[Cite as *State v. Tichaona*, 2011-Ohio-6001.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2010-P-0090**
GILBERT G. TICHAONA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2010 CR 0099.

Judgment: Modified and affirmed as modified.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Shubhra N. Agarwal, 3766 Fishcreek Road, #289, Stow, OH 44224-4379 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Gilbert G. Tichaona, appeals his conviction of two counts of burglary, following a jury trial, by the Portage County Court of Common Pleas. Appellant challenges the sufficiency and weight of the evidence. For the reasons that follow, we modify the trial court's sentencing entry and affirm as modified.

{¶2} Appellant was charged in a six-count indictment with burglary of A.K., in violation of R.C. 2911.12(A)(2) and (C), a felony of the second degree (count 1); burglary of E.H., in violation of R.C. 2911.12(A)(2) and (C), a felony of the second

degree (count 2); voyeurism, in violation of R.C. 2907.08(A) and (E)(2), a misdemeanor of the third degree (count 3); prohibitions (consuming or possessing beer while under the age of 21), in violation of R.C. 4301.61(E)(1), a misdemeanor of the first degree (count 4); gross sexual imposition against E.H., in violation of R.C. 2907.05, a felony of the fourth degree (count 5); and sexual imposition of E.H., in violation of R.C. 2907.06(A)(1) and/or (3) and (B), a misdemeanor of the third degree (count 6).

{¶3} Appellant pled not guilty and the case proceeded to trial by jury. C.B., a freshman at Hiram College, testified that on November 15, 2009, at about 3:00 a.m., which was about one hour before the crimes alleged in the indictment were committed, she was in her room on the third floor of her dormitory, Whitcomb Hall. C.B. was sitting on her bed using her laptop computer. The lights were on in her room. The door was closed, but not locked. Suddenly, her door opened and a black male walked into her room and looked around. C.B. said, “excuse me.” The male said he was sorry and then walked out. C.B. said the male appeared to be “out of it.”

{¶4} C.B. identified appellant in court as the male who came into her room. She said she knew appellant lived on the fourth floor of her dormitory, but she did not know him. She said he did not knock on her door and she did not invite him in.

{¶5} Next, A.K., a junior at Hiram College, living in another room on the third floor of Whitcomb Hall, testified that she is the resident assistant in charge of that floor. She said that in the early morning hours of November 15, 2009, she was alone in her room. She went to sleep at about 2:00 a.m. She said that sometime between 3:00 a.m. and 4:00 a.m., she was awakened by the sound of doors opening and slamming shut on her floor for about 20 minutes. Someone then popped open the lock on her door. The

locks on the entrance doors are in the door knobs. To lock the door, you press a button in the door knob. A.K.'s door had been closed and locked. She got out of bed, walked to the door, and pushed the lock in again to re-lock it. She then went back to bed.

{¶6} Shortly thereafter, someone popped open A.K.'s lock again, and a black male walked into her room and stood in front of her bed. A.K. asked, "what are you doing?" He did not respond, but stayed in her room another 15 seconds looking around her room, and then walked out.

{¶7} It was dark in her room so A.K. did not see the male's face at first. She was eventually able to see him due to light coming in from the hallway. A.K. said she recognized him as a student who lived on the fourth floor, and had seen him before walking past her door, but had never spoken to him.

{¶8} A.K. ran to the door and locked it. She called the police and, while she was on the phone, someone popped open her lock again. As she pushed the lock in again, she felt someone on the other side of the door turning the door handle, "still trying to get in." She kept her finger on the lock to make sure that person did not enter.

{¶9} Sometime later, the Hiram Police Dispatcher called A.K. back and said the responding officer had arrived, but needed to be let in. A.K. left her room, walked down the stairs, and met Hiram Police Officer Dennis Pongracz on the first floor. She explained to him what had happened, and described the black male as being very dark-skinned and wearing a tee shirt and jeans.

{¶10} Officer Pongracz then patrolled each of the four floors in Whitcomb Hall. While he was on the third floor, he heard loud music coming from the fourth floor. He found the music was coming from a room with its door open on the fourth floor. At

about 4:30 a.m., Officer Pongracz saw a black male wearing a tee shirt and jeans sitting at his computer listening to loud music. The officer told the male to turn his music down and shut his door. The officer continued to walk through the hall. The male did not turn his music down, so the officer returned to his room and again told him to turn his music down and shut his door, but he did not do so.

{¶11} Because this male fit A.K.'s description, Officer Pongracz asked her to accompany him to see if she could identify the male as the person who entered her room.

{¶12} Officer Pongracz testified that when he and A.K. were in the lounge area of the fourth floor, he saw the male he had seen earlier walk out of the ladies' restroom, and A.K. said, "that's him," referring to appellant. The officer then started talking to appellant. He was unable to give a reason for coming out of the women's bathroom or for going in and out of the girls' rooms. A.K. said that when she saw appellant on the fourth floor, he was unsteady on his feet and appeared to be intoxicated, although she did not smell alcohol on him.

{¶13} Officer Pongracz asked appellant why he was walking in and out of the dorm rooms, and appellant said, because they were unlocked. The officer testified that appellant's eyes were bloodshot, and he detected an odor of alcoholic beverage coming from him. The officer said he followed appellant into his room. He asked appellant how much he had to drink, and appellant said two bottles of beer. He later said they were two 12-ounce bottles of Budweiser. The officer arrested appellant for prohibitions. As Officer Pongracz escorted appellant to his cruiser, the officer again asked him what he was doing walking in and out of the dorm rooms. Appellant said he "was horny and

wanted to look at girls." Officer Pongracz then transported him to the Hiram Police Department.

{¶14} In yet a third incident, E.H., who was then 18 years old and a freshman at Hiram, testified that on November 15, 2009, she was also living on the third floor of Whitcomb Hall. She said that on that date she was in her room with her roommate and a childhood friend, H.B., who had come to Hiram to visit her. The three girls went to bed at about 1:00 a.m. E.H. and her roommate shared a bunk bed that was against the wall, with E.H. sleeping in the upper bunk and her roommate in the lower. E.H. slept facing the wall on her side. H.B. was sleeping on the floor in the middle of the room.

{¶15} At about 4:30 a.m., E.H. was awakened by someone "rubbing" her hip. The hand moved lower toward her crotch and touched her pubic area. The hand then flipped her over on her back. Two hands then grabbed her head and a black male's face came down toward her face trying to kiss her. She physically pushed him away and started yelling, "what the fuck?" The male, who E.H. identified in court as appellant, just stood there and stared at her. H.B. told him to get out. He stepped over H.B., said he was sorry, and then left the room.

{¶16} E.H. was in shock and very upset by the incident. Later that morning at breakfast, she told her resident assistant what had happened and, about one hour after that, reported the break-in to the police.

{¶17} E.H. said that when appellant entered the room, no lights were on and all three girls were sleeping. Prior to this incident, E.H. had never seen him before.

{¶18} H.B. testified that in the early morning hours of November 15, 2009, while she was asleep on the floor in E.H.'s dorm room, she was awakened by someone

walking past her. Shortly thereafter, H.B. heard E.H. call out, and H.B. saw a black male leaning over E.H. His hands were on her bed, but she could not see what he was doing with them. H.B. told the male to leave. He then turned around, mumbled something, and walked out of the room. H.B. then locked the door, which had previously been closed, but unlocked. She identified appellant in court as the male who entered the room.

{¶19} Appellant did not testify, nor did he present any witnesses on his behalf. The state's evidence was therefore undisputed.

