[Cite as *State v. Rudolph*, 2009-Ohio-5818.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92085

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY RUDOLPH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512815

BEFORE: Celebrezze, J., Dyke, P.J., and Jones, J.

RELEASED: November 5, 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).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Anthony Rudolph ("appellant"), appeals his convictions for burglary and involuntary manslaughter. Finding no merit to his appeal, we affirm.

{¶ 2} On February 26, 2004, appellant went to E's Bar with his father, Larry Rudolph, and his father's business partner, John Benko. Although appellant was only 18 years old at the time, he was served several alcoholic beverages throughout the night.[1] Appellant's father and Benko both testified that appellant became extremely intoxicated. At some point, appellant's father and Benko left the bar, but appellant remained.

{¶ 3} At approximately 11:15 p.m., appellant left the bar with a young lady whom he had just met. Appellant and the young lady went to the young lady's car, but she eventually asked appellant to leave due to his belligerent state. According to appellant, he remembers nothing else that happened that night. Appellant's father testified that appellant was severely inebriated and bleeding when he returned home, but he had no recollection of how he sustained his injuries.

{¶ 4} During the early morning hours of February 27, 2004, Martha Wascak, the victim, phoned 911 and said a man was attempting to break into

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[1] Appellant testified that he drank several beers and was also served shots of Jagermeister.

her home and was threatening to kill her. When police arrived at the scene, the glass in both the front and side doors of the victim's home was broken, but both doors were locked. Officers knocked on the victim's doors but received no response.

{¶ 5} One of the officers eventually used a flashlight to move a curtain on the side door of the home and saw the victim lying unresponsive on the kitchen floor. Officers kicked in the door to gain entry to the home and immediately attended to the victim. An inspection of the remainder of the home revealed that no one else was present.

{¶ 6} Officers noticed blood on the front and side doors and in the kitchen area of the home. Officers also spotted a trail of blood leading away from the home and down the street. One of the victim's neighbors had seen a man stumble away from the victim's home and provided a description to police, but no suspect was located. Officers then collected DNA samples of the blood both inside and outside the victim's home.

{¶ 7} The victim was transported to Metrohealth Medical Center where she was pronounced dead. Dr. Andrea McCollum, a deputy coroner for the Cuyahoga County Coroner's Office, conducted the autopsy of the victim. Dr. McCollum testified that the victim's death was the result of "cardiopulmonary arrest during the breaking and entering of her home due to hypertensive atherosclerotic cardiovascular disease with remote myocardial infarct." Dr.

McCollum testified that, in layman's terms, the victim had a fragile heart, "[a]nd now someone is breaking and entering into her home and she is frightened and she goes into cardiopulmonary arrest." The victim's death was ruled a homicide.

{¶ 8} The blood samples collected from the victim's home matched the victim's blood and that of another individual whose identity was unknown.

{¶ 9} In 2006, appellant was placed on probation in Lorain County for a DUI and obstructing official business. Due to a change in appellant's residence, his probation was transferred to the Cuyahoga County Probation Department. In 2007, officers were notified that appellant's DNA, which was on file with the Ohio DNA database as a part of his probation, matched the samples collected from Martha Wascak's home.

{¶ 10} Detective Sahir Hasan, who had been working on this case from the outset, contacted Brendan Coakley, appellant's probation officer, who informed him that appellant was scheduled to report for his regular meeting. As required by the terms of his probation, appellant provided another DNA sample. The results of this DNA test concluded that appellant was the source of the unidentified DNA collected from Martha Wascak's home. Although some of this DNA was collected from outside the victim's home, the tests also revealed that appellant's DNA was found on the interior side of the interior frame of the victim's side door.

{¶ 11} Appellant was arrested and charged with murder and aggravated burglary. Following a bench trial, he was found guilty of the lesser included offenses of involuntary manslaughter and burglary. Appellant appeals and argues that his convictions were based on insufficient evidence and were against the manifest weight of the evidence. Finding no merit to this appeal, we affirm.

Law and Analysis

{¶ 12} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct.2211, 72 L.Ed.2d 652, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 13} Where there is substantial evidence upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the trier of fact as to the weight and sufficiency of the evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 156, 529 N.E.2d 1236. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. On review, the appellate court must determine, after viewing the evidence in a light most favorable to the

prosecution, whether 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, 273, 574 N.E.2d 492; *Jackson v. Virginia*, supra.

{¶ 14} Sufficiency of the evidence is subjected to a different standard than is manifest weight of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the fact-finder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and duty to weigh the evidence and to determine whether the findings of * * * the trier of fact were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

{¶ 15} The United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The court held in *Tibbs v. Florida*, supra, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. Id. at 43.

{¶ 16} Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth

the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated that "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, 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." Id. at 720.

{¶ 17} Appellant argues that the state did not present sufficient evidence to find him guilty of burglary. Ohio's burglary statute provides that "[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." R.C. 2911.12(A)(4). Appellant specifically argues that the state did not prove beyond a reasonable doubt that any trespass occurred, as required for a burglary conviction. In support of this argument, appellant points out that no one saw him inside the victim's home. What appellant fails to explain is how his DNA was collected from the interior side of the interior frame of the victim's side door.

{¶ 18} The trespass element of Ohio's burglary statute does not require that the defendant's body completely enter the victim's home. "'In proving the element of unlawful entry in the criminal prosecution of defendant upon a

charge of burglary, proof of the insertion of any part of defendant's body is sufficient to constitute an entrance.'" *State v. Cuthbertson* (June 1, 1976), Hamilton App. No. No. C-75362, at *2, quoting *State v. Harris* (1943), 68 N.E.2d 403, 45 O.L.A. 598. Further, "'[i]t is not necessary that the party shall get his whole body into the house, and the least entry of any part of the body is sufficient.'" Id., quoting 12 C.J.S. 673, Burglary Sec. 10.

{¶ 19} Detective Sahir Hasan, one of the officers that responded to the victim's house on the night in question, testified that the glass in the victim's doors had been broken from the outside in. He made this determination based on the fact that the glass from the doors was concentrated on the inside of the home. Likewise, the state provided uncontested evidence that appellant's blood was found on the interior side of the interior frame of the victim's side door. Appellant and his father both testified that appellant was severely inebriated on the night in question, that appellant came home with a cut on his hand and blood on his clothes, and that appellant could offer no explanation for how he sustained this injury. Likewise, appellant offered no explanation as to how his DNA could have been present without appellant placing at least some portion of his body into the victim's home.

{¶ 20} The state also offered the testimony of several of the victim's neighbors, who overheard, at least in part, the event that occurred at the victim's home in the early morning hours of February 27, 2004. According to

one neighbor, he heard some commotion at the victim's home, walked outside to inspect, and saw a man fall as he was leaving the victim's porch and limp away. According to this same witness, the victim's screen door was closing as the individual fled.

{¶ 21} Although police officers testified that all of appellant's doors were locked when they arrived on the scene, the state provided irrefutable evidence that appellant's DNA was found on the interior frame of the victim's side door. Viewing this evidence in a light most favorable to the prosecution, it is abundantly clear that appellant's conviction was based on sufficient evidence.

{¶ 22} Similarly, applying the standard delineated in *Martin*, supra, appellant's conviction was not against the manifest weight of the evidence. All reasonable inferences in this case suggest that appellant, while extremely intoxicated, attempted to gain entry into Martha Wascak's home in the early morning hours of February 27, 2004. There are no significant conflicts in the evidence presented. This evidence clearly shows that appellant's DNA was found on the interior frame of the victim's side door. As such, the trial court in this case did not lose its way, there was no manifest miscarriage of justice, and appellant's convictions were not against the manifest weight of the evidence. Accordingly, we affirm.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, 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.

FRANK D. CELEBREZZE, JR., JUDGE

ANN DYKE, P.J., and
LARRY A. JONES, J., CONCUR