

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
AUGLAIZE COUNTY**

**STATE OF OHIO**

**PLAINTIFF-APPELLEE**

**CASE NUMBER 2-2000-10**

**v.**

**MICHAEL S. LEE**

**O P I N I O N**

**DEFENDANT-APPELLANT**

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**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.**

**JUDGMENT: Judgment affirmed.**

**DATE OF JUDGMENT ENTRY: September 14, 2000**

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**ATTORNEYS:**

**S. MARK WELLER  
Attorney at Law  
Reg. #0019521  
P.O. Box 180  
Wapakoneta, OH 45895  
For Appellant.**

**EDWIN A. PIERCE  
Prosecuting Attorney  
Reg. #0023846  
P.O. Box 1992  
Wapakoneta, OH 45895  
For Appellee.**

**BRYANT, J.** This appeal is taken by Defendant-Appellant Michael S. Lee from the judgment entered by the Court of Common Pleas of Auglaize County finding him guilty of burglary, theft and having a weapon while under a disability.

In the early morning hours of December 12, 1999, Mr. Amos Slone (hereinafter “Amos”), an elderly gentleman of 82 years, was abruptly awakened from his sleep by a loud banging at the front door of his home. The banging continued for several minutes. Amos finally came to the front door. Once he opened the door, he recognized the individual standing there but could not remember his name. The individual would later be identified as Defendant-Appellant Michael Lee.

Before Amos could ask Lee what he wanted Lee began to beg Amos to sell him a firearm. Lee repeatedly stated, “I want a gun. I want a gun. I want a gun. You got a shotgun?” Amos responded, “Now listen, I am sick and I’ve been asleep and I don’t want to be fooled with. If you want anything of particular (sic) I’ll let you have it. If I ain’t (sic) get out and leave me alone.”

Lee walked into Amos’ home through the screen door entrance and continued to ask Amos for a gun. Amos adamantly refused to give him any of his guns. Lee then asked Amos if he would at least give him a can of pop. Amos left the doorway to retrieve the can of pop.

Meanwhile, a friend of Lee's, Shannon Cordray, was waiting in a car outside Amos' home. Lee had asked Cordray if he would give him a ride to his grandfather's home that evening because he needed to pick something up. Cordray, who had only known Lee for a few days, agreed. Cordray drove Lee to Amos' home and sat outside while Lee went up to the door. Cordray witnessed Lee banging on the door and he noticed Amos appear several minutes later. After Lee entered the doorway Cordray noticed the men arguing and then Amos left the entryway and Lee vanished into the home. Minutes later Cordray observed Lee scurry out the front door carrying a weapon and testified that Lee hid the weapon under the mailbox on Amos' front porch. Cordray also testified that Lee hurriedly returned to the entryway inside Amos' home.

Amos returned from the kitchen several minutes later and handed Lee a can of pop and asked him to leave. Lee exited. After Lee left the home, Amos noticed that the New England Arms Company twelve (12) gauge shotgun on his gun rack was missing and he immediately phoned the police.

After leaving Amos' home Lee picked up the shotgun he had hidden under the mailbox and got back into Cordray's vehicle. Cordray refused to transport the weapon. Lee begged Cordray to at least take him to his mother's home so he could get rid of the shotgun. Cordray stopped at Lee's mother's home minutes later and waited for Lee to return to the vehicle. When Lee returned he no longer

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had a shotgun on him and Lee and Cordray drove back to Cordray's home to drink some beers. After an altercation between Lee and Cordray's family around 2:00 am Lee left with Cordray's cousin, Natasha Jolly. Over the next hour, Jolly drove Lee back to his mother's home and then to an unidentified residence and then back to his mother's home again.

When the police arrived at Amos' home he was unable to give the police a positive identification of the individual who stole his shotgun. He informed the police that the individual who stole the gun was the brother of one of his neighbors. The officer recognized the name of the neighbor and knew his brother as Michael Lee. After contacting several individuals including Lee's wife the police obtained information that Lee was "hanging out" at Shannon Cordray's. Officers were immediately dispatched to the Cordray residence. Lee was not at the Cordray residence when the police arrived. The police questioned Cordray who related the incidents that had occurred early that morning. Cordray also told the officers where they could find Lee and that Lee had taken the shotgun into his mother's home.

Several minutes later Officers apprehended Lee outside his mother's home. After obtaining consent from Lee's mother, the Officers searched her home but were unable to find a shotgun. On January 17, 2000, The Auglaize County Sheriff's Office received a phone call that two individuals had found a shotgun

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lying in a ditch. The Sheriff's Department picked up the shotgun and took it to the Sheriff's Office. Deputy Sheriff Steve Stienecker put the gun in the evidence laboratory and then searched the computer database to see if the shotgun had been reported stolen. A few minutes later an officer from St. Marys City called back indicating that it had been stolen from St Marys. Later, Amos' son-in-law who had originally purchased the gun and sold it to Amos testified that the shotgun retrieved by the Sheriff's department was indeed the shotgun stolen from Amos' home.

On December 17, 1999, Lee was indicted for theft of a firearm, a felony of the fourth degree, and having a weapon while under a disability, a felony of the fifth degree. At his arraignment on December 21, 1999, Lee entered pleas of not guilty to both charges. On February 3, 2000, Lee was indicted for burglary, a violation of R.C.§2911.12(A)(2), a felony in the second degree. That same day the State made a motion to join both the cases pursuant to Criminal Rule 8 because all charges were of the same or similar character or transaction.

On February 9, 2000, the trial court granted joinder and Lee entered a not guilty plea on the charge of burglary. After two days of trial the jury returned a verdict finding Lee guilty on all three counts.

On appeal from the judgment Lee makes the following two assignments of error:

- 1. The State of Ohio failed to prove, by proof beyond a reasonable doubt, the element of trespass on the charge of burglary.**
- 2. The verdict on all counts of the indictment was against the manifest weight of the evidence.**

In the first error assigned Lee claims that the State failed to provide evidence sufficient to sustain a conviction on the charge of burglary because the State failed to prove an essential element of burglary, trespass. Initially, we observe “on the trial of a case, either civil or criminal, the weight to be given the evidence and credibility of the witnesses are primarily for the trier of facts.” *State v. DeHass* (1967), 10 Ohio St. 2d 230, paragraph one of the syllabus. “Sufficiency is a term of art meaning that the legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 382.

When a defendant challenges the sufficiency of evidence, we determine "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. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. To reverse a judgment of a trial court when there is insufficient evidence to support it, only a concurring majority

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of a panel of a court of appeals reviewing the judgment is necessary. *Thompkins* at paragraph three of the syllabus.

Lee was charged with burglary, a violation of R.C. §2911.12(A)(2). R.C. 2911.12(A)(2) provides:

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

**(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation of any criminal offense;**

The acts constituting a criminal trespass are set forth in R.C. §2911.21, which provides in pertinent part:

**(A) No person, without privilege to do so, shall do any of the following:**

**(1) Knowingly enter or remain on the land or premises of another:**

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**(C) It is no defense to a charge under this section that the offender was authorized to enter or remain on the land or premises involved, when such authorization was secured by deception.**

R.C. §2901.01(A)(12) defines “privilege” as an “immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.”

It is undisputed that in the early morning hours of December 12, 1999, Lee entered Amos Slone's home with purpose of obtaining a firearm. Amos told Lee that if there wasn't anything he could help him with he wanted him to leave his home. Lee continued to ask Amos for a firearm. When Amos refused to sell Lee a firearm, Lee tricked Amos into leaving the room to get him a soda and in his absence Lee stole a firearm from Amos' home. Upon returning Amos asked Lee to leave his residence.

Lee claims that because Amos initially opened his screen door and allowed Lee to enter he had permission to enter the residence and thus could not be trespassing, an element necessary for a burglary conviction. In support of his claim Lee cites *State v. Barksdale* (1983), 2 Ohio St. 3d 126. In that case the Supreme Court held, for purposes of the offense of breaking and entering, "a business invitee or licensee, who commits a felony while present on another's land or premises, does not thereby become a trespasser." *Barksdale* at the syllabus.

