

[Cite as *State v. Masters*, 2010-Ohio-3365.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 09CA15
 :
 vs. :
 :
 ROBERT SHANE MASTERS, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Timothy Young, Ohio Public Defender, and Jeremy J. Masters, Assistant Ohio Public Defender, 250 East Broad Street, Ste. 1400, Columbus, Ohio 43215

COUNSEL FOR APPELLEE: C. Jeffrey Adkins, Gallia County Prosecuting Attorney, and Eric R. Mulford and Pat Story, Gallia County Assistant Prosecuting Attorneys, Gallia County Courthouse, 18 Locust Street, Rm. 1267, Gallipolis, Ohio 45631

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 5-25-10

ABELE, J.

{¶ 1} This is an appeal from a Gallia County Common Pleas Court judgment of conviction and sentence. A jury found Robert Shane Masters, defendant below and appellant herein, guilty of burglary in violation of R.C. 2911.12(A)(2). Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT DEPRIVED MR. MASTERS OF A FAIR TRIAL AND COMMITTED PLAIN ERROR WHEN IT FAILED TO PROPERLY INSTRUCT THE JURY THAT IN ORDER TO FIND MR. MASTERS GUILTY OF BURGLARY, THE JURY MUST HAVE DETERMINED THAT HE POSSESSED A PURPOSE TO COMMIT A SEPARATE UNDERLYING CRIMINAL OFFENSE.”

SECOND ASSIGNMENT OF ERROR:

“TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT WHEN THE TRIAL COURT DID NOT INSTRUCT THE JURY THAT IN ORDER FOR MR. MASTERS TO BE FOUND GUILTY OF BURGLARY, THE JURY MUST HAVE DETERMINED THAT MR. MASTERS POSSESSED A PURPOSE TO COMMIT A SEPARATE UNDERLYING CRIMINAL OFFENSE.”

{¶ 2} On November 15, 2008, Maria Canaday returned to her home at 1900 Chestnut Street and discovered that someone had broken-in and stolen a number of items. Several days later, appellant was transported to the police department on an unrelated matter. At that time, Detective Jeff Boyer (assigned to investigate the Canaday break-in) was made aware that appellant lived in the vicinity of the Canaday home. After Detective Boyer questioned appellant and drove him to that area, appellant ultimately confessed to burglarizing the house along with one of his friends.¹

¹ The record indicates that charges from this incident are pending against Ricky Gleason, appellant’s alleged accomplice.

{¶ 3} On November 21, 2008, the Gallia County Grand Jury returned an indictment charging appellant with burglary. At the jury trial, the Canadays described the property stolen from their home.² Detective Boyer also related his involvement with appellant, including appellant's confession to the crime. Appellant testified in his own defense and denied that he committed the crime. Rather, he claimed that his friend, Ricky Gleason, perpetrated the burglary and then called him to brag.

{¶ 4} The jury was unswayed by appellant's version of the events and, consequently, returned a guilty verdict. Appellant later filed a Crim.R. 33 motion for new trial and argued that insufficient evidence supported his conviction, but the trial court overruled the motion. This appeal followed.

I

{¶ 5} Appellant's two assignments of error both involve an alleged defect in the trial court's jury instructions. R.C. 2911.12(A)(2) proscribes trespass into the home of another with "purpose to commit in [that home] any criminal offense." (Emphasis added.) When instructing the jury, however, the trial court described this latter element as follows:

"Now purpose to commit is an essential element of the crime of burglary. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to commit burglary. . ." (Emphasis added.)

{¶ 6} Appellant argues that this instruction constitutes error because the statute

² Eugene Canaday estimated the value of that property as between \$12,000 and \$15,000. An insurance company paid \$13,000 for the loss, and the trial court ordered

requires that he be proven to have an intent to commit an offense separate and distinct from the burglary itself. By suggesting that burglary itself is sufficient to constitute the underlying offense, appellant maintains, this instruction is outcome determinative.

{¶ 7} Appellee does not contest the view that the instruction is flawed but, rather, argues that trial counsel did not object when the language could have been corrected. Indeed, the trial transcript reveals that both parties were asked if they had objections or corrections to the instructions, and each responded in the negative. Thus, appellee asserts that the issue has been waived.

II

{¶ 8} In his first assignment of error, appellant asserts that we should recognize plain error with regard to the trial court's jury instruction. We disagree with appellant.

{¶ 9} Generally, notice of Crim.R. 52(B) plain error must be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. See State v. Long (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus. To find plain error, an appellate court must be able to say that, but for the error, the outcome of the trial clearly would have been otherwise. Id. at paragraph two of the syllabus; State v. McCausland, 124 Ohio St.3d 8, 918 N.E.2d 507, 2009-Ohio-5933, at ¶15; State v. Braden, 98 Ohio St.3d 354, 785 N.E.2d 439, 2003-Ohio-1325, at ¶50; State v. Sanders (2001), 92 Ohio St.3d 245, 263, 750 N.E.2d 90.

{¶ 10} Although the Ohio Supreme Court's decision in State v. Gardner, 118

appellant to pay restitution for the remainder.

Ohio St.3d 420, 889 N.E.2d 995, 2008-Ohio-2787 dealt with aggravated burglary under R.C. 2911.11 rather than burglary under R.C. 2911.12, that decision is instructive. In Gardner, the trial court did not instruct on any specific underlying crime that would satisfy the R.C. 2911.11(A) "any criminal offense" language. Id. at ¶27. On appeal, the Montgomery County Court of Appeals found plain error and reversed the conviction because the trial court failed "to specify the underlying criminal offense he had a purpose to commit[.]" Id. at ¶29. The Ohio Supreme Court, however, reversed the appellate court and, citing a similar decision and statute in Washington state, held that the specific crime intended to be committed inside a burglarized home is not an essential element of an offense and the jury need not be so instructed. Id. at ¶71. Although the Court agreed that it is preferable to so instruct on the underlying offense, id. at ¶73, the court's plurality rejected a "plain error" analysis for the failure to do so. See id. at ¶¶77-79 & ¶¶86-87. In so ruling, the plurality relied on several factors including, inter alia, the lack of any apparent confusion on the part of the jury.

{¶ 11} In the case sub judice, we reject appellant's claim and note that: (1) before one gets to the portion of the transcript that contained the flawed instruction, the trial court gave an instruction that correctly parallels the offense itself; (2) we find nothing in the record to suggest jury confusion; (3) the only evidence adduced as to the underlying crime was theft; and, (4) sufficient evidence of theft supports the jury's verdict.

{¶ 12} We also emphasize that appellant confessed his involvement in the burglary to Detective Boyer and admitted that he "removed jewelry" and put it in the pockets of his "hoodie." Although appellant later denied that he committed the crime

and stated that he confessed only to please Detective Boyer, the truth and veracity of his testimony are issues the jury must determine. State v. Dye (1998), 82 Ohio St.3d 323, 329, 695 N.E.2d 763; State v. Ballew (1996), 76 Ohio St.3d 244, 249, 667 N.E.2d 369. A trier of fact is free to believe all, part or none of appellant's testimony. State v. Nichols (1993), 85 Ohio App.3d 65, 76, 619 N.E.2d 80; State v. Caldwell (1992), 79 Ohio App.3d 667, 679, 607 N.E.2d 1096.

{¶ 13} Here, the jury obviously believed Detective Boyer's version of the events rather than appellant's version and we will not second-guess that decision. Moreover, in light of the extensive evidence from the Canadays concerning the stolen jewelry, we are not persuaded that the outcome of this case would have been different but for the misstatement in one part of the trial court's instructions.

{¶ 14} Accordingly, based upon the foregoing reasons we hereby overrule appellant's first assignment of error.

III

{¶ 15} In his second assignment of error, appellant asserts that his trial counsel was ineffective for failing to object to the trial court's jury instruction. We disagree with appellant.

{¶ 16} A criminal defendant has a right to the effective assistance from counsel. McMann v. Richardson (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763; State v. Lytle (Mar. 10, 1997), Ross App. No. 96CA2182. To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him

of a fair trial. See e.g. Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; also see State v. Perez, 124 Ohio St.3d 122, 920 N.E.2d 104, 2009-Ohio-6179, at ¶200; State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904. Both prongs of the “Strickland test” need not be analyzed, however, if a claim can be resolved under one. State v. Madrigal (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52.

{¶ 17} To establish the existence of prejudice, a defendant must establish that a reasonable probability exists that, but for counsel's alleged error, the result of the trial would have been different. State v. White (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus.

{¶ 18} In the case sub judice, just as we did not find under appellant's first assignment of error that the outcome of the trial would have been otherwise if a different jury instruction had been given, we likewise cannot conclude that the outcome would have been different if counsel had lodged a timely objection to the jury instruction. In light of the overwhelming evidence against appellant, and in view of the fact that the jury rejected his denial of having confessed to Detective Boyer, we do not believe that the result of the trial would have been otherwise if counsel had timely interposed an objection and the trial court had corrected the instruction.

{¶ 19} Accordingly, based upon these reasons, we hereby overrule appellant's second assignment of error.

{¶ 20} Having considered all the errors assigned by appellant and argued by him in his brief, and having found merit in none, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Gallia County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Kline, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.