[Cite as *State v. Grigg*, 2011-Ohio-1511.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. DONNIE W. GRIGG Appellant	C.A. Nos. 25175 25176 25177 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE Nos. CR 09 08 2480 (B) CR 07 08 2689 CR 07 12 4126 (B)

DECISION AND JOURNAL ENTRY

Dated: March 30, 2011

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant Donnie W. Grigg appeals from his convictions in the Summit County Court of Common Pleas. For the reasons set forth below, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I.

{¶2} On the morning of August 10, 2009, Melissa Liberator, the program coordinator for Oriana House on Glenwood Avenue, which is a community corrections program housing up to 124 residents, discovered that her locked office had been broken into and money had been taken from client files. She noticed a shovel on her desk and discovered what appeared to be ceiling debris and dust on portions of the office furniture. Several shoe prints were also found.

A ceiling tile was disturbed in one area, and investigation of the area above the tiles revealed more shoe prints, disturbed dust, and also several file folders.

{¶3} Subsequent investigation and review of the video surveillance footage from the night before suggested that as two people acted as look-outs, one person entered a room known as the "slop room[,]" climbed into the area above the ceiling tiles, proceeded to enter the nearby locked office via the ceiling tiles, and thereafter broke into the file cabinet in the office and stole the client funds at issue. The look-outs were identified as Tyler Bellew and John Livingston. Mr. Grigg was identified as the main perpetrator. All three were residents of Oriana House at the time.

{¶4} Based upon the incident, Mr. Grigg, Mr. Bellew, and Mr. Livingston, were each indicted for one count of burglary in violation of R.C. 2911.12(A)(2).

{¶5} The case proceeded to a jury trial. On the day of trial, Mr. Grigg moved to have a new attorney appointed to represent him, as Mr. Grigg was dissatisfied with his trial counsel's representation up to that point. The trial court overruled Mr. Grigg's motion. Mr. Grigg was found guilty of the charge as indicted and sentenced to four years in prison. Based upon his conviction in the burglary case, Mr. Grigg pleaded no contest in two unrelated cases to community control violations. The trial court ordered Mr. Grigg's sentences in the unrelated community control violation cases to run consecutively and consecutive to Mr. Grigg's four-year sentence in the burglary case.

{¶6} Mr. Grigg has appealed from his burglary conviction and his two separate community control violation convictions, raising six assignments of error for our review. This Court consolidated the three cases into the instant appeal. For ease of analysis we have analyzed the assignments of error out of order.

II.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT COMMITTED PLAIN IF NOT STRUCTURAL ERROR WHEN IT OMITTED BASIC DEFINITIONS IN THE JURY INSTRUCTIONS AND, IN EFFECT, CHARGED FOR AN OFFENSE NOT INDICTED[.]"

{¶7} Mr. Grigg asserts in his second assignment of error that the trial court gave erroneous jury instructions with respect to the burglary charge and that the error amounts to plain error.

{¶8} We begin by noting that the jury verdict form in this case only states that the jury found Mr. Grigg guilty of burglary. As burglary can be a felony of the second, third, or fourth degree, see R.C. 2911.12, at the very least this omission raises an issue of whether *State v. Pelfrey,* 112 Ohio St.3d 422, 2007-Ohio-256, and R.C. 2945.75 would bar Mr. Grigg's conviction for a felony of the second degree. See *Pelfrey* at syllabus ("Pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense."). However, we need not resolve this issue as we conclude that the erroneous jury instructions require that Mr. Grigg receive a new trial.

{¶9} We note that Mr. Grigg failed to provide this Court with a transcript of the jury charge. A printed copy of the jury instructions was included in the record on appeal with the trial exhibits, and it appears that this copy satisfied the trial court's obligation to preserve a copy for use by the jury and for the record. See Crim.R. 30(A); see, also, *State v. Cadle*, 9th Dist. No. 24064, 2008-Ohio-3639, at ¶13. Nonetheless, "it is this Court's opinion that the better practice is

for the appellant to include a transcript of jury instructions in the record on appeal." Id., citing App.R. 9(B).