In contrast the State relies on *State v. Steffen* (1987), 31 Ohio St.3d 111, 509 N.E.2d 383 where the Supreme Court held even assuming lawful initial entry, the jury was justified in inferring that defendant's privilege to remain in a private home terminated when he commenced his assault on a resident. Moreover, the State maintains the record contains no evidence that Amos ever invited Lee to enter in addition to Amos' testimony that he opened the screen door and Lee



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walked in. In addition, Amos repeatedly told Lee that he did not have what he wanted and “get out and leave me alone.”

Lee’s reliance on *Barksdale* is misplaced. In *Barksdale* the accused entered a car lot that was open to the public, with the intention of committing a felony. The incident occurred at a commercial establishment that was open to the public not a private residence. Further the Supreme Court reasoned in *Steffen*:

**“The interest of a private person in the inviolability of his home is materially greater than that of a business owner in his business premises, particularly where the business premises are open to the public.”**

*Steffen* at 115, 509 N.E.2d 383.

Using a similar rationale the Second District reasoned:

**“Aggravated burglary and burglary of ‘occupied structures’ are legislatively serious felonies based upon an obvious, common-sense recognition of the inherent potential danger to persons who are or might be present in their homes. Carrying this rationale to its logical conclusion, crimes committed in ‘unoccupied structures’ or businesses ‘open to the public’ are statutorily lesser offenses.”**

*State v. Clark* (Sept. 29, 1999), Franklin County App. No. 98AP-1650, unreported.

The record reveals the following facts: In the early morning hours of December 12, 1999, Michael Lee was driven to Amos’ home by Cordray; Lee pounded on Amos’ door until he awoke; Amos repeatedly told him that he wouldn’t sell him a gun and told Lee “get out and leave me alone”; Lee responded by entering Amos’ screen door, hugging him and asking him why he wouldn’t

give him a gun; Amos again replied that he simply wouldn't do it; Lee responded by saying "Well give me a can of pop then"; Amos left to get a pop and Lee stole a twelve (12) gauge shotgun from Amos' wall; Amos returned with the pop and Lee exited immediately.

Lee argues that he had privilege to remain on the Amos' property and that privilege was never revoked. However, Amos testified that he indeed told Lee to "get out and leave me alone." Moreover, there is no indication from the record that Amos ever invited Lee into his home. Therefore, because the record does not reveal that Lee ever had the privilege to enter Amos' home and further, if Lee did have privilege, Amos testified that the privilege was revoked before the gun was stolen, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of trespass beyond a reasonable doubt and thus could have found Lee guilty of burglary.

In addition, in light of *Steffen* and its progeny, assuming *arguendo* that Lee had not trespassed initially, it may be presumed that Lee's privilege to enter the private residence of Amos Slone was revoked when he left the doorway to commit a felony elsewhere in the house.

No error having been shown, Lee's first assignment of error is overruled.

Next Lee argues that the verdict on all counts of the indictment was against the manifest weight of the evidence. A claim that the verdict was against the

manifest weight of the evidence does not mean that the evidence to convict was insufficient or inadequate. “Weight of evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.” *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 387, 678 N.E. 2d 541. In reviewing a claim that the conviction was against the manifest weight of the evidence the court considering the entire record:

**“\*\*\*weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.”**

*State v. Martin* (1983), 20 Ohio App. 3d 172, paragraph three of the syllabus. The power to reverse a conviction and order a new trial is discretionary and should only be used in exceptional circumstances when the evidence weighs significantly against the conviction. *Id.* at paragraph three of the syllabus.

After a thorough review of the record, the evidence and testimony presented at trial were credible and if believed, disbelieving conflicting testimony, support a finding of Lee’s guilt beyond a reasonable doubt and thus conviction rather than acquittal. Moreover, it should be noted that Lee chose not to present any evidence and rested his case after the State presented it’s case-in-chief. Moreover, Lee has failed to point to any place in the record where there is testimony that conflicts with the State’s theory of the case. Therefore, upon

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reweighing of the evidence this court cannot conclude that the jury lost its way or that by its verdict has caused a miscarriage of justice.

No error having been shown Lee's second assignment of error is overruled and the judgment of the Court of Common Pleas of Auglaize County is affirmed.

*Judgment affirmed.*

**HADLEY, P.J., and WALTERS, concur.**

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