

[Cite as *State v. Johnson*, 2009-Ohio-4361.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. **91629**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**CHARLES JOHNSON**

DEFENDANT-APPELLANT

~~JUDGMENT~~

**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-475971

**BEFORE:** Blackmon, J., Gallagher, P.J., and Kilbane, J.

**RELEASED:** August 27, 2009

**JOURNALIZED:**  
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Charles Johnson appeals his conviction for burglary<sup>1</sup> and assigns the following error for our review:

**“There was insufficient evidence to support the guilty verdicts for, and appellant’s conviction was against the manifest weight of the evidence.”**

{¶ 2} Having reviewed the record and pertinent law, we affirm Johnson’s conviction. The apposite facts follow.

### **FACTS**

{¶ 3} The Cuyahoga County Grand Jury indicted Johnson for burglary and theft. Johnson waived his right to a jury trial; the matter was tried before the bench.

{¶ 4} The Artifino Café (“Café”), located on Superior Avenue, sells sandwiches and drinks; it also sells art and jewelry. A jewelry counter is located near the entrance of the Café. It has walls around it, with access behind the counter gained only by passing through a set of low-swinging doors. Yashira Piazza, an employee of the Café, placed her purse on a stool located behind the counter. She stated that Johnson came into the store and inquired whether the store had an ATM, which it did not. Because Johnson turned and walked towards the door, Piazza assumed he had left and she

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<sup>1</sup>Johnson was also convicted for misdemeanor theft; however, he only contests the burglary conviction.

proceeded back to the kitchen. She later discovered her purse was missing. A surveillance camera captured Johnson reaching over the swinging doors and grabbing the purse.<sup>2</sup> Johnson was located by the police and confessed to stealing the purse.

{¶ 5} The trial court found Johnson guilty of burglary and an amended count of theft, a first-degree misdemeanor. The court sentenced Johnson to three years in prison for the burglary count and six months in prison for the theft count, to be served concurrently.

### **Burglary**

{¶ 6} In his sole assigned error, Johnson contends the evidence was insufficient<sup>3</sup> to support his burglary conviction. He contends he did not trespass, nor did he use force or stealth in obtaining the purse, and the area behind the counter was not a separately secured structure in the store. We disagree.

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<sup>2</sup>The video was not included in the appellate record.

<sup>3</sup>Although Johnson also contended at the beginning of his argument that the evidence was against the manifest weight of the evidence, he failed to develop this argument. Therefore, we will not review the conviction to determine if it is against the manifest weight of the evidence. App.R. 16(A)(7).

{¶ 7} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman*<sup>4</sup> as follows:

**“Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.”**<sup>5</sup>

{¶ 8} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks*,<sup>6</sup> in which the Ohio Supreme Court held:

**“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted 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**

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<sup>4</sup>(1978), 55 Ohio St.2d 261, syllabus.

<sup>5</sup>Id. See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23; *State v. Davis* (1988), 49 Ohio App.3d 109, 113.

<sup>6</sup>(1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

**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.)”**

{¶ 9} We conclude there was sufficient evidence to support the burglary conviction. Burglary is defined by R.C. 2911.12(A)(2) as follows:

**No person by force, stealth, or deception, shall do any of the following:**

“\* \* \*;

**“(2) trespass \* \* \* in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense.”**

{¶ 10} Criminal trespass is defined by R.C. 2911.21 as knowingly entering or remaining on another’s land or premises, “without privilege to do so.” Johnson argues he had privilege to enter the Café as an invitee because the Café was open to the public. Invitees are individuals who rightfully come upon a premises of another by invitation, express or implied, for some purpose which is beneficial to the owner.<sup>7</sup> However, the status of an invitee

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<sup>7</sup>*Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68.

is not absolute but is limited by the landowner's invitation.<sup>8</sup> "The scope of the invitation can be exceeded if the person leaves that portion of the premises that he or she has been invited to enter and goes to a different part of the premises."<sup>9</sup>

{¶ 11} We agree Johnson had privilege to enter the Café; however, his privilege to be there did not allow him access to all areas of the Café. There are certain areas that were not open to the public, such as the area behind the counter. Although a sign was not posted indicating only employees were permitted behind the counter, Piazza testified customers were not permitted behind the counter. Johnson also stated several times that he was aware he was not permitted behind the counter. Therefore, there is no dispute he entered the space without privilege.

{¶ 12} Johnson also contends there was no evidence presented that he gained access to the area by force, stealth, or deception. We disagree. The evidence indicated that Johnson led Piazza to believe he was leaving the Café by turning towards the door. However, once Piazza was in the back room, he stole the purse. Therefore, he did use stealth to gain access to the purse.

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<sup>8</sup>*State v. Flak*, 5<sup>th</sup> Dist. No. 2004-COA-038, 2005-Ohio-1474.

<sup>9</sup>*Id.* at ¶25, citing to *Gladon v. Greater Cleveland Reg. Transit Auth.* (1996), 75 Ohio St.3d 312, 315.

{¶ 13} Finally, Johnson contends that because he could reach across the counter to steal the purse, the area was not a separately secured structure. We disagree. In *State v. Harvey*,<sup>10</sup> the First Appellate District concluded that the pharmacy area of a store, which was set apart from the rest of the store with a counter, constituted a “separately secured” structure for purposes of burglary.

{¶ 14} Moreover, the fact that Johnson could reach over the counter does not negate the area’s character as a separately secured structure. The First Appellate District in *State v. Richardson*,<sup>11</sup> concluded that a defendant who reached into a cubicle surrounded by three walls had trespassed into a separately secured portion of an occupied structure. In finding the act constituted burglary, the court held as follows:

**“As the burglary statute is designed to protect against unauthorized entry and its attendant dangers, the ultimate test of whether a burglarious entry has occurred must focus on the protection the owners or inhabitants of a structure reasonably expect. The proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions\* \* \*. [E]ven an open door or window affords some expectation of protection from unauthorized intrusion because reasonable persons**

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<sup>10</sup>(Jan. 2, 1985), 1st Dist. No. C-840272.

<sup>11</sup>(Aug. 20, 1999), 1st Dist. No. C-980860.



**understand the social convention that portals may not be crossed without permission from the structure's owner. *People v. Nible* (1988), 200 Cal.App.3d 838, 844, 247 Cal.Rptr. 396.**

**“In today's world, counters are frequently used to designate the boundary between public and private spaces \* \* \*. Employees who work behind counters have a reasonable expectation that the public will not enter there, and members of the public know they may not go behind counters without permission. Here, the waist-high counter with gate reasonably communicated to all that nonemployees could not enter the office area without authorization.’ *People v. Mackabee* (1989), 214 Cal.App.3d 1250, 1257-1258, 263 Cal.Rptr. 183, 186.**

**“We believe that the court’s recognition that people who work in areas set off by partitions or counters perceive these as barriers against and protection from free accessibility supports our conclusion that such barriers may also constitute ‘separate enclosures,’ or ‘separately secured’ or ‘separately occupied’ portions of an occupied building. Accord *State v. Harvey* (Jan. 2, 1985), Hamilton App. No. C-840272, unreported; *State v. Ferguson* (1991), 71 Ohio App.3d 342, 594 N.E.2d 23 (fenced-in portion of a store is a structure). Employees and the general public recognize and accept such barriers in the same way that**

**they acknowledge separate rooms in a building.**

**Therefore, the burglary statute applies to work cubicles.”<sup>12</sup>**

{¶ 15} In the instant case, the area was separated from the rest of the Café by a counter, two walls, and low-swinging doors. The only way to access the area behind the counter was by walking through the swinging doors or jumping over the counter. Thus, the area was sufficiently separated from the rest of the Café to constitute a “separately secured” area in which employees had a reasonable expectation would not be entered by the public. Johnson stated he knew he was not permitted behind the counter. Under these facts, the court could have reasonably found the area behind the counter constituted a separately secured portion of an occupied building. Accordingly, Johnson’s assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant’s conviction having been affirmed,

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<sup>12</sup>*State v. Richardson*, supra.

any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., and  
MARY EILEEN KILBANE, J., CONCUR