

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

TROY W. BERGER,

Defendant-Appellant.

Case No.

21-1455

On Discretionary Appeal from the
GUERNSEY County Court of Appeals
FIFTH Appellate District

C.A. Case No. 20CA000022

MOTION FOR LEAVE TO FILE DELAYED APPEAL OF
APPELLANT TROY W. BERGER PURSUANT TO OHIO S. CT. PRAC. R 7.01(A)(4)(a)

(ASSISTANT PROSECUTING ATTORNEY)

JASON R. FARLEY GUERNSEY COUNTY

PROSECUTOR NAME AND COUNTY NAME

627 WHEELING AVENUE

ADDRESS

CAMBRIDGE, OHIO 43725

CITY, STATE & ZIP

PHONE

TROY W. BERGER A778505

NAME AND NUMBER

TRUMBULL CORRECTIONAL CAMP

INSTITUTION

5701 BURNETT RD.

ADDRESS

LEVITTSBURG OH 44430

CITY, STATE & ZIP

COUNSEL FOR APPELLEE, STATE OF OHIO

DEFENDANT-APPELLANT, PRO SE

RECEIVED

OCT 20 2021

CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED

DEC 02 2021

CLERK OF COURT
SUPREME COURT OF OHIO

FILED

DEC 02 2021

CLERK OF COURT
SUPREME COURT OF OHIO

**MOTION FOR LEAVE TO FILE DELAYED APPEAL OF
APPELLANT Troy W. BERGER**

Troy W. BERGER respectfully moves this Court for leave to file a delayed appeal from the Journal Entry of the GUERNSEY County Court of Appeals, FIFTH Appellate District, entered in Court of Appeals Case No. 20CA000022 on the date OCTOBER 8, 2021

THERE WAS INSUFFICIENT EVIDENCE AND
MANIFEST WEIGHT OF THE EVIDENCE. THE WITNESS
"RUTH MCKIM" TESTIFIED SHE THOUGHT THAT APPELLANT
STARTED THE FIRE, THEN TESTIFIED SHE DID NOT SEE
THE APPELLANT START THE FIRE. THERE WASN'T ANY
FACIAL RECOGNITION IN OR ON THE VIDEO TO TELL
WHO IT WAS IN THE VIDEO ON THE NIGHT OF THE
FIRE. TWO PHONE EXTRACTION WERE DONE AS WELL
WHICH CAME BACK WITH NOTHING. I FEEL I WAS
COERCED INTO THE CONFESSION AND I WOULD LIKE
TO FILE THIS APPEAL I ALSO NEED COURT
APPOINTED COUNSEL. I DID NOT DO THE CRIME
I ALSO HAD TWO OTHER WITNESS MY MOTHER
AND SAVANNA JEFFREY THAT WERE GONNA
TESTIFY ON MY BEHALF BUT DIDN'T GET TO.

~~THE BOTTOM~~ THE BOTTOM OF THE ONE PAGE IS CUT CAUSE I
MISPELLED AND MESSED UP MY WORDS I TRIED
SCATCHING IT OUT BUT IT LOOKED HORRIBLE I APOLOGIZE

An affidavit supporting the Appellant's allegations is attached hereto. Because the Appellant did not unduly delay the filing of this appeal, this Court should permit the Appellant to file a delayed appeal.

Respectfully submitted,

Troy Berger
SIGNATURE
TROY W. BERGER A778005
NAME AND NUMBER
TRUMBULL CORRECTIONAL
INSTITUTION
5701 BURNETT ROAD
ADDRESS
LEAVITTSBURG, OH 44430
CITY, STATE & ZIP

DEFENDANT-APPELLANT, PRO SE

AFFIDAVIT

State of Ohio)
) ss:
County of)

I, Troy W. BERGER, swear that the following is true:

1. INABILITY TO UTILIZE THE LEGAL LIBRARY DUE
TO A GLOBAL COVID PANDEMIC
2. LEGAL LIBRARY HAS 1 CLERK FOR THE USE OF
HUNDREDS OF INMATES
3. OUR LIBRARIANS DO NOT COME INTO THE CAMP
DUE TO THE VIRUS AND BEING QUARANTINED
4. PRISON IS UNDER STAFFED IN LEGAL SERVICES,
MAIL, ETC.
5. _____

Troy Berger A778505
NAME AND NUMBER

DEFENDANT-APPELLANT, PRO SE

Sworn to and subscribed in my presence this 10th day of October,
20 .

