[Cite as *State v. Smith*, 2012-Ohio-4506.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-1120
v.	:	(C.P.C. No. 10CR-01-0233)
Daryl M. Smith,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 28, 2012

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Daryl M. Smith ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of burglary. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} Appellant was indicted on one count of burglary. He pleaded not guilty to the charge, and a jury trial ensued. At trial, Sheila Lipsey-Clarke testified as follows. During the early part of December 2009, Clarke invited her friend Kelly to live in her

apartment. On December 25, 2009, Clarke received a call from her landlord while she was out of town. He said that "there was a lot of traffic going on" in Clarke's apartment and that "somebody there had threatened him when he asked them to vacate the premises." (Tr. Vol. I, 154.) Clarke returned to her apartment and found appellant and his girlfriend, Stevevaughnna Cammon, using crack cocaine with several other people. Her friend Kelly was not there. Clarke initially told everyone to leave, but the group convinced her to let them stay. The group spent the night, and the next morning Clarke told them to leave. They refused, and Clarke called the police. The police arrived and removed appellant and his friends from the apartment. They also arrested appellant on a warrant for an unrelated incident, and they told Clarke that appellant would be released "in a couple hours." (Tr. Vol. II, 202.)

{¶ 3} Afterward, Clarke had to go to the hospital because she was hit by a van. She was not sure how long she was at the hospital or even whether she spent more than one day there. A neighbor called her at the hospital and told her that some people were breaking into her apartment. He recognized them from the group that the police previously sent away. Clarke confirmed at trial that she did not give anyone in that group permission to go back to her apartment. Lastly, she identified photographs that the police took when they investigated the intrusion into her apartment. She said that the photographs showed a box near her door and that the box contained two video game systems belonging to her.

{¶ 4} Columbus Police Officer Anthony Roberts testified as follows. Roberts went to Clarke's apartment after she requested assistance in removing appellant, Cammon, and their friends. Appellant did not ask to retrieve any property from the apartment. Roberts returned to the apartment later that day to investigate a burglary. The apartment door "had been kicked in," and the doorjamb was broken. (Tr. Vol. II, 255.) Appellant and Cammon came out of the apartment. Appellant was carrying a box with video game systems. Columbus Police Officer Nicholas Mason assisted Roberts, and he testified as follows. Mason apprehended Cammon when she came out of Clarke's apartment. He found 60 grams of crack cocaine inside the sleeve of her coat. He knew what crack cocaine looked like because he has previously seen it while on patrol.

{¶ 5} After the prosecutor rested his case-in-chief, appellant moved for an acquittal, pursuant to Crim.R. 29(A), and the trial court denied the motion. Next, appellant testified as follows on his own behalf. In November 2009, Clarke invited him and Cammon to live in her apartment. The landlord would check on the apartment several times when Clarke was away. On December 25, 2009, Clarke returned from a trip to find appellant and Cammon using drugs with some other people. Clarke asked everyone to leave except for appellant and Cammon. The police arrived the next day and arrested appellant on a warrant. They also told appellant that he had no right to be in Clarke's apartment. Appellant was released in a few hours after someone posted bail for him. Appellant testified that, after his release, he and Cammon went to Clarke's apartment "for the burglary." (Tr. Vol. II, 354.) But he subsequently said that Clarke gave them permission to go back to the apartment. He knew that Clarke was in the hospital when he went back to her apartment. He also acknowledged that the police saw him leaving with a box containing video game systems, however he claimed that the items belonged to him. Lastly, he testified that Cammon was leaving with a coat, but he said he was not aware that there was crack cocaine in the coat until the police found it.

{¶ 6} When appellant finished testifying, he renewed his Crim.R. 29(A) motion for acquittal, and the trial court denied the motion. The jury found appellant guilty of burglary.

II. ASSIGNMENTS OF ERROR

{¶ 7} Appellant has filed an appeal and assigns the following as error:

> [I.] The trial court erroneously overruled appellant's motion for acquittal at the close of the state's case as there was no evidence the occupant of the premises in question or anyone else was present or likely to be present.
>
> [II.] The trial court erroneously overruled appellant's motion for acquittal at the close of all of the evidence, as: (1) There was no evidence the occupant of the premises in question or anyone else was present or likely to be present. (2) There was no credible evidence appellant trespassed in the premises with the purpose to commit any criminal offense.

> [III.] The evidence was legally insufficient to support appellant's conviction on burglary as a second degree felony, or as the offense of burglary as an offense of lesser degree. At most the evidence supports conviction for criminal trespass.

III. DISCUSSION

{¶ 8} We address together appellant's three assignments of error, in which he argues that his conviction for burglary is based on insufficient evidence and that the trial court erred by denying his Crim.R. 29(A) motions for acquittal. We disagree.

{¶ 9} A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶ 37. That standard tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 192. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

{¶ 10} Appellant contends that his conviction cannot stand because his testimony differed from that of the prosecution's witnesses. But, in deciding whether a conviction is based on sufficient evidence, we do not weigh the evidence or assess its credibility. *State v. Lindsey*, 190 Ohio App.3d 595, 2010-Ohio-5859, ¶ 35 (10th Dist.). Instead, we determine whether, if believed, the evidence against a defendant would support a conviction. *Id.*

{¶ 11} Appellant was convicted of burglary, pursuant to R.C. 2911.12(A)(2), which states that "[n]o person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure * * * that is 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, with purpose to commit in the habitation any criminal offense." The prosecutor alleged

that appellant committed burglary by trespassing into Clarke's apartment in order to steal her video game systems and to aid and abet Cammon in the possession of drugs.

{¶ 12} A trespass occurs when someone knowingly enters the premises of another without privilege. R.C. 2911.21(A)(1). Here, the evidence established that appellant lacked privilege to enter Clarke's apartment after he was released on bail. For instance, Clarke testified that she did not give appellant permission to be in her apartment, and the police had previously removed him from the apartment and told him that he was not allowed to be there. Likewise, the jury was able to conclude that appellant trespassed into the apartment given that he kicked the door open in order to enter it. In fact, at one point in his testimony, appellant said that he "went in for the burglary," although he later stated he did not go back to the apartment to burglarize it. (Tr. Vol. II, 354.)

{¶ 13} Nevertheless, appellant contends that he did not enter Clarke's apartment when anyone was likely to be present. We determine whether "the circumstances * * * justify a logical expectation" that a person could have been present in the apartment. *See State v. Green*, 18 Ohio App.3d 69, 72 (10th Dist.1984). Although appellant knew that Clarke was at the hospital, he did not have information as to how long she would be gone, and therefore, he had no assurance that she would not return to her apartment during the intrusion. Also, other individuals, aside from Clarke, were likely to be present. Specifically, Clarke gave her friend, Kelly, permission to live in the apartment, and her landlord often checked on the apartment. Therefore, construing the evidence in a light most favorable to the state, we conclude that appellant trespassed into Clarke's apartment when someone was likely to be present.

{¶ 14} Next, appellant argues that he did not go into Clarke's apartment in order to commit a crime. In particular, he contends that he owned the video game systems he removed from the apartment. But the jury was able to conclude that appellant stole those items because Clarke testified that they belonged to her, and, when the police previously removed appellant from Clarke's apartment, he did not ask to retrieve any property.

{¶ 15} Appellant also trespassed into Clarke's apartment to aid and abet Cammon in the possession of drugs. To prove aiding and abetting, the prosecutor must show that

"the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240, 245 (2001). Officer Mason testified that he found crack cocaine in a coat that Cammon retrieved from Clarke's apartment, and appellant admitted that fact during his testimony. The jury was able to infer that appellant intended to help Cammon obtain those drugs given that he allowed her to accompany him into Clarke's apartment after he kicked the door open. *See State v. Williams*, 10th Dist. No. 10AP-1042, 2011-Ohio-4595, ¶ 18-20 (inferring that an accomplice shared the criminal intent of the principal offender based on their presence, companionship, and conduct before and after an offense).

{¶ 16} For all these reasons, we conclude that the evidence, if believed, established that appellant trespassed into Clarke's apartment in order to commit a crime at a time when someone was likely to be present. Therefore, appellant's conviction for burglary is based on sufficient evidence, and the trial court did not err by denying his motions for acquittal. We overrule appellant's first, second, and third assignments of error.

IV. CONCLUSION

{¶ 17} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.