[Cite as *State v. Gonzales*, 2014-Ohio-545.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-12-037

Appellee — Trial Court No. 12 CR 189

v.

Jamie Gonzales — **DECISION AND JUDGMENT**

Appellant — Decided: February 14, 2014

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Thomas A. Matuszak, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas, following a jury trial, in which appellant, Jamie Gonzales, was found guilty of one count of trespass in a habitation, in violation of R.C. 2911.12(B), a fourth degree felony. On appeal, appellant sets forth the following five assignments of error:

First Assignment of Error:

The trial court abused its discretion and erred to the prejudice of appellant by improperly instructing the jury on the word "enter" in violation of appellant's right to due process under the Fifth Amendment of the United States Constitution.

Second Assignment of Error:

The trial court abused its discretion and erred to the prejudice of appellant by denying his Rule 29 motion.

Third Assignment of Error

Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Constitution of the State of Ohio.

Fourth Assignment of Error:

The trial court erred to the prejudice of appellant by allowing the state to impeach appellant outside of the requirements of Criminal [sic] Rule of Evidence 609.

Fifth Assignment of Error:

Appellant's conviction was against the manifest weight of the evidence presented by the state and contrary to law.

{¶ 2} On March 25, 2012, Amanda Vandercoy called the Bowling Green police department to report a suspicious man loitering in the third-floor hallway of the Village

Green apartment complex. Minutes later, Ali Heltzel opened her apartment door, number 324, in response to a knock. Upon opening the door, Heltzel spoke to a man, who said he was there for a "birthday or togetherness services." Heltzel told the man no one in the apartment was having a birthday. The man responded by saying that someone named "Jim" called and asked him to come to the apartment. At that point two other women who were with Heltzel at the time came to the door. When he saw others in the apartment, the man left.

{¶ 3} Officers Jeremy Lauer, Paul Tyson, and Kristopher Garman arrived in response to Vandercoy's call. At that point, the officers were told that Heltzel had called to report a man matching Vandercoy's description at her apartment door. Both Heltzel and Vandercoy told the Bowling Green police that the man was wearing a blue sweat suit and a red baseball cap. While the officers were on their way to Heltzel's apartment, they saw a man in a blue sweat suit. When he saw the officers, the man ran away. After speaking to Heltzel and her two female friends in the apartment, the officers began to search for the intruder, eventually finding a bicycle propped near a fence at the rear of the building. At that point they saw appellant walk up to the bike, wearing a blue sweat suit and a red cap. When the officers asked appellant what he was doing at the building, appellant responded that he was visiting friends and pointed toward the third floor of the building, in the vicinity of apartment 324.

{¶ 4} When the officers stated that appellant appeared to have no reason to be at the apartment complex, appellant responded "It's no big deal, trespass in an M-4." He

then became aggressive and clenched his fists. When appellant refused to comply with the officers' attempt to arrest him, they sprayed appellant with pepper spray and placed him in handcuffs. Heltzel, Vandercoy and her fiancé, James McCann, and one of Heltzel's friends, Jessica Szczepanski, identified appellant as the man who was hanging around the building and who knocked on Heltzel's door.

{¶ 5} On April 19, 2012, appellant was indicted by the Wood County Grand Jury on one count of trespass in a habitation. On April 30, 2012, appellant was arraigned and entered a not guilty plea. On May 31, 2012, the prosecution filed a motion in which it asked the trial court to allow the filing of Heltzel's videotaped deposition, which the trial court granted. On June 8, 2012, the trial deposition was taken, and a transcript and video recording of the deposition were filed in the trial court on June 12, 2012.

{¶ 6} A one-day jury trial was held on June 20, 2012. Before the trial began, a discussion was held between the trial court, the prosecutor and appellant's attorney as to statements appellant made to the police officers after he was arrested. After due consideration, the trial court excluded only those statements appellant made after Heltzel identified him. Thereafter, a discussion was held regarding the admissibility of prior judgment entries of conviction and sentencing at trial, and appellant's attorney agreed to stipulate as to appellant's prior convictions. A discussion was also held regarding the state's request for a jury instruction defining the term "enter." After considering arguments for both sides, the trial court stated that it would instruct the jury that "entry occurs when a person breaks the plane of an entrance to a habitation." The defense

objected to the trial court's proposed instruction, which was overruled. The trial then commenced with voir dire and counsels' opening statements, after which evidence was presented on behalf of the state through Heltzel's videotaped deposition and the testimony of Vandercoy, McCann, Szczepanski, Lauer, Tyson and Garman.

