. Cuyahoga No. 50057, 1986 Ohio App. LEXIS 5481 (Jan. 30, 1986); *State v. Robinson*, 8th Dist. Cuyahoga Nos. 49501, 49518, and 49577, 1985 Ohio App. LEXIS 9055 (Oct. 24, 1985) (a person is likely to be present when the homeowner was away, but had given keys to a neighbor who checked on the house periodically).

**{¶25}** A review of the record in this case does not lead to the conclusion that the trial court lost its way in assessing the weight of the evidence and the credibility of the

witnesses. The photos corroborated Mahone's testimony. The fact that the saliva on the cigarette butt matched Bell's was undisputed; Mahone testified that she neither knew Bell nor gave him permission to enter her mother's house. Mahone also testified that the house's contents were undisturbed prior to the break-in and the discovery of the cigarette butt. Consequently, the manifest weight of the evidence supported Bell's convictions.

**{¶26}** Bell's assignments of error are overruled. His convictions are 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.

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

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ANITA LASTER MAYS, JUDGE

EILEEN A. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR