

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio

Court of Appeals No. F-11-002

Appellee

Trial Court No. 10CR000080

v.

James P. Kelly, Jr.

DECISION AND JUDGMENT

Appellant

Decided: November 4, 2011

* * * * *

Scott Haselman, Fulton County Prosecuting Attorney, and
Paul H. Kennedy, Assistant Prosecuting Attorney, for appellee.

Terice A. Warncke, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Appellant, James Kelly, Jr., appeals from the judgment of the Fulton County Court of Common Pleas following a bench trial, which convicted him of attempted burglary and sentenced him to two years of community control, and a reserved prison term of 11 months. For the reasons that follow, we affirm.

{¶ 2} Appellant presents one assignment of error:

{¶ 3} "1. THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO SUSTAIN THE ATTEMPTED BURGLARY CONVICTION AGAINST MR. KELLY, AND APPELLANT'S CONVICTION IN THIS CASE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND SHOULD BE REVERSED."

{¶ 4} This conviction stems from an incident that occurred on May 28, 2010. Testimony at trial indicated that on that day, Antonio Stuart, Eric Hawthorne, Khary Hawthorne, and Mike Harris gathered to transport a hot tub into Stuart's garage, and then stayed at Stuart's house to watch a basketball game. Sometime around 8:00 to 9:00 p.m., while the basketball game was starting, Stuart heard noises coming from the sliding door located on the back of his house in the kitchen. Upon investigation of the noise, Stuart saw appellant, who was intoxicated, attempting to open the locked door. Stuart testified that appellant was pulling on the door shouting "[O]pen the f-ing door. Let me in. Let me in." Stuart replied, "[D]ude, this is not your house. Go somewhere." The testimony indicated that Stuart then grabbed some knives from a kitchen drawer and held them up to the door. Upon seeing the knives, appellant ran away.

{¶ 5} Stuart and his friends then ran after appellant. The testimony of Stuart, his friends, and his neighbor, indicated that shortly after going outside, appellant was now chasing Stuart, yelling that he was going to kill Stuart, and that Stuart was going to hell. The witnesses further testified that the chase went into the street where appellant threw a punch at Stuart, causing both men to tumble to the ground. At this point, Eric Hawthorne

entered the fray to separate the two. Within a few minutes, police arrived on the scene, where they found appellant laying in the roadway, drifting in and out of consciousness. Appellant was later transported by helicopter to a local hospital where he was treated for seven stab wounds. On June 21, 2010, the Fulton County Grand Jury indicted appellant on one count of attempted burglary in violation of R.C. 2923.02(A) and former 2911.12(A)(4)¹, a felony of the fifth degree.

{¶ 6} On October 25, 2010, the case was tried to the bench. At trial, appellant based his defense on a mistake of fact. Appellant presented evidence that earlier in the evening his cousin had granted him permission to stay at her house, which was located in the same subdivision as Stuart's. Testimony showed that appellant had stayed at his cousin's house on numerous occasions, and that he always entered through the back sliding door. Moreover, several photographs were entered as exhibits, which showed that the back of appellant's cousin's house and Stuart's house were similar in color and shape, with the only major difference being that the garages were located on opposite sides. Appellant's theory was that because he mistakenly thought that he was entering his cousin's house, which he had permission to do, he could not have knowingly trespassed onto Stuart's property, and thus was innocent of attempted burglary. Immediately after the presentation of evidence and closing arguments, the trial court found appellant guilty as charged.

¹R.C. 2911.12 was amended effective September 30, 2011, replacing 2911.12(A)(4) with 2911.12(B).

{¶ 7} On appeal, appellant makes two arguments. First, appellant argues that there was insufficient evidence to sustain a conviction. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. "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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 8} Here, the elements of attempted burglary are found in R.C. 2923.02(A) and former 2911.12(A)(4). R.C. 2923.02(A) provides that "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." The offense of burglary is defined in former R.C. 2911.12(A) as "[n]o person, by force, stealth, or deception, shall do any of the following: * * * (4) Trespass in 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."

{¶ 9} Appellant asserts that the state did not present evidence that could sustain a verdict on the elements of force and appellant acting "knowingly." As to force, appellant notes that no weapons, tools, or implements of any kind were found on or near him. Furthermore, appellant correctly identifies that the testimony shows that he was attempting to pull on a closed door using only his hands. Appellant argues that this

normal type of effort does not constitute "force." In support of his argument, appellant cites to *State v. Casino*, 8th Dist. No. 87650, 2006-Ohio-6586. In that case, a family living on the second floor of a duplex found the disoriented and intoxicated defendant in their apartment, using their bathroom, after having placed his belongings on the kitchen counter. At trial, a jury found the defendant guilty of burglary in violation of former R.C. 2911.12(A)(4). However, the Eighth District vacated the conviction because the testimony "strongly suggest[ed] that both the side door to the duplex and the door to the second floor apartment were open when Casino entered the dwelling." *Id.* at ¶ 16. The court continued, "In the absence of any evidence that the doors to the habitation were locked before Casino's entry, or were damaged by his use of force in gaining entry, there is insufficient evidence of force to support a conviction for burglary in violation of [former] R.C. 2911.12(A)(4)." *Id.*

{¶ 10} Appellant relies on *Casino* for the proposition that merely opening a closed door without doing any damage does not constitute force, and thus the evidence against appellant showing only that he used his bare hands is insufficient. However, we think that the present situation is distinguishable from *Casino* in that here, the door to Stuart's house was clearly locked. Consequently, if successful, appellant necessarily would have had to use force, as defined in *Casino*, to enter Stuart's house. Moreover, and more importantly, we find the Tenth District's holding in *State v. Lane* (1976), 50 Ohio App.2d 41, to be a more accurate description of this district's law regarding "force."

{¶ 11} As identified in *Lane*, R.C. 2901.01(A)(1) defines force as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." Thus, "the statute clearly indicates that 'compulsion * * * physically exerted' against a thing to gain entrance constitutes force." *State v. Lane* at 46. The *Lane* court went on to hold:

{¶ 12} "Defendant must have forced open a closed door but unlocked door. This forcing open may have been accomplished by defendant by using his strength to turn the doorknob and pushing the door open. We find no indication from the statutory definition that the General Assembly intended to exclude the forcing open of closed but unlocked doors from the definition of force set forth in R.C. 2901.01(A), or from the crime of aggravated burglary as defined by R.C. 2911.11(A)." *Id.*

{¶ 13} Further, citing to a list of other cases, including one from the Eighth District, this court has stated, "Ohio decisions recognize that unauthorized entry into a residence through use of an unlocked, closed door is sufficient to prove the force element for a conviction of burglary." *State v. Austin*, 6th Dist. No. L-09-1011, 2009-Ohio-6258, ¶ 22. See, also, *State v. Rohrbach* (Sept. 3, 1993), 6th Dist. No. 92WD072. Thus, appellant's argument that the act of merely pulling on a closed door does not constitute force is without merit. Consequently, and in light of Stuart's testimony regarding appellant's attempt to open the door, we hold that sufficient evidence exists on the issue of force to sustain appellant's conviction.

{¶ 14} Appellant next asserts that the state did not present sufficient evidence to sustain a verdict on the issue of whether he acted "knowingly." "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). "Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances." *State v. Huff* (2001), 145 Ohio App.3d 555, 563. As such, the test for whether a defendant acted knowingly is subjective, but it is determined by objective criteria. *State v. Elliott* (1995), 104 Ohio App.3d 812, 821. Here, there is no doubt that appellant was knowingly attempting to enter a house; the issue, then, is whether appellant knew that he was attempting to enter a house that he was not privileged to enter.

{¶ 15} Appellant contends that he did not know that he was entering the wrong house, and that this case involves a simple mistake of fact. Appellant argues that his "undisputed state of intoxication, though not a legal excuse, is certainly relevant and weighty evidence to contradict any notion that he acted knowingly," and that "the houses in the neighborhood, relevantly those of his cousin and Antonio Stuart (both yellow), looked very similar and thus, gave rise to [appellant] having mistakenly entered upon the wrong property and tried to open the door of the wrong house."

{¶ 16} We reject appellant's arguments for two reasons. First, R.C. 2901.21(C) provides that "[v]oluntary intoxication may not be taken into consideration in

determining the existence of a mental state that is an element of a criminal offense." See, also, *State v. Stockhoff*, 12th Dist. No. CA2001-07-179, 2002-Ohio-1342 (holding that appellant's argument that due to his voluntary intoxication he could not form the mental state of knowingly regarding his burglary conviction was without merit). Second, the evidence at trial demonstrates that while the backs of the houses are similar, the garages are on opposite sides of the house. The evidence also demonstrates that the surroundings of the houses were noticeably different—behind Stuart's house were a cemetery and woods, whereas behind appellant's cousin's house were other houses. Finally, the evidence demonstrates that appellant knew the neighborhood well, having lived there at various times with his mother, his cousin, and his ex-girlfriend. Therefore, sufficient evidence exists for the trier of fact to conclude that appellant acted knowingly.

{¶ 17} Accordingly, we hold that appellant's argument that the state failed to prove sufficient evidence to support his conviction for attempted burglary is without merit.

{¶ 18} Appellant's second argument on appeal is that his conviction is against the manifest weight of the evidence. In support of this argument, appellant contends that three of the state's witnesses—Antonio Stuart, Eric Hawthorne, and Desirae Swick—were impeached, and thus their testimony was unreliable. As to Stuart and Hawthorne, appellant alleges that they perjured themselves when they testified that Stuart did not take a knife with him when he left his home to chase appellant, that their testimony was inconsistent regarding which door Stuart exited, and that they had a motive to testify falsely to avoid felonious assault charges. As to Swick, appellant claims her testimony

was not credible because it conflicted with the testimony of the other witnesses regarding whether they came out of the garage or the front door. Appellant therefore concludes that his conviction was against the manifest weight of the evidence. We disagree.

{¶ 19} In reviewing a manifest weight of the evidence claim, the appropriate inquiry 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 [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.'" (Emphasis sic.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶ 81. (Citations omitted.) We note that, reversing a verdict and ordering a new trial is appropriate "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, 78 Ohio St.3d at 387. "Weight is not a question of mathematics, but depends on its *effect in inducing belief*." (Emphasis sic.) *Id.* Further, "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The trier of fact may believe all, some, or none of what a witness says. *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶ 20} Upon reviewing the record, we cannot say that the trial court "clearly lost its way." In an effort to discredit the testimony of Stuart, Eric Hawthorne, and Swick, appellant points to incidents that occurred after he attempted to open Stuart's back door.

However, the relevant facts are those relating to the charge of attempted burglary, not what occurred later in the street. As to the attempted burglary, the trial court found the testimony of Stuart and Eric Hawthorne—that appellant was at Stuart's back door attempting to pull it open—to be "very credible." Further, appellant testified that he could not remember many of the events from that night, and when asked whether it was possible that he tried to open Stuart's back door replied, "It's possible; yes." Based on this, we conclude that the conviction for attempted burglary was not against the manifest weight of the evidence.

{¶ 21} Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 22} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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