{¶ 7} Vandercoy testified that she is a BGSU student living with her fiancé, James McCann, across the hall from Heltzel. Vandercoy stated that, on March 25, 2012, she saw a male, wearing a blue sweatshirt and sweatpants and a baseball cap, walking in the parking lot of building three at 2:30 p.m. Vandercoy further stated that later, around 6:30 p.m., she saw the same man sitting on the staircase inside the building, looking at DVD cases and later, around 7:30 p.m., the man was standing "pressed up in that corner" outside Heltzel's door. Vandercoy testified that she called the police, who later came to her door and asked her to identify the man she saw in the hallway and outside the building. She made an in-court identification of appellant as the man she saw on March 25, 2012. On cross-examination, Vandercoy stated that she never saw appellant before that day, and she did not see him talking to Heltzel.

{¶ 8} McCann testified that he saw a man wearing blue pants, a blue sweatshirt and a red cap in the hallway of building three between 3:00 and 4:00 p.m., and later after returning from shopping. The second time, the man stared at McCann before taking off by "walking fast." McCann further stated that he saw the same man again around 8:30 p.m., on the third floor outside Heltzel's apartment; however, he did not hear appellant talking to Heltzel and the other occupants in her apartment.

{¶ 9} Szczepanski testified that she and another friend were with Heltzel on March 25, 2012, when they heard a knock at the door. Szczepanski stated that Heltzel answered the door with her dog in her arms, however, Szczepanski could not see who was at the door because it was not all the way open. She stated that Heltzel was standing "slightly behind it, but not like a lot, so it was slightly opened and she was kind of peeking out a little bit." Szczepanski said that the man at the door told Heltzel that someone named Jim asked him to come "for a birthday party or togetherness." At that point, the man "started entering" the apartment by "[a] few inches," and that his hand was on the doorjamb, preventing the door from closing.

{¶ 10} Szczepanski testified that she got up, "took ahold of the door and * * * informed [the man] that he had the wrong apartment." Szczepanski stated that she acted aggressively because she felt "protective over my friends and we were kind – I was scared." She described the man as wearing "blue sweatpants, a blue sweatshirt, sunglasses, tennis shoes and a hat." She further stated that when the man backed out of the doorway they locked the door and called police. When the police arrived, they asked the three women to come outside to identify him. Szczepanski stated that, at that point, the man was "screaming that he hadn't done anything wrong and they couldn't get him on anything." She also stated that the man said "I didn't touch you, baby."

{¶ 11} On cross-examination, Szczepanski testified that the knock on Heltzel's door was not unusually loud or soft. She did not recall appellant putting his hands on anyone, and she did not remember hearing him say "sorry" as he was walking away.

Szczepanski stated that the man came "three or four inches into the doorway." On re-cross, Szczepanski said that appellant placed his hand closer to the outside of the door and then "slowly moved it towards the doorjamb" as he talked to Heltzel.

{¶ 12} Heltzel's video deposition testimony, recorded on June 8, 2012, was played for the jury at the conclusion of Szczepanski's testimony. Heltzel testified in the video that she lived alone in her apartment at Village Green after her boyfriend moved out in February 2012. Heltzel stated that, for several weeks before appellant knocked on her door, she asked male friends to go with her to walk her dog because she had the feeling she was being watched. Heltzel said that she opened the door after hearing a knock and seeing appellant through the peep hole. When she asked appellant who he was, he said he "was offering services for a birthday or some sort of togetherness." Heltzel said the man at the door was wearing a dark blue sweatshirt and sunglasses, and that he had salt-and-pepper facial hair. She stated that, during the conversation, appellant edged toward the door opening and put his hand on the frame. Appellant told Heltzel that someone named "Jim" told him to come to apartment 324. Heltzel said that when she started to shut the door, appellant backed away. She then locked the door and called the police.

{¶ 13} Heltzel testified that the Bowling Green police came to her door and told her a man was in custody, and that she went outside and identified appellant as the man at her door. Heltzel said that she told police appellant was not invited into the apartment, nor was he made to feel welcome. She testified that when he saw Heltzel, appellant said "I didn't touch you baby." On cross-examination, Heltzel testified that it was dark

outside when appellant knocked on her door, and that she stood behind the open door with her small dog in her arms. Heltzel further testified that she told appellant it was not anyone's birthday. He then put his hand on the door frame, and his foot crossed the threshold. Heltzel stated that, when she began to shut the door, appellant backed away and said "sorry." Heltzel said she was standing a foot or two away from the doorway during the encounter.