{¶10} Mr. Grigg concedes on appeal that his trial counsel did not object to the jury instructions. Thus, his argument is reviewable only for plain error. *State v. Snyder*, 9th Dist. No. 25157, 2011-Ohio-175, at ¶6.

{¶11} Generally, to establish plain error,

> "[f]irst, there must be an error, i.e., a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights[ ]' [to the extent that it] * * * affected the outcome of the trial." *State v. Hardges*, 9th Dist. No. 24175, 2008-Ohio-5567, at ¶9, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21, 27.

"[E]ven if the defendant satisfies this burden, the appellate court has discretion to disregard the error and should correct it only to prevent a manifest miscarriage of justice." (Internal quotations and citation omitted.) *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, at ¶27.

{¶12} "As a general rule, a defendant is entitled to have the jury instructed on all elements that must be proved to establish the crime with which he is charged[.]" (Internal citation omitted.) *State v. Adams* (1980), 62 Ohio St.2d 151, 153. However, "a trial court's failure to separately and specifically charge the jury on every element of each crime with which a defendant is charged does not per se constitute plain error nor does it necessarily require reversal of a conviction." Id. at 154. "Only by reviewing the record in each case can the probable impact of such a failure be determined, and a decision reached as to whether substantial prejudice may have been visited on the defendant, thereby resulting in a manifest miscarriage of justice." Id.

{¶13} In the instant matter, the State concedes that the jury instructions are improper. The State, however, argues that Mr. Grigg was not prejudiced by the error.

{¶14} The allegedly erroneous instruction states:

> "The defendant is charged with burglary. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 10th day of August, 2009, and in Summit County, Ohio, the defendant knowingly trespassed by force, stealth, or deception in an occupied structure to wit: 55 Glenwood Avenue, Akron, Ohio, or in a separately secured or separately occupied portion thereof, when another person other than an accomplice of the defendant was present or likely to be present, with purpose to commit in that structure or separately occupied portion thereof, a criminal offense."

This is not a correct instruction, as it completely omits the element of "a permanent or temporary habitation" and thus fails to track the language of the statute. See R.C. 2911.12(A)(2). The statute provides that:

> "No 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*." (Emphasis added.) R.C. 2911.12(A)(2).

{¶15} Thus, there is an obvious defect in the instructions. However, "[a]n erroneous jury instruction does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Cunningham* (2004), 105 Ohio St.3d 197, 2004-Ohio-7007, at ¶56.

{¶16} This Court concludes there was plain error. The State presented evidence that Mr. Grigg committed some form of theft that evening, however, we cannot say that the evidence overwhelming supported a conviction under R.C. 2911.12(A)(2). There was testimony that Oriana House was a residential facility, and hence a suggestion that some portions constituted "a permanent or temporary habitation." R.C. 2911.12(A)(2). However, the testimony concerning the layout of Oriana House was vague. No witness directly testified that the residents of Oriana resided in that portion of the Oriana complex where the crime took place. Thus, although there was some testimony from which one *could* reasonably infer that residents lived in the structure

where the crime took place, such an inference was not required based upon the evidence. The testimony established that Oriana House is comprised of at least two buildings and the testimony concerning the location of the "dorms" relative to the office was far from precise.

{¶17} Thus, given that one of the instructions was incomplete and as explained below, another instruction was inaccurate, and given the rather unique and atypical factual situation of this case, this Court concludes the erroneous instructions constituted plain error.

{¶18} The State appears to contend that because the trial court's definition of occupied structure was correct, this somehow mitigates the effect of the other error in the instructions. However, despite the State's contention to the contrary, the trial court's definition of an occupied structure is also inaccurate. An occupied structure is defined by R.C. 2909.01(C) as

> "any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:
>
> "(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.
>
> "(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.
>
> "(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.
>
> "(4) At the time, any person is present or likely to be present in it." See, also, R.C. 2911.12(B).

