[Cite as *State v. Pfromm*, 2012-Ohio-5439.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0094**
- vs -	:	
RICHARD R. PFROMM,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2011 CR 0026.

Judgment: Affirmed.

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

Brian A. Smith, 503 West Park Avenue, Barberton, OH 44203 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Richard R. Pfromm, appeals his conviction, following a jury trial, in the Portage County Court of Common Pleas of burglary. Appellant challenges the sufficiency and weight of the evidence. For the reasons that follow, we affirm.

{¶2} Appellant was charged in a one-count indictment with burglary, a felony of the fourth degree, in violation of R.C. 2911.12(A)(4). Appellant pled not guilty. The case proceeded to trial by jury.

{¶3} Heather Trask testified she lives in a mobile home in a trailer park in Ravenna Township with her two young children, ages six and one. She said that on January 23, 2011, at about 4:00 p.m., she came home with her children after visiting her grandmother. When she pulled into the trailer park, she noticed a male, who she had never seen before and who she later identified as appellant, carrying trash to the community dumpster.

{¶4} Ms. Trask testified that after parking, she walked in the front door of her house with her children. The trailer also has a front and a back door, which provided additional access to Ms. Trask's home. The latch on the front door had not been working properly for some time, and she was waiting for her landlord to repair it. This time, after opening the door, the latch would not engage at all.

{¶5} Ms. Trask said that she slammed the front door about 30 times from the inside trying to get the latch to work, to no avail. She said: "I had the door open. I was squatted down, and I was looking at the latch, so the doorknob was eye level, and the next think I know, he was in my house." Appellant did not knock on the door or say anything, but entered the house without Ms. Trask's knowledge or permission. She was not asked and therefore did not testify as to whether appellant entered through the front or back door or a window.

{¶6} Ms. Trask testified that appellant shut the front door and leaned against it. She smelled alcohol on his breath. Appellant asked Ms. Trask for a screwdriver and a hammer. She refused to give them to him. Ms. Trask said she was afraid of appellant because he was a stranger and he was intimidating. Ms. Trask said that appellant asked her if she was afraid. She said he asked her this because she probably

appeared to be frightened. He then asked her if she had a husband. While appellant was still holding the door closed, Ms. Trask told him she would call her landlord to fix the door, but appellant gave her the "thumbs down" signal, and said, "no, don't call the landlord." Ms. Trask told appellant she could handle the door on her own, but he would not leave.

{¶7} Ms. Trask testified she could not order appellant to leave because he was bigger than her and she was afraid for her children. Instead, she tried to distract him by talking to him, hoping to get him to leave her house. She asked him if he lived nearby. In response, he said the landlord allows him to dump his trash in the trailer park. He also said he lives on the other side of the fence, but Ms. Trask said she did not know what fence he was talking about.

{¶8} Suddenly, while appellant was still leaning against the door, he staggered. Seizing this opportunity to get him to leave, Ms. Trask jerked the door open and told appellant she could take care of the door herself. He stepped out, and she quickly shut the door and pushed her couch up against it to keep him out.

{¶9} Ms. Trask then called her landlord. She told him her door was not working and a stranger had just entered her house. She described him and said she saw him taking trash to the dumpster. Her landlord said he knew the male she was describing. He gave Ms. Trask the male's address and told her to call the police. She immediately called the Portage County Sheriff's Office and, while crying, reported that a male had entered her home.

{¶10} Ryan Schindler and Christopher Cruise, deputies with the Portage County Sheriff's Office, testified that they were dispatched to Ms. Trask's home. Both deputies

said that, upon arrival, Ms. Trask told them that when she was bending down trying to fix her door, appellant "pushed his way into her house." She gave the officers appellant's information, and they went to his house, which is one-half mile from Ms. Trask's trailer. Deputy Schindler was the first officer to arrive at appellant's residence. Upon Deputy Schindler's arrival, appellant came outside. Deputy Schindler said that he and appellant were familiar with each other. The deputy asked appellant if he knew why he was there. Appellant said he was in the trailer park dropping off trash and saw a woman having problems with her door. Appellant said he helped her fix her door. The deputy asked appellant if she had invited him in, and appellant said, "no."

{¶11} Deputy Cruise testified that when he first arrived at Ms. Trask's home, she was visibly upset. From Ms. Trask's description of appellant, the deputies knew who he was and went to his house. When Deputy Cruise arrived at appellant's house, Deputy Schindler was already there and had talked to appellant. Deputy Cruise asked appellant if he had been to the trailer park. Appellant said he was there to dump his trash. Appellant said that, while there, he also talked to a female in the park about the door to her trailer.