{¶ 14} On redirect, Heltzel testified that appellant was not carrying any birthday items, and he was not dressed like a delivery person. She also testified that appellant took a forward step during the conversation, opened the door wider, and crossed the threshold by about one foot.

{¶ 15} Bowling Green police officers Jeremy Lauer, Paul Tyson and Kristopher Garman testified that they were dispatched to Village Green Apartments on March 25, 2012, in response to Vandercoy's call. Shortly after arriving at the complex, the officers were told of Heltzel's call. Upon looking around the premises, they found a bicycle in the backyard alongside three DVD cases and saw appellant, whom Garman recognized from previous encounters with police, walking toward the building. The officers testified that appellant was wearing blue sweatpants, a blue shirt, and a red baseball cap. All three officers testified that appellant became "rigid" and angry when he was accused of being on the premises illegally, and that appellant was not worried about being arrested on an "M-4" trespassing charge. Garman testified that appellant said he was visiting a "friend"

in apartment 324. All three officers stated that appellant resisted arrest to the extent that he could not be subdued until he was sprayed with pepper spray.

{¶ 16} At the close of the officers' testimony, the state rested. The defense then made an oral motion to dismiss pursuant to Crim.R. 29. In support of its motion, the defense argued that insufficient evidence was presented to show that appellant entered Heltzel's apartment by "force, stealth or deception" because appellant was not more than 18 inches inside the apartment door, and his entry "was not a result of any deception." The prosecution responded that the definition of "force' is "any compulsion, effort, [or] constraint," however slight, and that appellant used the birthday story as "a sly act used to gain entrance." The trial court denied the motion to dismiss and the trial continued with appellant taking the stand in his own defense, against the advice of counsel.

{¶ 17} Appellant testified at trial that he went to apartment 324 on March 25, 2012, looking for "muscle relaxers" for a friend. Appellant said that he had been to the complex before to buy drugs, but he was not certain which unit he had visited previously. Appellant also said that he:

> basically knocked on the door for a visual identification of the person that sold me the stuff in the past because, like I'm telling you, all it was a friend of a friend I really didn't know. I knew the building, but I didn't know the person and that's why I didn't – you know, I went back twice, and then the third time I got up the gumption to knock on the door to see if the person that dealt with my friend was still living there or in the building.

{¶ 18} Appellant stated that his conversation with Heltzel was "very brief" and that he used the pretense of a "birthday" or "togetherness" to "break the ice." He admitted touching the door jamb but said he backed up when Heltzel opened the door, he put his foot in the doorway "maybe an inch," and that he backed out when Heltzel's friends showed up. He denied having the intent to enter the apartment. Appellant said that he went back to his bicycle after the encounter and smoked a "little roach." He said he became upset because "I said this is not even criminal trespassing because I haven't harassed the ladies or anything. I didn't even go back there. After they said that they didn't order no birthday party or the Jim dude wasn't there I left and that was about it." He complained about being pepper sprayed for a "misdemeanor four."

{¶ 19} Appellant denied forcing his way into the apartment and trying to deceive Heltzel. He said he did not touch the door with his right hand, however, he stated: "I will admit I fumbled with some words because, you know, I had a few beers in me and I was just trying to figure out if the one lady, the friend of the friend that lived there, and that was it."

{¶ 20} On cross-examination, appellant said that he went to the apartment to buy dope from a woman that he had never seen before, and he did not know the phone number of the friends who wanted the drugs. When the prosecutor asked appellant if he wanted to enter the apartment, hide in a closet, and take pictures of Heltzel, appellant replied: "I didn't have a camera on me that day." Thereafter, the prosecutor questioned appellant about a prior burglary conviction in which he hid in a closet and took pictures,

to which the defense objected. When the prosecutor responded that the question was for purposes of impeachment, appellant's defense attorney told him to continue, but be willing to "be stuck" with appellant's answer. Ultimately, the objection was overruled by the court, and the prosecutor asked appellant:

> You snuck into somebody's home when they weren't there, you hid in a closet basically as a voyeur and when the people came home there were men among them and at that point in time you tried to make your escape and told the people there that you were trying to find a guy named Tim? Isn't that true?
>
> Appellant: Not – no, that is not true.