{¶19} Here the trial court instructed that an "[o]ccupied structure means any house, building, outbuilding, or any portion thereof, which is maintained as a permanent or temporary dwelling, in which at the time any person is present or likely to be present." This instruction inappropriately combines two portions of R.C. 2909.01(C), essentially creating a definition of occupied structure not provided for by the legislature.

{¶20} Therefore, this Court concludes the errors in the jury instructions amounted to plain error. We sustain Mr. Grigg's second assignment of error.

ASSIGNMENT OF ERROR III

"THERE WAS INSUFFICIENT EVIDENCE OF BURGLARY[.]"

{¶21} Mr. Grigg contends in his third assignment of error that the evidence was insufficient to sustain his conviction for burglary.

{¶22} "Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo." *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, at ¶18, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). In reviewing the evidence, we do not evaluate credibility and we make all reasonable inferences in favor of the State. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. The State's evidence is sufficient if it allows the jury to reasonably conclude that the essential elements of the crime were proven beyond a reasonable doubt. Id.

{¶23} Mr. Grigg seems to suggest, without providing any supporting authority or analysis, that because the trial court committed plain error in charging the jury, that somehow renders the evidence insufficient. See App.R. 16(A)(7). Further, Mr. Grigg has failed to articulate how or in what way the State's evidence is insufficient, and instead offers a conclusory statement that "[r]easonable minds could not find beyond a reasonable doubt that Mr. Grigg trespassed in an undefined person's area which was an undefined habitation with purpose to commit an undefined particular offense." See App.R. 16(A)(7). "If an argument exists that can support this assignment of error, it is not this court's duty to root it out." *Cardone v. Cardone*

(May 6, 1998), 9th Dist. No. 18349, at *8. Therefore, we overrule Mr. Grigg's third assignment of error.

ASSIGNMENT OF ERROR VI

"THE TRIAL COURT ERRED IN FINDING COMMUNITY CONTROL VIOLATIONS BASED UPON THE ERRONEOUS BURGLARY CONVICTION[.]"

{¶24} Mr. Grigg contends that because his conviction for burglary must be reversed and his convictions for the community control violations were based solely upon his conviction for burglary, his community control violation convictions cannot stand. The State does not appear to dispute this, aside from stating that the burglary conviction should stand. We agree that the assignment of error should be sustained.

{¶25} Mr. Grigg entered a no contest plea on the community control violations. The sentencing transcript indicates that the trial court found him guilty of those violations based only upon the existence of his burglary conviction. The trial court did not find any specific facts related to the burglary, nor was any evidence from the burglary trial admitted at the community control violation plea hearing and sentencing. "Parole and probation may be revoked even though criminal charges based on the same facts are dismissed, the defendant is acquitted, or the conviction is overturned, unless all factual support for the revocation is removed." *Barnett v. Ohio Adult Parole Authority* (1998), 81 Ohio St.3d 385, 387; see, also *State v. Jackson*, 2nd Dist. No. 23457, 23458, 2010-Ohio-2836, at ¶58. Thus, in light of the lack of factual information elicited at the plea and sentencing hearing on the community control violations, the reversal of Mr. Grigg's burglary conviction leaves no factual support for the community control violations. See id. Therefore, we sustain Mr. Grigg's sixth assignment of error.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING APPELLANT'S MOTION TO REPLACE HIS APPOINTED COUNSEL[.]"

ASSIGNMENT OF ERROR IV

"THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]"

ASSIGNMENT OF ERROR V

"INEFFECTIVE ASSISTANCE OF APPOINTED TRIAL COUNSEL DENIED FUNDAMENTAL DUE PROCESS TO APPELLANT'S PREJUDICE[.]"

{¶26} In light of our resolution of Mr. Grigg's second assignment of error, his first, fourth, and fifth assignments of error have been rendered moot. See App.R. 12(A)(1)(c).

III.

{¶27} In light of the foregoing, we sustain Mr. Grigg's second and sixth assignments of error and overrule his third assignment of error. Mr. Grigg's remaining assignments of error have been rendered moot.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

MARK H. LUDWIG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.