{¶12} Deputy Cruise asked appellant if the female had invited him in. This time appellant said yes. He said he went inside her house because she asked him to help her. At that time Deputy Cruise smelled an alcoholic beverage on appellant's breath. After talking to appellant, Deputy Cruise learned from Deputy Schindler that appellant had told him the female did *not* invite him in her house. Deputy Cruise then arrested appellant for burglary.

{¶13} The state rested and appellant made a motion for acquittal under Crim.R. 29. The court overruled the motion. Appellant then rested. The court asked defense counsel if she wanted to renew her motion for acquittal and she declined. Following deliberations, the jury found appellant guilty of burglary. The court sentenced him to the Portage County Jail for six months. Appellant appeals his conviction, asserting three assignments of error. Because the first two are related, they shall be considered together. They allege:

{¶14} "[1.] Appellant's conviction for burglary was not supported by the sufficiency of the evidence.

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

{¶16} A challenge to the sufficiency of the evidence invokes an inquiry into due process and examines whether the state introduced adequate evidence to support the verdict as a matter of law. *State v. Schlee*, 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13 (Dec. 23, 1994). Generally speaking, a "sufficiency" argument raises a question of law as to whether the prosecution offered *some evidence concerning each element of the charged offense. State v. Windle*, 11th Dist. No. 2010-L-0033, 2011-Ohio-4171, ¶25. The proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Troisi*, 179 Ohio App.3d 326, 2008-Ohio-6062, ¶9 (11th Dist.), citing *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991).

{¶17} 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶18} 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*, 22 Ohio St.3d 120, 123 (1986). (Citations omitted.)

{¶19} "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, ¶61, discretionary appeal not allowed at 116 Ohio St.3d 1508, 2008-Ohio-381. (Citation omitted.)

{¶20} 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, ¶33.

{¶21} As a preliminary matter, the state argues that because appellant did not renew his motion to acquit after he rested, appellant waived his sufficiency argument. We disagree. This court has held that an appellant may argue insufficiency of the evidence even if he did not renew his Crim.R. 29 motion at the conclusion of all

evidence. *State v. Oliver,* 11th Dist. No. 2010-P-007, 2012-Ohio-122, ¶80; *State v. Cartulla,* 11th Dist. No. 2008-L-133, 2009-Ohio-2794, ¶10. Further, "[u]nder Crim.R. 29(A), a defendant must move for acquittal at the close of the State's case and, *if he presents a defense*, he must renew his motion at the close of all the evidence." (Emphasis added.) *State v. Fisher*, 148 Ohio App.3d 126, 2002-Ohio-3026, ¶15 (9th Dist.), citing *State v. Miley*, 114 Ohio App.3d 738, 742 (4th Dist.1996). Here, appellant did not present a defense. Consequently, by moving to acquit following the presentation of the state's case, the issue was preserved.

{¶22} At the time of the offense, R.C. 2911.12(A)(4), burglary, provided: "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.) Pursuant to Ohio Jury Instructions, the trial court instructed the jury that "force means any violence, compulsion, effort, or constraint used by any means upon or against a person or thing to gain entrance." Alternatively, the court charged the jury that "stealth means any secret or sly act to avoid discovery and to gain entrance into, or to remain within, the structure of another without permission." *See* 4 Ohio Jury Instructions (2008), Section 511.12(2), (3).

{¶23} With respect to the use of force, appellant argues the evidence was insufficient because Ms. Trask did not testify regarding how he gained entrance to her house. The only evidence of force was presented via the testimony of Deputy Schindler and Deputy Cruise. They testified that Ms. Trask reported that appellant pushed his way into her house. A "push" is defined as "a sudden forcible act of pushing," or "a sudden force steadily applied in a direction away from the body exerting it." Webster's

Third New International Dictionary 1848 (1986). However, Ms. Trask's testimony did not support the officers' testimony because she did not testify that appellant pushed his way into her home.

{¶24} To the contrary, Ms. Trask's testimony supported the alternative element of stealth. Ms. Trask saw appellant in the trailer park carrying trash. Shortly thereafter, she entered her home and discovered the latch on her front door would not engage. Her attention was focused on her door. She slammed it about 30 times in efforts to get it to work. Then, while holding the door open, she squatted down and was looking directly at the door latch. She said the next thing she knew, appellant was in her house. Thus, while she was focused on her door, appellant entered her house without her knowledge or permission. He did not ask if she needed help; knock on her door; or in any way announce his presence. The first time Ms. Trask was aware he had entered her house was when she saw him inside. Then, after gaining entrance, appellant closed the front door and leaned against it. When Ms. Trask told him she was going to ask her landlord to fix the door, appellant told her not to. After refusing to give him a screwdriver or hammer, appellant asked her if she was afraid of him. Ms. Trask testified she was frightened and probably appeared to be afraid. Appellant then asked her if she had a husband.

{¶25} Appellant told Deputy Schindler that, while he was in the trailer park dropping off trash, he saw a woman having problems with her door. Appellant said he helped her fix her door. The deputy asked appellant if she had invited him in, and he said, "no."

{¶26} From the foregoing, the jury could reasonably have found that, coupled with his silence, appellant took advantage of Ms. Trask's diverted attention on the door to enter without her knowledge. Because "secret" is defined as kept from knowledge or view, the jury's interpretation of the evidence is consistent with the verdict.

{¶27} Ohio Appellate Districts have held the evidence was sufficient to prove the defendant gained access to the victim's home by stealth on similar facts. *State v. Stewart*, 8th Dist. No. 86397, 2006-Ohio-1071, ¶18 (defendant secretly entered victim's home after she went to sleep); *State v. Bacon*, 8th Dist. No. 85475, 2005-Ohio-6238, ¶43-48 (defendant was peeking into victim's front door window and then moved to the side of her house); *State v. Buelow*, 2d Dist. No. 2004 CA 18, 2004-Ohio-6052, ¶64 (defendant entered victim's unlocked house uninvited in the middle of the night while all occupants were asleep. Defendant had not been invited in the house and, in entering the house, he did not wake guests who were asleep on couches in living room); *State v. Ward*, 85 Ohio App.3d 537, 540 (3d Dist.1993) (defendant entered unlocked door of home while its owner was mowing her lawn without attempting to speak to her)**.**

{¶28} While appellant argues Ms. Trask's testimony regarding appellant's method of entry into her house conflicted with Deputy Schindler's and Deputy Cruise's testimony regarding her report concerning appellant's method of entry, the resolution of conflicts in the evidence is not part of a sufficiency analysis. *Thompkins*, *supra*. Instead, the issue is whether the state offered some evidence concerning each element of the offense. *Windle*, *supra*.

{¶29} We therefore hold the state presented sufficient evidence to support the jury's conviction of burglary.

{¶30} With respect to his manifest-weight argument, appellant argues that Ms. Trask's testimony was inconsistent and contradicted by the deputies' testimony. First, appellant argues the fact that she called her landlord before calling the sheriff's office was inconsistent with her testimony that she was afraid of him. We do not agree. Although Ms. Trask was finally able to get appellant out of her house, the door was not secure and, without a lock, there was nothing to prevent him from re-entering. Further, as soon as appellant left, Ms. Trask called her landlord. Then, immediately after talking to him, she called the police. In addition, she said that once appellant left her house, she immediately closed the door and put her couch in front of the door to keep him out. Thus, Ms. Trask's call to her landlord was not inconsistent with her testimony that she was afraid of appellant.

{¶31} Appellant next argues that, although Ms. Trask said she did not tell appellant to leave, Deputy Schindler said she told the deputies that she asked appellant to leave. Ms. Trask testified that, although she wanted appellant to leave, she did not feel she could order him out because he was bigger than her and she was afraid of him, so, instead, she waited for an opportunity to get him to leave. Ms. Trask may not have explained this distinction to the deputy or he may not have appreciated it. In any event, the contradiction is inconsequential because, according to the testimony of both witnesses, she wanted appellant to leave and did what she could to get him to leave.

{¶32} Next, appellant argues Ms. Trask's testimony that her encounter with appellant lasted about 15 minutes was contradicted by the police report indicating that it lasted four minutes. Since Ms. Trask did not sign the police report and she testified she did not remember reporting the incident as lasting four minutes, the report was not

properly used to impeach her. In any event, appellant does not explain and we do not see how, in the circumstances, this apparent contradiction was material.

{¶33} Finally, appellant argues the state failed to show he could have entered Ms. Trask's house without her noticing him while she was blocking the doorway. However, Ms. Trask's attention was focused on the door latch. Further, there is no evidence Ms. Trask was blocking the doorway. She said the door was open as she attempted to get the latch to engage. However, because the record is not clear as to exactly where she was positioned, how wide the door was open, or where appellant entered, it is not clear exactly how he entered her house. What is clear, however, is that, while Ms. Trask's attention was focused on the broken latch of her front door, appellant entered her home without her knowledge or permission. Thus, Ms. Trask's testimony was not inconsistent with appellant sneaking into her house.

{¶34} In weighing the evidence, the jury obviously resolved any alleged conflicts in the evidence in Ms. Trask's favor and found her testimony to be credible. As the trier of fact, it was entitled to make this call. In reviewing the record, we cannot say the jury lost its way and created such a manifest miscarriage of justice that appellant was entitled to a new trial.

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

{¶36} Appellant alleges for his third and final assignment of error:

{¶37} "The trial court's decision to allow the testimony of Deputy Schindler that 'I [Deputy Schindler] had been there several times,' in referring to Appellant's home, constituted an abuse of discretion and prejudicial error."

{¶38} Decisions relating to the admissibility of evidence are within the broad discretion of a trial court, and such rulings will not be upset without an abuse of the court's discretion. *State v. Ricco*, 11th Dist. No. 2008-L-169, 2009-Ohio-5894, ¶17. An abuse of discretion occurs where the trial court's judgment does not comport with reason or the record. *Id*., citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925).

{¶39} Unless otherwise prohibited, evidence is relevant and admissible if it has any tendency to make a consequential fact more or less probable. Evid. 401 and Evid.R. 402. A trial court, however, is required to exclude relevant evidence "if its probative value is substantially outweighed by the danger of *unfair* prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403. (Emphasis added.)

{¶40} "Because fairness is subjective, the determination whether evidence is unfairly prejudicial is left to the sound discretion of the trial court and will be overturned only if the discretion is abused." *State v. Crotts,* 104 Ohio St.3d 432, 2004-Ohio-6550, ¶25, citing *State v. Robb*, 88 Ohio St.3d 59, 68 (2000).

{¶41} Appellant argues the trial court abused its discretion in overruling a request to strike an answer by Deputy Schindler to a question posed by the defense on cross-examination. The deputy testified on direct-examination that, following an interview with Ms. Trask, he went to appellant's residence to talk to him. On cross-examination, defense counsel asked Deputy Schindler, "How did you know where he lived?" Deputy Schindler answered, "I've been there several times." Defense counsel asked the court to strike the answer and the court denied the request.

{¶42} Appellant argues the deputy's answer implied that appellant has a criminal history. However, the deputy's answer was responsive to the defense's question and

further, as appellant concedes on appeal, the answer was relevant to establishing the chain of events of that day. Thus, Deputy Schindler's response was relevant and admissible pursuant to Evid.R. 401 and 402.

{¶43} In any event, even if Deputy Schindler's answer that he had been to appellant's home several times should have been stricken, any error was harmless. Deputy Schindler's answer did not necessarily imply that appellant had a criminal history. His testimony was equally consistent with any number of innocuous inferences, such as that he and appellant knew each other personally, from school, from their neighborhood, or from mutual friends. In fact, the defense conceded *at trial* that appellant and Deputy Schindler were "on pretty friendly terms" and that appellant and the deputy "knew each other personally."

{¶44} This court addressed a similar issue in *State v. Scott*, 11th Dist. No. 2001-L-086, 2002-Ohio-6692. The defendant in *Scott* was charged with OVI. A truck driver had described the defendant's vehicle to the officer as a Mustang with yellow and red plates. The officer testified he saw a vehicle matching that description. The defendant argued that the mention of the yellow and red license plates was improper character evidence because the color of the license plates implied that he had a prior OVI. This court held that even if evidence of the defendant's yellow and red license plates should not have been permitted, any error was harmless because the state never explained that yellow and red plates mean that the driver has a prior conviction for OVI. *Id*. at ¶22.

{¶45} Thus, pursuant to our holding in *Scott*, because Deputy Schindler did not explain that he had been to appellant's residence in the past in connection with prior crimes, any error in the admission of such evidence was harmless.

{¶46} Moreover, appellant sustained no prejudice from the admission of this evidence. Deputy Schindler's answer was elicited by the defense on cross-examination. Further, the deputy's answer was responsive, brief and isolated. There was no follow-up by the state in terms of any questioning or argument on this issue. In addition, the evidence of the use of stealth by appellant to enter Ms. Trask's home without her knowledge or permission was undisputed.

{¶47} Appellant's reliance on *State v. Henton*, 121 Ohio App.3d 501 (11th Dist. 1997) is misplaced because in that case the state produced evidence of the defendant's prior drug-abuse conviction to prove the prior-conviction element of the charged offense, although the defendant had offered to stipulate to the existence of the prior drug-abuse conviction.

{¶48} We therefore hold the trial court did not abuse its discretion in denying appellant's request to strike Deputy Schindler's testimony.

{¶49} Appellant's third assignment of error is overruled.

{¶50} For the reasons stated in this opinion, the assignments of error lack merit. It is the order and judgment of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.