[Cite as *State v. Hubbard*, 2004-Ohio-553.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 03AP-286
v.	:	(C.P.C. No. 02CR06-3711)
Bruce W. Hubbard,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on February 5, 2004

Ron O'Brien, Prosecuting Attorney, and *Heather R. Saling*, for appellee.

Clark Law Office, and *Toki M. Clark*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

WATSON, J.

{¶1} This is an appeal from the judgment of the Franklin County Court of Common Pleas finding defendant, Bruce W. Hubbard, guilty of receiving stolen property,

a first degree misdemeanor, and burglary, a third degree felony. For the reasons that follow, we affirm.

{¶2} On June 18, 2002, a burglar broke into a window in the home at 825 South Third Street. The burglar escaped with a cell phone, a silver ring, a black bag, an MP3 player, and other various items. No one was home at the time of the burglary, which was between 10:30 a.m. and 3:00 p.m. Later that day, an officer was dispatched to Schiller Park on a disturbance call about a man harassing a passerby. The man allegedly doing the harassing was defendant. The officer detained defendant due to potential charges of an open beer container and littering in the park. The officer dispatched the burglary detective who eventually arrived at the park. The detective recognized various items defendant had with him in the park, such as the cell phone, black bag and silver ring. Defendant was charged with burglary and receiving stolen property.

{¶3} The jury found defendant guilty of the two offenses; however, the jury hung with respect to the degree of both offenses. As to the burglary, the jury was unable to agree whether someone was likely to be present in the home at the time. As to receiving stolen property, the jury could not agree on the value of the stolen items. Therefore, the trial court entered judgment against defendant on the *lesser* included offenses of each count, burglary as a third degree felony, under R.C. 2911.12(A)(3) instead of 2911.12(A)(2), and receiving stolen property as a first degree misdemeanor. Defendant filed the instant appeal.

{¶4} Defendant ("appellant") asserts the following assignment of error:

> THE CONVICTION OF APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶5} In determining whether a conviction is against the manifest weight of the evidence, the court acts as a thirteenth juror and must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether the jury clearly lost its way in resolving conflicting evidence. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶6} Appellant's merit brief addresses the element of burglary under R.C. 2911.12(A)(2), requiring that any person, other than the accomplice or offender, is present or likely to be present in the dwelling.[1] However, the state correctly points out that appellant was convicted of burglary under R.C. 2911.12(A)(3) instead of R.C. 2911.12(A)(2). R.C. 2911.12(A)(3) states that no person by force, stealth, or deception shall "[t]respass in an occupied structure * * * with purpose to commit in the structure * * * any criminal offense[.]" Hence, under R.C. 2911.12(A)(3), the state was not required to prove that another person was present or likely to be present in the dwelling. However, in his reply brief,[2] appellant challenges the conviction generally and because appellant's assignment of error is that the conviction was against the manifest weight of the evidence, we will address the argument in the reply.

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[1] R.C. 2911.12(A)(2) states that no person by force, stealth, or deception shall: "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[.]"

[2] The court notes that reply briefs are intended "to merely be an opportunity to reply to the brief of the appellee." *In re Beck*, Belmont App. No. 00 BA 52, 2002-Ohio-3460, at ¶18, citing App.R. 16(C). " 'A reply brief may not raise new assignments [issues], which were omitted from appellants' original brief.' " Id. Here, the state addressed whether there was any person likely to be present in the dwelling in response to appellant's brief. The state mentions DNA and fingerprint evidence in its statement of facts but does not make any argument with respect to the evidence because appellant did not make any argument in his brief. However, because the state mentions the evidence in its brief and because appellant's assignment of error is general, we give appellant the benefit of the doubt and will address the argument in his reply brief.

{¶7} Appellant argues that the DNA evidence showing that it was his blood on the broken glass from the victim's home and the fact that appellant had several of the stolen items in his possession at the park is not enough to sustain the conviction. Appellant argues there were no eyewitnesses placing him inside the home. Appellant maintains he is the type of person who walks the neighborhood and, therefore, it is within the realm of possibility that his blood ended up on the broken glass even though he did not burglarize the home.

{¶8} Appellant's argument fails. We find the convictions for burglary and receiving stolen property are not against the manifest weight of the evidence. The officer dispatched to the park detained appellant for throwing a cigarette butt on the ground and for having an open beer container. The officer noticed a cut and/or blood on appellant's hand. Appellant also had a phone in his pocket, a ring on his finger and a black bag with items inside. The officer noted that these items were previously reported stolen. The officer called the detective on the burglary case. The detective came to the park to identify the property. The victims also identified the property as that which was stolen from their home. The fingerprints lifted from the crime scene matched appellant's. Blood was found inside the black bag, inside a makeup case, on broken glass pieces, a hose nozzle, and a pillowcase. The blood on the black bag and glass matched appellant's DNA to a reasonable degree of scientific certainty.[3] In light of this evidence, we find the jury did not clearly lose its way in this case. Although the jury disagreed as to whether the state proved whether any person was present or likely to be present in the home under

[3] The DNA expert testified that, although blood was found on numerous items, only certain items were examined.

R.C. 2911.12(A)(2), it found appellant guilty of the two lesser included offenses. Accordingly, appellant's sole assignment of error is overruled.

{¶9} For the foregoing reasons, appellant's assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

LAZARUS, P.J., and SADLER, J., concur.