{¶20} Following the trial, the jury returned its verdict finding appellant guilty of two counts of burglary, in violation of R.C. 2911.12(A)(4), felonies of the fourth degree, each being a lesser-included offense of burglary as charged in counts 1 and 2 of the indictment. The jury also found appellant guilty of the prohibitions offense as charged in count 4 of the indictment. The jury found appellant not guilty of the remaining counts.

{¶21} Appellant was sentenced to 150 days in the Portage County Jail and was given credit for 254 days he had previously served. Costs were also assessed against him.

{¶22} Appellant appeals his conviction asserting three assignments of error. Because the first two assigned errors are interrelated, they shall be considered together. They allege:

{¶23} "[1.] The Trial Court committed reversible error when it overruled Tichaona's Crim.R. 29(A) motion for acquittal because the evidence was insufficient to support a conviction for burglary.

{¶24} "[2.] Tichaona's conviction for burglary was against the manifest weight of the evidence."

{¶25} An appellate court reviewing the sufficiency of the evidence examines the evidence admitted at trial and determines whether, after viewing the evidence in a light most favorable to the state, the jury could have found all of the elements of the crime proven beyond a reasonable doubt. *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13; *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. "On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52 (Cook, J., concurring). "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *Thompkins*, supra.

{¶26} In contrast, in reviewing a challenge to the manifest weight of the evidence, an appellate court, reviewing the entire record, weighs the evidence and all reasonable inferences, and considers the credibility of the witnesses. *Schlee*, supra, at *14-*15. The court determines whether, in resolving conflicts in the evidence and deciding witness credibility, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. Id. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Thompkins*, supra, at 387.

{¶27} Witness credibility rests solely with the finder of fact, and an appellate court is not permitted to substitute its judgment for that of the jury. *State v. Awan* (1986), 22 Ohio St.3d 120, 123. (Citations omitted.)

{¶28} "The jury is entitled to believe all, part, or none of the testimony of any witness." *State v. Archibald*, 11th Dist. Nos. 2006-L-047 and 2006-L-207, 2007-Ohio-4966, at ¶61, discretionary appeal not allowed at 116 Ohio St.3d 1508, 2008-Ohio-381. (Citation omitted.)

{¶29} The role of the reviewing court is to engage in a limited weighing of the evidence in determining whether the state properly carried its burden of persuasion. *Thompkins*, supra, at 390. If the evidence is susceptible to more than one interpretation, the appellate court must interpret it in a manner consistent with the verdict. *State v. Banks*, 11th Dist. No. 2003-A-0118, 2005-Ohio-5286, at ¶33.

{¶30} Appellant was convicted of two counts of burglary, in violation of R.C. 2911.12(A)(4). This section provides in pertinent part: "No person, by *force*, stealth, or deception, shall *** *[t]respass* in a permanent or temporary habitation of any person when any person *** is present or likely to be present." (Emphasis added.)

{¶31} "Force" is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1).

{¶32} "Trespass" is defined at R.C. 2911.21(A)(1), in pertinent part, as follows: "No person, without privilege to do so, shall *** *[k]nowingly* enter or remain on the *** premises of another ***." (Emphasis added.)

{¶33} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain

nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶34} First, appellant argues that the state failed to present sufficient evidence that he entered the victims' rooms by means of force, stealth, or deception. We do not agree.

{¶35} "It has long been established in Ohio that the force element of an aggravated burglary charge can be accomplished through the opening of a closed but unlocked door. *State v. Lane* (1976), 50 Ohio App.2d 41. See, also, *State v. Austin*, [2d Dist.] No. 20445, 2005-Ohio-1035 (evidence that the defendant turned a door knob of an unlocked door in order to enter an apartment was sufficient proof of forcible entry) ***." *State v. Howard*, 8th Dist.No. 85500, 2005-Ohio-5135, at ¶9. Accord, *State v. Shirley*, 9th Dist. No. 20569, 2002-Ohio-31, 2002 Ohio App. LEXIS 4, *6-*7 ("Even the opening of an unlocked door constitutes force sufficient to satisfy the [aggravated burglary] statute").

{¶36} It is undisputed that the doors in both A.K.'s and E.H.'s rooms were closed and that appellant opened them to gain entry into their rooms. This is sufficient to constitute force for purposes of the burglary statute. It is also undisputed that A.K.'s door was locked and that appellant actually popped open the lock in her door twice in order to gain entry into her room. For this additional reason, the state presented sufficient evidence that appellant used force to gain entry into the victims' rooms.

{¶37} Next, appellant argues the state failed to present sufficient evidence that he *knowingly* entered the victims' rooms. He argues the state's witnesses testified he appeared to be out of it and intoxicated. He argues that the layout on the top three

floors of the dormitory are similar, and that it “appears” from the state’s witnesses that at the time he entered the victims’ rooms, he was trying to locate his own room and entered the victims’ rooms by accident. As a result, he argues the evidence showed his conduct was accidental, not knowing. Again, we do not agree.

{¶38} To the extent appellant is arguing that his voluntary intoxication should have been taken into account in determining whether he acted knowingly in committing the two burglary offenses of which he was convicted, the argument lacks merit. *State v. Boggs*, 11th Dist. No. 2001-P-0157, 2003-Ohio-6968, at ¶33. In *Boggs*, this court stated:

{¶39} “Finally, Appellant claims that he could not have acted knowingly, due to his impairment from alcohol. R.C. 2901.21 has been amended, effective October 27, 2000, and now provides, in pertinent part, ‘voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense.’ Thus, appellant was not entitled to use the defense of voluntary intoxication.” (Footnotes omitted.) Id.

{¶40} In any event, we note there was no direct evidence that at the time appellant entered A.K.’s and E.H.’s rooms, (1) he was attempting to locate his room; (2) he was confused by any similarity in layout of the various floors; or (3) he entered the victims’ rooms by accident.

{¶41} Further, it is well settled that a defendant’s “knowledge can be ascertained from the surrounding facts and circumstances.” *State v. Lopshire*, 11th Dist. No. 2005-P-0037, 2006-Ohio-3215, at ¶31, citing *State v. Johnson* (1978), 56 Ohio St.2d 35, 38, citing *State v. Huffman* (1936), 131 Ohio St. 27, paragraph four of the syllabus.

{¶42} The surrounding facts and circumstances in this case demonstrate that appellant was aware he was entering the victims' rooms, as opposed to his own, and that his conduct was therefore knowing, not accidental. First, appellant stated that he had only consumed two bottles of beer. Thus, there is no evidence that appellant consumed an excessive amount of alcohol. Second, appellant was able to make his way into *three different girls' rooms*. This is *not* a case where the defendant accidentally stumbled into one girl's room thinking it was his. Third, not only did appellant open the closed doors of his two victims, he popped the lock twice on A.K.'s door before entering. Fourth, when the victims instructed appellant to leave their rooms, he understood their demands and was able to comply with them. Fifth, when leaving C.B.'s and E.H.'s rooms, he said he was sorry. This apology evidenced a consciousness of wrongdoing and belies his argument that he was so drunk he did not know what he was doing. Sixth, when leaving E.H.'s room, appellant was able to step over H.B., who was lying in the middle of the room, to avoid walking on her. Seventh, when Officer Pongracz found appellant in his room, he was not sprawled on his bed sleeping or lying unconscious on the floor. To the contrary, he was sitting at his computer listening to music. Eighth, when Officer Pongracz asked appellant why he entered the victims' rooms, appellant stated he was "horny" and wanted to look at girls. This admission is, in fact, direct evidence of appellant's motivation in entering the victims' rooms. Ninth, E.H.'s testimony that appellant rubbed her hip, moved his hand down toward her crotch, touched her pubic area, flipped her over, held her head, and moved to kiss her all show that appellant was in control of his actions and was acting out his admission to the officer that he was "horny." Viewing the evidence in a light

most favorable to the state, the jury could have found appellant acted knowingly when he entered the victims' rooms. As a result, appellant's sufficiency argument fails.

{¶43} In support of his manifest-weight challenge, appellant attacks E.H.'s and H.B.'s credibility by arguing they did not immediately tell anyone about this incident, as opposed to A.K., who immediately reported appellant's forced entry into her room to the police. However, E.H. testified that after she awoke to appellant molesting her, she was in shock and could not go back to sleep. As a result, she logged on to Facebook to try to calm herself down until she was able to go back to sleep. Likewise, H.B. testified that E.H. was very upset, and H.B. felt it was more important to calm her down than to encourage E.H. to immediately report the incident to the police at 4:30 in the morning. In any event, E.H. and H.B. testified that later that morning at breakfast they reported the break-in to E.H.'s resident assistant. E.H. testified that one hour later, the police arrived and she reported the incident to them.

{¶44} While A.K. immediately reported appellant's entry into her room to the police, we note that she was a junior and a resident assistant with experience in conflict mediation, handling incidents of domestic violence and alcohol abuse, and reporting crimes to the police. In contrast, E.H. was only 18 years old and a freshman, and neither she nor H.B. had any such experience. While an older, more experienced person may well have immediately reported the incident, in light of E.H.'s and H.B.'s youth and inexperience, we perceive nothing so unusual or aberrant about their waiting a few hours to report the incident that would suggest their testimony was fundamentally not credible.

{¶45} As the trier of fact, it was for the jury to resolve any conflicts in the evidence and to determine whether E.H.'s and H.B.'s testimony was credible. Because there was only one version of events before the jury, there were no conflicts for the jury to resolve, and it was only called on to determine the credibility of the state's witnesses. In light of the jury's verdict, it obviously found E.H.'s and H.B.'s testimony credible. In making this determination, we cannot say the jury clearly lost its way and created such a manifest miscarriage of justice that appellant is entitled to a new trial.

{¶46} Appellant's first and second assignments of error are overruled.

{¶47} For his third and final assignment of error, appellant contends:

{¶48} "The Trial Court committed reversible error in imposing court costs against Tichaona without complying with R.C. 2947.23(A) ***."

{¶49} In its sentencing entry, the trial court imposed court costs on appellant. However, at the sentencing hearing, the trial court failed to advise appellant that it was imposing court costs. In *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, the Supreme Court of Ohio recently stated:

{¶50} "While the failure of the court to orally notify Joseph that it was imposing court costs on him does not void Joseph's sentence, it was error: Crim.R. 43(A) states that a criminal defendant must be present at every stage of his trial, including sentencing. The state urges that any error is harmless. However, Joseph was harmed here. He was denied the opportunity to claim indigency and to seek a waiver of the payment of court costs before the trial court. He should have had that chance.

{¶51} "We therefore remand the cause to the trial court for the limited purpose of allowing Joseph to move the court for a waiver of the payment of court costs. Should

Joseph file such a motion, the court should rule upon it within a reasonable time." Id. at 80.

{¶52} Here, the state concedes that the trial court failed to orally advise appellant at the sentencing hearing that it was imposing court costs on him. The state further concedes that in failing to so advise appellant, the trial court erred. However, the state contends that, because appellant filed his financial disclosure/affidavit of indigency in this court in support of his motion to waive the filing fees and costs on appeal and this court granted said motion, instead of remanding the case to the trial court pursuant to *Joseph*, supra, this court should waive appellant's trial court costs due to his status as an indigent defendant.

{¶53} Because the state agrees that the trial court erred in failing to orally advise appellant regarding court costs and, further, because the state requests that appellant's trial court costs be waived, we hereby modify the trial court's sentencing entry to vacate that portion of the entry imposing court costs on appellant.

{¶54} For the reasons stated in this opinion, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is hereby modified and affirmed as modified.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.