[Cite as *State v. Butler*, 2010-Ohio-5774.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94223

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES O. BUTLER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526082

BEFORE: Gallagher, A.J., McMonagle, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: November 24, 2010
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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, James O. Butler, appeals his conviction for burglary (R.C. 2911.12(A)(4)) and criminal damaging (R.C. 2909.06(A)(1)). For the reasons stated herein, we affirm.

{¶ 2} Appellant was indicted on the above offenses, and the matter proceeded to a jury trial. Testimony was presented concerning an incident that occurred on June 17, 2009, at a house located at 12609 North Parkway

Drive, Garfield Heights, Ohio. The house is owned by appellant's mother, Francis Butler.

{¶ 3} Francis testified she lives in the home with her 24-year-old grandson, Brandon. Francis has four adult children, one of whom is the appellant. She indicated that none of her children live with her, but she is there for her children when they need her. Each of her children has a key to the house, except for appellant, who had to be let into the home. Francis allowed appellant to stay in her home "off and on" for "days at a time," and he had been staying at the house for at least several months prior to the incident. He did not pay Francis any rent.

{¶ 4} There were times when appellant was left in the house alone. When he stayed at the house, he stayed in a guest bedroom. He kept his belongings in the house, and he used the house as his mailing address.

{¶ 5} On the morning of June 17, 2009, Francis was leaving for work when appellant pulled up in her driveway. He had not been in the house the night before. Francis told appellant he could not enter the house. She testified she wanted him out of the house because "since he had been coming, you know staying there off and on, things had started missing. I was missing things."

{¶ 6} Francis testified that she locked the doors when she left the house that morning and that Brandon was inside. After Francis went to work, she received a call from the police. When she returned home, she observed a screen door was bent and had been tampered with.

{¶ 7} Brandon testified that on the date of the incident, Francis did not want appellant in the home. After going to the bathroom, Brandon discovered appellant had entered the home and asked him to leave. When appellant refused, Brandon called the police. Brandon noticed that the screen on the back door was bent out of shape.

{¶ 8} The responding patrolman, Robert Jarzembak, testified that when he arrived, appellant and Brandon were in the yard yelling at each other. He observed that the back door to the home looked as if it had been forced open. He also escorted appellant, who looked as if he had been shaving, back into the home to obtain some belongings. Although it appeared to Jarzembak to be a family dispute, upon further investigation, he learned that appellant entered the home through a locked door after being advised not to enter the home.

{¶ 9} The jury returned a verdict of guilty on both the burglary and criminal damaging charges. The trial court sentenced appellant to an aggregate term of incarceration of one year.

{¶ 10} Appellant filed this appeal, raising two assignments of error for our review. His first assignment of error provides as follows: "I: [Appellant] was a lawful resident of the home in question and therefore was not trespassing and his conviction for burglary is not supported by sufficient evidence."

{¶ 11} When an appellate court reviews a claim of insufficient evidence, "'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.'" *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37.

{¶ 12} Appellant claims there was insufficient evidence to support his conviction for burglary.[1] Although appellant argues he resided in the home pursuant to a lawful tenancy, there was evidence presented at trial that showed appellant did not have a key to the home and, although he was permitted to stay at the home off and on, he needed permission to enter. Further, while appellant may have had permission to enter the home on prior

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[1] R.C. 2911.12(A)(4), the burglary statute, provides as follows: "No 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."

occasions, "past consent does not constitute current consent." *State v. Ray*, Lucas App. No. L-04-1273, 2005-Ohio-5886.

{¶ 13} On the date of the incident, Francis specifically instructed appellant not to enter the home, and there was evidence that he forcibly entered through a screen door while an occupant was home. Evidence of forcible entry into a residence permits a reasonable inference that the defendant did not have permission to enter. *State v. Davis*, Montgomery App. No. 22780, 2009-Ohio-2539, ¶ 13.

{¶ 14} We find there was sufficient evidence to support a rational trier of fact's determination that appellant did not possess a lawful tenancy or otherwise have a privilege to be on the premises and that he forcibly entered the home while another person was present. Viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of burglary were proven beyond a reasonable doubt.

{¶ 15} Appellant's second assignment of error provides as follows: "II: The trial court erred in permitting, over defense objection, the introduction of prejudicial other acts evidence, including the witness' belief that the appellant was a thief." Evid.R. 404(B) provides the following: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 16} Appellant argues that the trial court improperly allowed testimony, over objection, concerning appellant's implicit theft of missing items at Francis's home. Here, the statements were introduced to show why Francis did not want appellant in her home and to support the state's position that appellant lacked permission to be in her home. The court did not allow any specifics to be addressed. Further, both Francis and Brandon testified that appellant lacked permission to enter the home on the date of the incident, and there was evidence that he forcibly entered the home. Because we cannot say that there is a reasonable possibility the testimony contributed to appellant's conviction, we find any error in the introduction of these statements was harmless. Appellant's second assignment of error is overruled.

Judgment affirmed.

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 conviction 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.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

CHRISTINE T. McMONAGLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR