

[Cite as *State v. Gregory*, 2010-Ohio-1342.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24788

Appellee

v.

JEREMY LONZO GREGORY

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 09 01 0050

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

CARR, Judge.

{¶1} Appellant, Jeremy Gregory, appeals his convictions out of the Summit County Court of Common Pleas. This Court affirms, in part, and reverses, in part.

I.

{¶2} On January 20, 2009, Jeremy Gregory was indicted by the Summit County Grand Jury on one count of breaking and entering in violation of R.C. 2911.13(A), a felony of the fifth degree. On April 10, 2009, the indictment was supplemented to include one count of burglary in violation of R.C. 2911.12(A)(3), a felony of the third degree. The charges in the indictment stemmed from an incident on November 20, 2008 in which a neighbor, Patrick Forester, reported to police that Gregory had broken into a house located at 104 West Miller Avenue in Akron, Ohio. Gregory had been renting that particular house until the late summer months of 2008. A jury trial commenced on April 20, 2009, and Gregory was subsequently convicted of both counts

in the indictment. Gregory was sentenced to a total of two years imprisonment, which was suspended on the condition that he successfully complete three years of community control.

{¶3} On appeal, Gregory raises six assignments of error. This Court has consolidated and reorganized his assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR II

“THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A VERDICT OF GUILTY OF BURGLARY.”

ASSIGNMENT OF ERROR III

“THE CONVICTION FOR BREAKING AND ENTERING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶4} In his second assignment of error, Gregory argues that his burglary conviction was not supported by sufficient evidence. This Court disagrees.

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted 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 prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Galloway* (Jan. 31, 2001), 9th Dist. No. 19752.

{¶5} The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *State v. Walker* (Dec. 12, 2001), 9th Dist. No. 20559; See, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring).

{¶6} Gregory was convicted of burglary under R.C. 2911.12(A)(3), which states:

“(A) No person, by force, stealth, or deception, shall do any of the following:

“(3) Trespass in an occupied structure or 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[.]”

{¶7} Gregory specifically argues that the State failed to prove beyond a reasonable doubt that the structure in question was “occupied,” and we thus focus our analysis on this element. Pursuant to R.C. 2909.01(C), an “occupied structure” is “any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

“(1) It is maintained as permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

“(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

“(3) At any time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

“(4) At any time, any person is present or likely to be present in it.”

{¶8} The State presented sufficient evidence to demonstrate that the house fell within the definition of occupied structure set forth in R.C. 2909.01(C)(4). Patrick Forester, who lived across the street from the house in question, testified on behalf of the State at trial. He testified that Gregory moved out of the residence in July or August of 2008. He said he was familiar with the house because he worked for the landlord, Jim Shoefelt, to prepare the house for rental. After Gregory was evicted, Patrick cleared trash and debris from the inside of the house as well as the backyard. He said he worked on the house on an ongoing basis from the time Gregory moved out through the time of trial.

{¶9} Patrick testified that on the night of the incident, he saw a man and his dog enter the home, followed by “four or five big crashes.” Patrick went across the street to check on the house and found that the door had been broken. Because he had helped to maintain the house, he had a key to the home, and this was the first time he noticed that the door was damaged.

{¶10} Patrick's son, Michael Forester, also testified on behalf of the State at trial. Michael testified that after Gregory moved out of the house "[t]he back yard had trash and everything" and the "[i]nside of the house was pretty well messed up." Michael assisted his father in maintaining the house.

{¶11} James Shoenfelt, who owns and rents the property also testified. He said that Gregory had rented the property in 2008 before being evicted for failing to make rent payments. Mr. Shoenfelt stated that Gregory left the property in the condition of a "junk yard" and that the city health department had sought a court order to have the trash removed from the property. Mr. Shoenfelt cleared some debris himself and he had intended to do more work on the house because he was in the process of "rehabbing" the property. The individual he employed to oversee the renovations was currently on another job.

{¶12} The evidence presented established that Patrick, Michael, and Mr. Shoenfelt, were working on the house from the time Gregory left until the trial. Thus, the State presented sufficient evidence to support a finding that a person was likely to be present in the house at the time of the incident, and therefore the house was an occupied structure pursuant to R.C. 2909.01(C)(4). Because the State presented sufficient evidence to prove the house was an occupied structure, the second assignment of error is overruled.

{¶13} In his third assignment of error, Gregory challenges his breaking and entering conviction. Having concluded that the State proved the structure in question to be occupied, the structure was not "unoccupied" as necessary for a conviction for breaking and entering. R.C. 2911.13(A). Therefore, his conviction for breaking and entering is reversed.

{¶14} Gregory's second assignment of error is overruled and his third assignment of error is sustained.

ASSIGNMENT OF ERROR I

“CONVICTIONS AND SENTENCES FOR BOTH BURGLARY AND BREAKING AND ENTERING VIOLATED DOUBLE JEOPARDY PROTECTIONS.”

ASSIGNMENT OF ERROR IV

“INSTRUCTING THE JURY THAT MR. GREGORY COULD BE CONVICTED OF BOTH BURGLARY AND BREAKING AND ENTERING WAS PLAIN ERROR[.]”

{¶15} Because our resolution of the second and third assignments of error is dispositive of the issues raised in Gregory’s first and fourth assignments of error, this Court declines to address those assignments of error as they are rendered moot. See App.R. 12(A)(1)(c).

ASSIGNMENT OF ERROR V

“IMPROPER ARGUMENTS PREJUDICED MR. GREGORY’S SUBSTANTIAL RIGHTS AND CLEARLY CHANGED THE OUTCOME OF TRIAL[.]”

{¶16} In his fifth assignment of error, Gregory takes issue with the discussion of the terms “occupied” and “unoccupied” by the State during both opening statements and closing arguments. Gregory also takes issue with several statements made by the State during closing arguments which attacked the credibility of the defense alibi witnesses. Gregory argues the trial court committed plain error in allowing the State to make these statements which affected his substantial rights.

{¶17} As trial counsel for Gregory did not object to the statements in question, Gregory has forfeited all but plain error. *State v. Graves*, 9th Dist. No. 08CA009397, 2009-Ohio-1133, at ¶24, citing *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, at ¶45. Pursuant to Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” To constitute plain error, the error must be obvious and have a substantial adverse impact on both the integrity of, and the public’s confidence in, the

judicial proceedings. *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. A reviewing court must take notice of plain error only with the utmost caution, and only then to prevent a manifest miscarriage of justice. *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶12.

{¶18} The portion of Gregory's fifth assignment of error which relates to the State's discussion of the terms "occupied" and "unoccupied" is moot in light of our resolution of Gregory's second and third assignments of error.

{¶19} Turning to the second portion of Gregory's argument, we hold that the State's comments regarding the credibility of the alibi witnesses did not constitute plain error. The Supreme Court of Ohio has stated that prosecutors should not express personal views with regard to the credibility of witnesses. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. However, prosecutors are "normally entitled to a certain degree of latitude in [their] closing remarks." *Id.* at 13. The testimony in this case revealed that the alibi witnesses were friends of Gregory's family. This testimony put their potential bias squarely before the jury. During the State's closing argument, the prosecutor properly highlighted several inconsistencies in the testimony of the defense witnesses. However, there is no question that the statements by the prosecutor which accused the defense witnesses of collaborating to develop a story were improper. The prosecutor should have properly focused on their bias, as reflected in their testimony, rather than offering his personal opinion.

{¶20} As noted above, because Gregory did not object to the statements made by the prosecutor during closing argument, he argues on appeal that the statements constituted plain error. In order to prevail under a plain error analysis, Gregory bears the burden of demonstrating that the outcome of trial clearly would have been different but for the errors. *State v. Long* (1978), 53 Ohio St.2d 91, Crim.R. 52(B). While Gregory points to statements which were

improper, he has not explained how the result of trial would have been different had the statements not been made. In the absence of any affirmative demonstration of prejudice, Gregory cannot prevail on his plain error claim.

{¶21} It follows that his fifth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

“MR. GREGORY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL[.]”

{¶22} In his sixth assignment of error, Gregory claims he was denied the effective assistance of trial counsel. This Court disagrees.

{¶23} In order to prevail on a claim of ineffective assistance of counsel, Gregory must show that “counsel’s performance fell below an objective standard of reasonableness and that prejudice arose from counsel’s performance.” *State v. Reynolds* (1998), 80 Ohio St.3d 670, 674, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. Thus, a two-prong test is necessary to examine such claims. First, Gregory must show that counsel’s performance was objectively deficient by producing evidence that counsel acted unreasonably. *State v. Keith* (1997), 79 Ohio St.3d 514, 534, citing *Strickland*, 466 U.S. at 687. Second, Gregory must demonstrate that but for counsel’s errors, there is a reasonable probability that the results of the trial would have been different. *Id.*

{¶24} The Ohio Supreme Court has recognized that a court need not analyze both prongs of the *Strickland* test, where the issue may be disposed upon consideration of one of the factors. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143. Specifically,

“Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.” *Bradley*, 42 Ohio St.3d at 143, quoting *Strickland*, 466 U.S. at 697.

{¶25} Gregory argues that the failure of trial counsel to object at various points throughout trial constituted ineffective assistance of counsel. This Court has stated that failure to preserve error on appeal, even if professionally unreasonable, is not tantamount to ineffective assistance of counsel when there is no effect on the judgment below. See *State v. Halsell*, 9th Dist. No. 24464, 2009-Ohio-4166, at ¶34. Other than to argue in his merit brief that the errors “plainly affected the judgment below,” Gregory has not demonstrated that the result of trial would have been different if trial counsel had timely objected at various points throughout trial. Therefore, absent a demonstration that the result of trial would have been different had trial counsel timely objected to the statements in question, Gregory cannot prevail on his ineffective assistance of counsel claim.

{¶26} It follows that the sixth assignment of error is overruled.

III.

{¶27} Gregory’s third assignment of error is sustained. This Court declines to address his first and fourth assignments of error as they are rendered moot. Gregory’s second, fifth and sixth assignments of error are overruled. The judgment of the Summit County Court of Common

Pleas is affirmed, in part, and reversed, in part, and remanded for proceedings consistent with this decision.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

MARK H. LUDWIG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.