{¶ 21} After the above exchange, appellant asserted his "Fifth Amendment right" and refused to talk about the prior incident or to respond to the prosecutor's questions about previous assaults on a peace officer and other felony convictions, which appellant characterized as "exacerbated charges" that were "overcharged for crimes committed." Appellant stated that he took the stand in this case because "this is an ambiguous charge." Appellant also said that he felt like he was "illegally arrested."

{¶ 22} The trial court submitted several questions to appellant from members of the jury. In response to those questions, appellant testified that his memory of the date in question is impaired because he drank alcohol that day, and he might have broken the plane of the door to Heltzel's apartment by an inch, but not a foot. In response to a question about his familiarity with an "M-4" charge, appellant responded:

> I'm 43 years old. I've had – had misdemeanors. I've had a DUI. I've read the law. I'm no – I know what is – what's the word? I just say, you know, I know what an overindictment [sic] is and this is an overindictment [sic].

{¶ 23} Appellant also testified that he had been convicted of 51 misdemeanors "through the years" in addition to other criminal trespass charges and/or convictions and an arrest for voyeurism. Appellant also testified that he had seen a drug dealer go into Heltzel's apartment building in the past, and he knocked on her door because he thought he heard a familiar voice inside.

{¶ 24} Officer Garman testified in rebuttal that, after appellant was handcuffed, he told the officers about times that he had illegally been arrested, and named some of the officers involved. Garman also stated that appellant threatened to masturbate on Bowling Green Police Chief Brad Conner's girlfriend and, before he was placed in holding cell, appellant "began engaging in some masturbation" while he still had pepper spray on his body.

{¶ 25} At the close of appellant's testimony, the defense rested, and both parties presented closing arguments. The trial court then instructed the jury as to the elements of the crime charged, after which the jury retired to deliberate. After a short time, the jury found appellant guilty of trespass in a habitation. A sentencing hearing was held on June 21, 2012, at which appellant personally addressed the court. Thereafter, the trial court stated that it had considered the purposes and principles of sentencing, as well as

the applicable factors regarding recidivism and the seriousness of the offense, and psychological harm to the victim. Also, the trial court stated that it had reviewed appellant's criminal record, as stated in the presentence report, and considered the fact that appellant showed no genuine remorse for his actions. After considering and finding that appellant is not amenable to community control, the trial court sentenced appellant to serve 17 months in prison, and instructed him as to the possibility of postrelease control. A timely notice of appeal to this court was filed on July 19, 2012.

{¶ 26} In his first assignment of error, appellant asserts that the trial court's jury instruction as to the definition of "enter" was improper. In support, appellant argues that the trial court should have given the jury the "common, ordinary" definition of "enter" which, according to appellant, is "to go or come into a place or condition * * *."

{¶ 27} On appeal, the trial court's decision to give a requested jury instruction will not be overturned absent an abuse of discretion. *State v. Durbin*, 5th Dist. Holmes No. 13 CA 2, 2013-Ohio-5147, ¶ 24. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 28} A review of the record shows that, on June 18, 2012, the state filed a request for the trial court to allow a jury instruction clarifying the meaning of the word "enter," as used in R.C. 2911.21(A)(1). That statute sets out the crime of criminal trespass by stating that "[n]o person, without privilege to do so, shall * * * [k]nowingly

enter or remain on the land or premises or another." In support, the state argued that, while the word "enter" is not separately defined by statute, it is significant in this case. Specifically, although appellant did not completely enter Heltzel's apartment, he did use deception to get her to open the door, after which he attempted to deceive her in order to gain entrance, and then managed to break the plane of her doorway by 6-12 inches. Appellant filed a response in opposition in which he argued that, without a statutory definition, the court should apply the "common" meaning of the term "enter," which is "to come or go into."

{¶ 29} Immediately before appellant's trial commenced, the court revisited the issue of a jury instruction as to the term "enter." At that time the state argued that, pursuant to *State v. Kelly*, 2d Dist. Clark No. 2011 CA 37, 2012-Ohio-1095, and *State v. Miller*, 11th Dist. Lake No. 2002-L-162, 2004-Ohio-6342, the act of "entering" a building for purposes of R.C. 2911.21 is accomplished when the defendant breaks the plane of the structure. The state also made the analogy to rape cases in which penetration, however slight, is sufficient to establish the statutory element of entry, and asked the trial court to instruct the jury that "entry" is accomplished "when a person breaks the plane of a property line that defines the boundaries of the land or premises of another. Breaking that plane, however slight, is sufficient to constitute entry."

{¶ 30} In response, the defense argued that "entry" for purposes of establishing the crime of trespass is not analogous to an element of the crime of rape. The defense also

argued that the "common definition" of the term "enter," i.e. "to come or go into," is sufficient to instruct the jury in this case.

{¶ 31} In *State v. Kelley*, 2d Dist. Clark No. 2011 CA 37, 2012-Ohio-1095, the trial court addressed the issue of whether the accused committed the crime of attempted burglary. In determining whether to grant a motion for acquittal, the trial court determined that evidence presented showed that appellant broke the plane of a dwelling by "[sticking] his body" into a window. *Id*. at ¶ 32. *See also State v. Miller*, 11th Dist. Lake No. 2002-L-162, 2004-Ohio-6342, ¶ 49. (A defendant's attempted burglary conviction is supported by sufficient evidence if he * * * moves a window or door to gain access to a home.) Similarly, another Ohio court appellate court has held that a trespass occurred when the accused placed his hand through a window because,

> "[i]n proving the element of unlawful entry in the criminal prosecution of [a] defendant upon a charge of burglary, proof of the *insertion of any part of defendant's body is sufficient to constitute an entrance*." (Emphasis added.) *State v. Harris*, 8th Dist. Cuyahoga No. 96566, 2012-Ohio-10, ¶ 19, quoting *State v. Rudolph*, 8th Dist. Cuyahoga No. 92085, 2009-Ohio-5818, ¶ 18.

{¶ 32} In this case, during its charge to the jury, the trial court stated that:

> Trespass. What does trespass mean? "Trespass" means the Defendants, without any right to do so, knowingly entered or remained in the habitation of another.

Enter. "Enter" means to come or go into. Entry occurs when a person breaks the plane of an entrance to a habitation.

"Habitation" means the place where a person lives.

{¶ 33} On consideration of the foregoing, we cannot say that the trial court abused its discretion by instructing the jury that "[e]ntry occurs when a person breaks the plane of an entrance to a habitation." Appellant's first assignment of error is not well-taken.

{¶ 34} In his second assignment of error, appellant asserts that the trial court erred by denying his motion for acquittal. In support, appellant argues that: (1) his intrusion into Heltzel's residence was "minimal at best" and did not justify a felony conviction, and (2) he did not attempt to enter the residence by "force, stealth or deception."

{¶ 35} The standard of review for a decision regarding a Crim.R. 29 motion for acquittal is the same as that for a decision on a sufficiency challenge, i.e.,:

"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. Lowe*, 8th Dist. Cuyahoga No. 99176, 2013-Ohio-3913, ¶ 11, quoting *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77.

{¶ 36} Appellant was charged with one count of trespass in a habitation, in violation of R.C. 2911.12(B), which states that "[n]o person, by force, stealth, or deception, shall 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." It is

undisputed that Heltzel's apartment was inhabited at all times relevant to this appeal. Also, as stated in our determination of appellant's first assignment of error, evidence was presented at trial that appellant crossed the threshold of the apartment, which the jury determined to be an "entry" for purposes of establishing a trespass.

{¶ 37} As to whether appellant attempted to enter the premises by force, stealth, or deception, even if appellant had permission to enter the apartment, the jury still could find that he was trespassing if entry was obtained on false pretenses. *In re J.M.*, 7th Dist. Jefferson No. 12 JE 3, 2012-Ohio-5283, ¶ 17. Testimony was presented that appellant attempted to convince Heltzel and her friends that he had been called to the apartment to deliver birthday items or attend a "togetherness" event. During his testimony, appellant admitted that both of these statements were false.

{¶ 38} On consideration, this court finds that, after examining the evidence presented at trial most favorably in light of the prosecution, a rational jury could have found all the essential elements of the crime were proved beyond a reasonable doubt. Accordingly, the trial court did not err by denying appellant's Crim.R. 29 motion for acquittal. Appellant's second assignment of error is not well-taken.

{¶ 39} In his third assignment of error, appellant asserts that he received ineffective assistance of appointed counsel. In support, appellant argues that his defense counsel was ineffective because he failed to stipulate to appellant's prior convictions, thereby opening the door to the state's use of "certified judgment entries for impeachment purposes should Appellant take the stand."