Sally Ashley
Notary Public
My Commission Expires: _____



SALLY ASHLEY
NOTARY PUBLIC, STATE OF OHIO
TRUMBULL COUNTY
My Comm. Expires April 8, 2023

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to File Delayed Appeal was forwarded by regular U.S. Mail to ASSISTANT GUERNSEY Prosecuting Attorney,
COUNTY
GUERNSEY County at the address of 627 WHEELING AVE. CAMBRIDGE, OH
43725
on the date OCTOBER 8, 2021.

Troy Berger
SIGNATURE
TROY W. BERGER A778505
NAME AND NUMBER

DEFENDANT-APPELLANT, PRO SE

3304517249 Fifth District 11

OPINION FILED: 8/30/2021POSTED: 8/30/2021NOA DATE: 11/25/2020 DATE HEARD: 8/12/2021 LOCATION HEARD: _____COUNTY: GUERNSEY NO: 20CA000022 DECISION: AffirmedCAPTION: State of Ohio v. Troy W. BergerTOPIC: Aggravated arson/Manifest weight and sufficiencyPANEL: BALDWIN

JUDGE (WRITER)

GWIN

JUDGE

HOFFMAN

JUDGE

August 25, 2021

DATE SIGNED

8/26/21

DATE SIGNED

DATE SIGNED

3304517219 Fifth District 11

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED
COURT OF APPEALS

AUG 30 2021

GUERNSEY COUNTY, OHIO
JENNIFER JOHNSON,
CLERK OF COURTS

STATE OF OHIO,

Plaintiff - Appellee

-vs-

TROY W. BERGER,

Defendant - Appellant

JUDGES:

Hon. Craig R. Baldwin, P.J.

Hon. W. Scott Gwin, J.

Hon. William B. Hoffman, J.

Case No. 20CA000022

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Guernsey County
Court of Common Pleas, Case No.
20 CR 05

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

APPEARANCES:

For Plaintiff-Appellee

JASON R. FARLEY
Assistant Guernsey County
Prosecuting Attorney
627 Wheeling Avenue
Cambridge, Ohio 43725

For Defendant-Appellant

MICHAEL GROH
1938 E. Wheeling Avenue
Cambridge, Ohio 43725

Guernsey County, Case No. 20CA000022

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Baldwin, J.

{11} Defendant-appellant Troy Berger appeals his conviction and sentence by the Guernsey County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{12} On January 29, 2020, the Guernsey County Grand Jury indicted appellant on one count of aggravated arson in violation of R.C. 2909.02, a felony of the first degree. At his arraignment on February 13, 2020, appellant entered a plea of not guilty to the charge. Subsequently, a jury trial commenced on September 1, 2020. The following testimony was adduced at trial.

{13} During the evening of December 17, 2019, there was a fire at 624 South 8th Street in Cambridge, Ohio. Ruth McKim resided at such address and Ray McKim, her father, and Savannah Jeffrey, the mother of appellant's children, were staying at the residence at such time. Michael Stellfox, an investigator with the Ohio State Fire Marshal's Fire and Explosion Investigation Bureau, testified that he investigated the fire the following day and determined that it was "an incendiary fire with a direct result of [a] human act,..." Trial Transcript at 236. He testified that by "human act", he meant that an actual person used "some way or means, whether it be an open flame device such as a lighter, or a match, or something that intentionally started the fire." Trial Transcript at 236. Based on his investigation, he believed that a lighter or match caused the fire and not an ignitable liquid. Agent Stellfox testified that the origin of the fire was a trash pile behind the residence.

{14} At the trial, Ray McKim testified that appellant was at the house the evening of December 17, 2019. When asked what happened that evening, he testified that

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appellant set the house on fire. Ray McKim testified that appellant, earlier that day, "was up there and he told my -- told me to tell my daughter she was going to regret this day, and next thing we knew we smelled smoke and smoke as coming out of the ceiling." Trial Transcript at 299. Ray McKim testified that he was in the house when the fire started. He further testified that appellant had told him that appellant was going to call the police to report that there were syringes in the house.

{15} The next witness to testify was Ruth McKim who owned the house. She testified that she told the police that she thought that appellant had started the fire because appellant "was the only one there circling my house looking through my windows." Trial Transcript at 313. Ruth McKim testified that Savannah Jeffrey was at McKim's house and that Jeffrey and appellant had been arguing. Appellant had been trying to get Jeffrey to leave McKim's house, but Jeffrey did not want to leave. Ruth McKim testified that she had called 911 earlier on the day of the fire because appellant would not leave her house when told to do so. Although no one came to remove appellant, appellant finally left. Ruth McKim identified appellant walking around her house in a video taken by her neighbor across the street. She further testified that after she kicked appellant out of her house, she observed him walking back and forth in her side yard while looking in her front windows. She testified that she was in the residence when the fire started and could see smoke coming from the walls and ceiling. Appellant did not leave until after the fire started. When asked, Ruth McKim testified that she was positive that it was appellant peeking in her windows and walking around and that it was appellant in the video.

{16} On cross-examination, Ruth McKim agreed that appellant was at her house that night wanting to talk to Savannah because he wanted to try and talk her into going

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home to be with her and their children so that they could be a family. She testified that appellant came into her house and indicated that Savannah was a crystal meth user. Savannah, however, refused to come home to the children. Ruth McKim also testified that appellant asked her for a cigarette and that she gave one to him. She did not recall appellant asking her for a lighter or matches and did not recall giving him either a lighter or matches. According to her, appellant always had a lighter. She also testified that she did not see appellant start the fire.

{17} Appellant testified that he went to the McKim house that night to try to get Savannah Jeffrey to come home to be with him and their two children. He testified that he knocked on the front door of the house and that Ruth McKim let him into the house. He testified that Savannah went to the McKim household to either try to buy or use drugs with Ruth McKim's older son. Appellant testified that he knew that was the reason because Savannah would tell him that. Once he left McKim's house, appellant called the police about their drug use. Appellant testified that after calling the police, he went back to the McKim house and knocked on the door and told Ray McKim that the police would possibly be at the house. Appellant testified that he never went behind the house and that he waited to see if the police or law enforcement were going to arrive. Appellant then returned to his residence and was arrested there.

{18} There was testimony at trial that appellant was apprehended by Patrolman Ben Harper of the Cambridge Police Department after being identified by Ruth McKim as a possible suspect and was interviewed by Detective Greg Clark of the Cambridge Police Department on December 18, 2019. Appellant confessed to the Detective that he had committed the offense. The interview was played at trial and entered into evidence as an

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exhibit. During the interview, appellant admitted to starting the fire in a matter consistent with Agent Stellfox's findings. However, appellant later testified that he did not start a fire anywhere that night in or around or near the McKim house, but told Detective Clark that he had lit a bag of trash on fire because he was nervous and scared. He testified that he felt trapped and did not believe that he had a choice. The following is an excerpt from appellant's testimony at trial:

{¶9} Q. So what did you do when you felt like you didn't have a choice? Did you make a choice between the two theories?

{¶10} A. Yes.

{¶11} Q. And what did you say?

{¶12} A. I went along with Detective Clark's first theory.

{¶13} Q. And that first theory was?

{¶14} A. Just to lie - - just that I intended not to harm anybody, just to light a bag of trash on fire, and that was - - and that was it.

