[Cite as *State v. Lamp*, 2023-Ohio-4733.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JUSTIN M. LAMP,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 CO 0038

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2022 CR 271

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Vito J. Abruzzino, Columbiana County Prosecutor and *Atty. Tammie M. Jones*, Assistant Prosecutor, Columbiana County Prosecutor's Office, 135 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

Atty. Aaron M. Meikle, 173 West Market Street, Warren, Ohio 44481, for Defendant-Appellant

Dated: December 20, 2023

WAITE, J.

{¶1} Appellant Justin M. Lamp appeals a September 30, 2022 Columbiana County Court of Common Pleas judgment entry convicting him of breaking and entering into an unoccupied detached garage. Appellant argues that his conviction, specifically the element of "unoccupied structure," is not supported by sufficient evidence. Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} In June of 2020, Eugene Prendergast purchased the property next door to his residence in West Township, Columbiana County. The property included a house, a detached garage, barn, and a pole building. The prior owner of the property had died in January of that year and Eugene purchased it at an auction. Eugene closed on the property in August of 2020.

{¶3} At the time, the property was occupied by renters who had a month-to-month leasing arrangement with the prior owner. The renters voluntarily moved out in November. The residence was described as a "fixer upper" that needed to be renovated. (Trial Tr., p. 202.) Eugene planned to begin renovations and allow his daughter to live on the property. Eugene continued to live next door which is where he had been residing for a long period of time.

{¶4} On December 14, 2021, Eugene and his son, Justin, visited the property and conducted a walk-through of the garage. The garage contained several items, mostly tool related items left behind by the renters. They were attempting to determine what to keep and what to throw away. At the time of the walk-through, the lights in the garage were operable and the power was connected.

{¶5} On December 15, 2021, Justin drove by the property shortly after noon on his way to drop his daughter off at school. He drove this path every week day to take his daughter to school. While driving, he noticed there was an unfamiliar tan colored Ford Ranger parked in front of the garage. He attempted to reach his father on the phone but did not receive any responses. Because he needed to get his daughter to school on time and did not want to place her in harm's way, he did not stop and approach the vehicle at that time. However, on his way back, around 12:45 p.m., he noticed the vehicle remained parked in front of the garage.

{¶6} Justin pulled into the driveway and parked behind the vehicle. Minutes later, Appellant, wearing camouflaged clothing, exited the garage through the man door and approached Justin's vehicle. In summation, Justin asked Appellant why he was inside the garage and informed him that he had no business trespassing on the property. Appellant responded that he thought the property was for sale and wanted to see it. Justin told him to leave and he did so. Before Appellant left, Justin took photographs of Appellant's vehicle. Justin and Eugene both testified that there are no "for sale" signs on the property nor is there any other indication that the property might be for sale.

{¶7} Later that night, Eugene and Justin checked on the garage and noticed that the light would not turn on. They determined that the breaker had been turned off. Based on the circumstances, and the presence of a bolt cutter found nearby, Eugene believed that Appellant turned off the breaker in order to cut and remove the copper wire and take it with him. Eugene and Justin also noticed several large items and tools, (including a generator, car jacks, and a window air conditioner) were piled near the door as if someone

collected them to take out of the garage. They observed “drag marks” across the floor from the generator, which was a heavy item. (Trial Tr., p. 217.)

{¶8} Justin provided the photographs of the vehicle to law enforcement and he posted them on social media in an attempt to identify Appellant. Deputy Willie Coleman of the Columbiana County Sheriff’s Office learned that the license plate was registered to a Cadillac belonging to Ronald Stone. Stone testified that Appellant is a long-time friend who occasionally helps him repair vehicles. He asked Appellant to complete repairs on the Ford Ranger and he put a license plate on it (that had been registered to the Cadillac) so it could be driven and repaired. Investigators presented a photo array to Justin that included a photograph of Appellant. Justin immediately identified Appellant in a photo lineup.

{¶9} Appellant was indicted on one count of breaking and entering, a felony of the fifth degree in violation of R.C. 2911.21(A)(1). Following a two-day trial, a jury convicted Appellant of the sole offense as charged. On September 30, 2022, the trial court sentenced Appellant to eleven months of incarceration with credit for 153 days served. The court informed Appellant that he was subject to an optional two-year postrelease control term. It is from this entry that Appellant timely appeals.

Mootness

{¶10} *Sua Sponte,* we note that Appellant has been released from incarceration and does not appear to be subject to any state supervision. Appellant did not request a stay of his sentence. The briefing schedule delayed this matter substantially, as Appellant sought three motions for extension and the state obtained two extensions. Appellant filed his brief before this Court could rule on his third request, however, it was filed after the

expiration of the second extension and without requesting leave from this Court. The state was granted two more limited extensions. The transcript also took longer.

{¶11} The first brief was filed almost five months after the notice of appeal was filed and the state's brief was filed almost seven months after the notice was filed. An order from this Court closing the briefing schedule was filed a little over eight months after the filing of the notice of appeal. Appellant was sentenced to eleven months with credit for 153 days (just over five months) served, thus he may have been released before the state even filed its brief. Based on the Ohio Offender's database, it does not appear that Appellant was subjected to a postrelease control term as his name does not appear in the system, even under supervised release.

{¶12} As Appellant has been released from confinement and is not subject to supervised release, his appeal is moot. It is noted that Appellant has an extensive criminal record, thus any potential reversal would not provide him with a clean criminal record. However, in the interests of fairness and justice, his arguments will be addressed.

ASSIGNMENT OF ERROR

> The trial court erred in convicting Mr. Lamp of Breaking and Entering, a violation of R.C. 2911.13, because the conviction was against the sufficiency of the evidence presented at trial. R.C. 2909.01; R.C. 2911.13; *State v. Dickson*, 2013-Ohio-5293 (7th Dist.); *State v. Fazenbaker*, 163 Ohio St. 3d 405 (2020); *State v. Tinney*, 2012-Ohio-1495 (7th Dist.).

{¶13} Appellant's argument is confusing, as he meshes arguments concerning the completeness of the jury instructions with sufficiency of the evidence arguments. Based

on the cited caselaw it appears that this assignment of error is intended to contest sufficiency of the evidence. Appellant contends that the state failed to present evidence regarding "how the property or structure is being maintained, the actual occupancy of the structure, whether there were any overnight occurrences, and whether anyone was present or likely to be present." (Appellant's Brf., p. 3.)

{¶14} The state responds by arguing that it presented evidence the garage was not maintained as a permanent or temporary dwelling (testimony that it was used for storage, it was not heated, and no one lived in the garage); the garage was unoccupied (the entire property had been vacant for at least one month); the garage was not specifically adapted for the overnight accommodation of any person (no heating, photographs showing conditions not suitable for overnight stays); and that no one was present at the time or likely to be present (no one was in the garage at the time, property was vacant for at least one month, no reason that a person would have been in the garage at that time.) The state urges that the factors are specific to the time of the incident, not anytime in general.

{¶15} As no objection was made, the substance of the jury instructions will not be addressed because the issue was not preserved for appeal. In fact, trial counsel took no issue with the instruction and even opined that the jury should use a common sense definition. The issue also does not appear within the assignment of error heading and no argument is made regarding how any potential error affected the outcome of the trial. As such, we are unable to review the issue. It is the parties' duty to investigate and develop facts and arguments in support of or against a particular argument. See *Matter of Estate*

of McDaniel, 2023-Ohio-1065, 212 N.E.3d 351 (7th Dist.). We have declined to undertake that duty when the parties have not fulfilled their obligation. *Id.* at ¶ 59.

{¶16} In fact, in the case relied on by Appellant to advance his sufficiency argument, the court chose not to address an unpreserved issue as to a jury instruction on "unoccupied structure" where the appellant did not provide any argument as to how the jury instruction affected the outcome of the trial. *State v. Fazenbaker*, 9th Dist. Summit No. 29108, 2021-Ohio-3447, ¶ 16.

{¶17} "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). When reviewing a conviction for sufficiency of the evidence, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 7th Dist. No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. No. 09-JE-26, 2011-Ohio-1468, ¶ 34.

{¶18} In reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff,* 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on the grounds of sufficiency unless the reviewing court determines no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id.*

{¶19} R.C. 2911.13(A), Ohio's breaking and entering statute, provides that: "[n]o person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony."

{¶20} Although the revised code does not define "unoccupied structure," the Ohio Supreme Court has held that logically, the inverse of "occupied" should be used to define the term. *State v. Faze*nbaker, 163 Ohio St.3d 405, 2020-Ohio-6731, 170 N.E.3d 828.

{¶21} R.C. 2909.01(C) defines "occupied structure" as:

> [A]ny 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.

Whether Structure Maintained as Permanent Dwelling

{¶22} There is no question that the garage was never maintained as a dwelling, temporary or permanent. Photographs admitted into evidence, particularly Exhibits 4 and 5, depict conditions unsuitable for habitation. The cement floor has several long cracks and is unclean, as one would expect of a typical garage floor used for parking vehicles and storing items. Leaves, trash, and what appears to be strands of hay clutter the floor. There appears to be no insulation in the walls, which are unfinished with the studs revealed. Also, scattered on the floor are boxes, containers of bug spray and other liquids, empty buckets, and various items such as tools and helmets. There is no evidence that any type of furnishing is present. Further, there is testimony that the garage doors opened manually and did not have a lock. The man door had a slide lock but no keyed entrance. From this evidence, the structure would not be considered habitable for a permanent or temporary dwelling and it would take considerable effort for it to be made suitable for such purpose.

Whether Structure Occupied as Permanent or Temporary Habitation

{¶23} The undisputed testimony revealed that no one had lived in the residence, which was detached from the garage and located about ten to fifteen feet away, for at least one month before the incident. Testimony was further introduced that the property, including the garage, required extensive renovations. The previous tenants had moved out a month or so prior to the break in and the garage itself contained remnants of the prior tenant's possessions.

Whether Specially Adapted for Overnight Accommodation

{¶24} As previously discussed, there is no evidence that the garage could accommodate occupancy by a person. While wired for electricity, there was no heating or insulation. The floors are cracked concrete cluttered with dirt, yard debris, and random items. The garage doors manually opened without a locking mechanism. The man door had only a slide lock with no keyed entrance.

Whether Any Person is Present or Likely to Be Present

{¶25} While the argument could certainly be made that, at any time, a person could theoretically be found inside their garage, there was no evidence that at the time of this incident anyone was likely to be inside the garage. There were no vehicles on the property or signs there was anyone anywhere on the property at that time. Appellant argues that Justin frequently drove past the house and that Eugene lived next door, but neither of these facts are relevant, here. Appellant's assignment of error is without merit and is overruled.

Conclusion

{¶26} Appellant argues that his conviction, specifically the element of "unoccupied structure," is not supported by sufficient evidence. Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, J. concurs.

D'Apolito, P.J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.