{¶ 40} In order to prevail on a claim of ineffective assistance of counsel, an appellant must show that his or her counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-pronged test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also State v. Plassman*, 6th Dist. Fulton No. F-07-036, 2008-Ohio-3842. This burden of proof is high given Ohio's presumption that a properly licensed attorney is competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988). *State v. Newman*, 6th Dist. Ottawa No. OT-07-051, 2008-Ohio-5139, ¶ 27. Issues which are arguably a matter of counsel's trial tactics and strategies do not constitute ineffective assistance. *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980), citing *State v. Lytle*, 48 Ohio St.2d 391, 396, 358 N.E.2d 623 (1976).

{¶ 41} A review of the record shows that the state never moved to enter certified judgment entries evidencing appellant's prior convictions at trial during its case-in-chief. Appellant then chose to testify at trial, against his own attorney's advice. That testimony included statements regarding appellant's criminal record.

{¶ 42} After consideration of the foregoing, we find that appellant has failed to establish that counsel's representation fell below a standard of reasonableness or that, but

for counsel's perceived errors appellant would not have been convicted. Appellant's third assignment of error is not well-taken.

{¶ 43} In his fourth assignment of error, appellant asserts that the trial court erred by allowing the state to impeach his testimony on cross-examination with his prior criminal convictions. In support, appellant argues that the state was improperly allowed to question him about matters that are not subject to disclosure pursuant to Evid.R. 609.

{¶ 44} Generally, it is well-established that trial courts exercise broad discretion in the admission or exclusion of evidence. An appellate court will not disturb evidentiary decisions of the trial court absent a showing of an abuse of discretion. *State v. Riddle*, 6th Dist. Ottawa No. OT-10-040, 2011-Ohio-1547, ¶ 7.

{¶ 45} Pursuant to Evid.R. 609(A)(2):

> Notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

{¶ 46} Pursuant to Evid.R. 403(B), relevant evidence may nevertheless be excluded "if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

{¶ 47} As set forth above, the defense objected when the prosecution attempted to cross-examine appellant as to his prior felony conviction for burglary. After a discussion with the court, the state was allowed to inquire as to the facts underlying appellant's felony conviction, which appellant denied. No other evidence concerning that conviction was presented, and appellant refused to answer any further questions regarding prior felony convictions. In addition, appellant admitted to numerous misdemeanor convictions, without objection by defense counsel. Appellant argues on appeal that this line of questioning was highly prejudicial and should have been barred by Evid.R. 609. We disagree, for the following reasons.

{¶ 48} Evid.R. 609 only allows the impeachment of an accused with felony convictions. The failure to object to questions regarding an accused's prior misdemeanor convictions waives all but plain error on appeal. *State v. Skatzes*, 104 Ohio St.3d 195, 819 N.E.2d 215, 2004-Ohio-6391, ¶ 26. "Plain error is present only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different." *State v. Russell*, 12th Dist. Butler No. CA2012-03-066, 2013-Ohio-1381, ¶ 55, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 767 N.E.2d 216, 2002-Ohio-2126, ¶ 108.

{¶ 49} After reviewing the entire record in this case, which included the testimony of multiple witnesses as to appellant's actions on March 25, 2012, we find that ample evidence was presented to support appellant's convictions. Accordingly, appellant has failed to demonstrate that, but for the inclusion of questions and testimony regarding his prior misdemeanor convictions, he would not have been convicted in this case.

{¶ 50} For the foregoing reasons, appellant's fourth assignment is error is not well-taken.

{¶ 51} Appellant asserts in his fifth assignment of error that his conviction is against the manifest weight of the evidence. In support, appellant incorporates his arguments in support of his first four assignments of error, and then argues that "the evidence presented by the state at trial forms a factually insufficient basis to convict him of Trespass in a Habitation * * *."

{¶ 52} A manifest weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St .3d 380, 386, 678 N.E.2d 541 (1997). In considering such a challenge the court of appeals, acting as a "thirteenth juror," reviews the record, weighs the evidence and all reasonable inferences, and determines whether in resolving evidentiary conflicts the jury clearly lost its way so as to create a manifest miscarriage of justice so as to warrant the extreme remedy of a reversal. *Id.*

{¶ 53} After weighing all of the evidence and all reasonable inferences, we find no indication that the jury lost its way so as to create a manifest miscarriage of justice and warrant the reversal of appellant's conviction. Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 54} The judgment of the Wood County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE