

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

State of Ohio

Court of Appeals Nos. L-08-1396
L-08-1397

Appellee

Trial Court No. CR0200802505

v.

Arthur L. King
Robert L. King

DECISION AND JUDGMENT

Appellants

Decided: January 22, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, David F. Cooper and Robert A. Miller, Assistant Prosecuting Attorneys, for appellee.

James F. Schaller, II, for appellant Arthur L. King; Thomas P. Kurt, for appellant Robert L. King.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} These are consolidated appeals by appellants, Arthur King and Robert King, of judgments of conviction and sentence for burglary, a violation of R.C.

2911.12(A)(1) and (C), rendered in the Lucas County Court of Common Pleas after a joint non-jury trial. The trial proceeded in September 2008. Both appeal their convictions. Arthur King also appeals his sentence.

{¶ 2} Police apprehended the Kings as they attempted to leave a duplex apartment building located at 318/320 Kenilworth in Toledo, Ohio, at 3:15 a.m. on June 19, 2008 through the rear door. They were leaving with bags of cut or broken copper tubing or pipe and tools. An inspection of the building's basement disclosed that copper piping and tubing had been cut or torn from the plumbing in the basement. Damaged plumbing was leaking water in the basement where pipes had been cut or pried.

{¶ 3} Both appellants assert error based upon the claim that the evidence at trial was not sufficient to support a conviction for burglary. Arthur King's Assignment of Error No. I provides:

{¶ 4} "I. The judgment of the trial court convicting Arthur L. King of burglary in violation of R.C. 2911.12 is not supported by sufficient evidence where the State failed to prove that appellant use [sic] stealth, force, or deception to enter an occupied premise. Trial Tr. 11-117 (September 24, 2008.)"

{¶ 5} The sole assignment of error asserted by Robert King provides:

{¶ 6} "Assignment of Error: The judgment of the trial court convicting Robert L. King of burglary in violation of Ohio Revised Code §2911.12 is not supported by sufficient evidence, where the State of Ohio failed to prove that appellant used stealth, force, or deception, to enter an occupied premise."

{¶ 7} Arthur King has also asserted two additional assignments of error:

{¶ 8} "II. The judgment of the trial court convicting Arthur L. King of burglary in violation of R.C. 2911.12 is against the manifest weight of the evidence where the State's evidence that appellant used force or deception to enter an occupied premise was predicated in part upon a third-party's assurance to a witness that the building was closed and secured. Trial Tr. 11-117 (September 24, 2008).

{¶ 9} "III. The trial court erred in imposing sentence upon appellant by failing to comply with the mandatory provisions of R.C. 2929.19 regarding post-release control notification. Sentencing Hearing Tr., 2-11 (September 29, 2008); Judgment Entry on Sentencing (October 7, 2008.)"

Sufficiency of Evidence to Support Conviction

{¶ 10} We consider the sufficiency of the evidence issue in both appeals first. "Sufficiency" concerns a question of law on whether the evidence at trial is legally adequate to support a jury verdict as to all elements of a crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. The Ohio Supreme Court in *State v. Jenks* (1991), 61 Ohio St.3d 259 identified the required analysis to determine whether there was sufficient evidence to support a conviction:

{¶ 11} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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.

(*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

State v. Jenks, paragraph two of the syllabus.

{¶ 12} R.C. 2911.12 provides in pertinent part:

{¶ 13} "2911.12 Burglary

{¶ 14} "(A) No person, by force, stealth, or deception, shall do any of the following:

{¶ 15} "* * *

{¶ 16} "(2) Trespass 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;

{¶ 17} "* * *

{¶ 18} "(C) Whoever violates this section is guilty of burglary. A violation of division (A)(1) or (2) of this section is a felony of the second degree. * * *"

{¶ 19} Appellants argue that the evidence at trial was insufficient to establish that their trespass of the duplex was accomplished "by force, stealth, or deception," as required under R.C. 2911.12(A). Appellants argue that there was no direct or circumstantial evidence to establish how they entered the duplex. The evidence at trial

disclosed that there was no damage to the doors or windows to show means of entry. Although a window screen to a first floor window was found on the ground at the time appellants were apprehended, the owner of the building was unable to testify whether the screen had been on the ground even before the incident.

{¶ 20} There are two entrances to the duplex, doors in the front and rear. Testimony at trial established that the front door automatically locked. There was no testimony at trial by anyone with personal knowledge on whether the rear door had been left open or closed, locked or unlocked that night.

{¶ 21} In response, the state argues that there was competent credible evidence to support a finding that the trespass was committed through use of both stealth and force.

{¶ 22} Police apprehended the Kings at 3:15 a.m. on June 19, 2008. At that time the first floor apartment at the duplex was vacant due to an eviction. On the preceding day, workers for the landlord cleaned the vacant apartment and had piled abandoned belongings of the former tenant at the curb in front of the building.

{¶ 23} David Pattin resided in the upper unit. Pattin testified that he was awakened by the door bell to his apartment at approximately 3:00 a.m. on June 19, 2008. He was not expecting anyone and did not respond. He did not turn on lights. Thereafter, he heard banging from within the building. He felt the house vibrate and heard what sounded like pipes hitting the ground in the basement. He called 911 and reported a break-in at 3:07 a.m. When police arrived, they saw the Kings, through basement windows, walking about the darkened basement using flashlights. The building was

dark. Upon subsequent inspection, police determined that there was available lighting in the basement that was off.

{¶ 24} For purposes of R.C. 2911.12(A), the term "stealth" includes "any secret, sly or clandestine act to avoid discovery and to gain entrance into or remain within a residence of another without permission." *State v. Lane* (1976), 50 Ohio App.2d 41, 47; *State v. Ellis*, 6th Dist. No. L-00-1280, 2002-Ohio-1224. In *State v. Ellis*, this court held that entry, uninvited, through the backdoor of a residence in the middle of the night, with flashlights, looking for something to steal was sufficient evidence of stealth to support a conviction for burglary.

{¶ 25} Here appellants also entered the dwelling in the middle of the night, uninvited, with flashlights, and were seen looking about the basement using flashlights while stealing copper pipe from the building's plumbing. Additionally, the piled belongings at the curb coupled with the ringing of the upstairs tenant's doorbell at 3:00 a.m. presented further evidence of stealth. Under such circumstances it is a reasonable inference that the door bell was rung by appellants to determine whether the building was vacant to assure entry without detection. See *State v. Campbell*, 3d Dist. No. 3-07-27, 2008-Ohio-1647, ¶ 23 (reasonable inference that anonymous hang up phone call was made to confirm that no one was present at building).

{¶ 26} Viewing the evidence most favorably to the state, we conclude that a rational trier of fact could have found that use of stealth to enter or remain in the duplex was proven beyond a reasonable doubt. Accordingly, Assignment of Error No. I of

appellant Arthur King and the sole assignment of error of appellant Robert King are found not well-taken.

{¶ 27} In view of our conclusions on the use of stealth, it is unnecessary to consider appellant's claim concerning the sufficiency of evidence of use of force to trespass in the duplex to support the conviction. The issue is moot. App.R. 12(A)(1)(c)

Manifest Weight of the Evidence

{¶ 28} In an appeal in a criminal case where it is claimed that a verdict is against the manifest weight of the evidence, an appellate court acts as a "thirteenth juror," reweighs the evidence, and may disagree with a factfinder's conclusions on conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d at 387; *State v. Lee*, 6th Dist. No. L-06-1384, 2008-Ohio-253, ¶ 12. "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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 new trial ordered." *State v. Thompkins*, 78 Ohio St.3d at 387, quoting with approval, *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Reversals on this ground are granted "only in the exceptional case in which the evidence weighs heavily against conviction." *Id.*

{¶ 29} We have reviewed the entire record and conclude that there has not been a manifest miscarriage of justice in this case with respect to proof that appellant trespassed in the duplex by force, stealth, or deception. In our view there was competent, credible

evidence in the record supporting a conclusion that the burglary was committed by use of stealth. Appellant Arthur King's Assignment of Error No. II is not well-taken.

Notification of Postrelease Control

{¶ 30} Appellant, Arthur L. King, argues under Assignment of Error No. III that the trial court failed to comply with notification requirements of R.C. 2929.19 with respect to postrelease control both at the sentencing hearing as well as in the judgment entry imposing sentence. He requests that his sentence be vacated and the case remanded to the trial court for resentencing due to the failure. He argues that resentencing is to be de novo under the decision of *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250.

{¶ 31} The state agrees that the trial court failed to comply with mandatory notification requirements for postrelease control. The state requests that the sentences of both appellants be vacated and both cases be remanded for resentencing under R.C. 2929.191(A) and (C).

{¶ 32} The sentencing hearing for both appellants proceeded in the Lucas County Court of Common Pleas on September 28, 2008. Both appellants were convicted of burglary, a violation of R.C. 2911.12(A)(1) and (C) and a second degree felony. R.C. 2967.28(B)(2) mandates that second degree felony convictions are subject to a mandatory three year period of postrelease control.

{¶ 33} As the trial court did not provide statutorily mandated notice of postrelease control at their sentencing hearings or in their sentencing judgments, the sentences of both appellants are void. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085 at

paragraph one of syllabus; *State v. Ayers*, 6th Dist. No. E-07-072, 2009-Ohio-393, ¶ 18. As the sentences in these cases were imposed after July 11, 2006, under the recent Ohio Supreme Court decision in *State v. Singleton*, Slip Opinion No. 2009-Ohio-6434, the resentencing procedures under R.C. 2929.191 are available to correct the deficiencies. *Id.*, at paragraph two of the syllabus.

{¶ 34} Appellant Arthur L. King's Assignment of Error No. III is well-taken.

{¶ 35} Accordingly, for the reasons set forth in this decision and judgment, the trial court judgment journalized on October 7, 2008 imposing sentence on Arthur L. King is hereby reversed and the case remanded to the Lucas County Court of Common Pleas for resentencing under procedures provided under R.C. 2929.191. The trial court judgment journalized on October 7, 2008 imposing sentence on Robert L King is also hereby reversed and the case remanded for resentencing under procedures provided under R.C. 2929.191. Costs are taxed to the state pursuant to App.R. 24.

JUDGMENTS REVERSED.

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

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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