{¶15} Q. Was that the truth?

{¶16} A. No.

{¶17} Q. Did you start the fire at the McKim home that night?

{¶18} A. No, I didn't.

Trial Transcript at 462-463.

{¶19} At the conclusion of the evidence and the end of deliberations, the jury found appellant found appellant guilty of aggravated arson in violation of R.C. 2909.02(A)(1). Pursuant to a Judgment Entry filed on October 28, 2020, appellant was

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sentenced to a term of six to nine years in prison and ordered to pay restitution. Appellant was also given notice of his duty to register as an arson offender.

{¶20} Appellant now appeals, raising the following assignments of error on appeal:

{¶21} "I. THERE WAS INSUFFICIENT EVIDENCE TO FIND APPELLANT GUILTY OF AGGRAVATED ARSON."

{¶22} "II. APPELLANT'S CONVICTION FOR AGGRAVATED ARSON WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I, II

{¶23} Appellant, in his two assignments of error, argues that his conviction for aggravated arson is against the manifest weight and sufficiency of the evidence. We disagree.

{¶24} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). On review for manifest weight, a reviewing court is to examine 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin*, 20 Ohio

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App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶25} Appellant was convicted of aggravated arson in violation of R.C. 2909.02(A)(1). Such section states as follows: (A) No person, by means of fire or explosion, shall knowingly do any of the following:(1) Create a substantial risk of serious physical harm to any person other than the offender."

{¶26} We find that, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that appellant started the fire and, by doing so, knowingly caused a substantial risk of serious physical harm to the McKims and Savannah Jeffrey, the occupants of the house at the time the fire was started. Michael Stellfox testified that it was dangerous for people to be in a household that has that type of fire. While appellant argues that no one saw him start the fire, there was overwhelming circumstantial evidence that he started the fire. At trial, Ruth McKim testified that she was in the house when the fire started and she was certain that appellant was outside the house peeking in the windows. She positively identified appellant from the surveillance video which showed him walking from behind the house seconds before the fire started. Ray McKim testified that appellant, after being thrown out of the house earlier, came back and told him that Ruth was going to regret it. Appellant had been arguing with Savannah Jeffrey. Michael Stellfox testified that the fire was caused by a human act. Moreover, appellant told Detective Clark that he started the fire in a manner consistent with the findings of Stellfox. While appellant testified that his confession was not the truth and that

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he confessed because he was nervous and felt trapped, the jury, as trier of fact, was in the best position to assess his credibility and clearly did not find appellant to be credible. We further find that the jury did not lose its way in convicting appellant of aggravated arson.


{¶27} Appellant's two assignments of error are, therefore, overruled.

{¶28} Accordingly, the judgment of the Guernsey County Court of Common Pleas is affirmed.

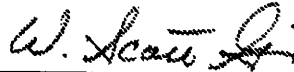
By: Baldwin, P.J.

Gwin, J. and

Hoffman, J. concur.



HON. CRAIG R. BALDWIN



HON. W. SCOTT GWIN



HON. WILLIAM B. HOFFMAN

CRB/dr

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED
COURT OF APPEALS

AUG 30 2021

GUERNSEY COUNTY, OHIO
JENNIFER JOHNSON,
CLERK OF COURTS

STATE OF OHIO,

Plaintiff - Appellee

-vs-

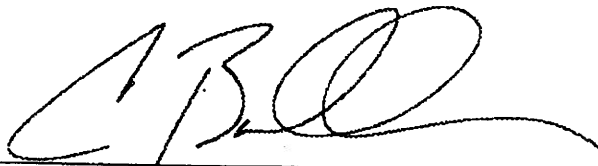
TROY W. BERGER,

Defendant - Appellant

JUDGMENT ENTRY

CASE NO. 20CA000022

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Guernsey County, Ohio is affirmed. Costs are assessed to appellant.



HON. CRAIG R. BALDWIN



HON. W. SCOTT GWIN



HON. WILLIAM B. HOFFMAN