

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

State of Ohio

Court of Appeals No. S-10-001

Appellee

Trial Court No. 09 CR 1191

v.

Howard A. Chapman

**DECISION AND JUDGMENT**

Appellant

Decided: June 3, 2011

\* \* \* \* \*

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,  
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Loretta A. Riddle, for appellant.

\* \* \* \* \*

HANDWORK, J.

{¶ 1} This appeal is from the December 18, 2009 judgment of the Sandusky County Court of Common Pleas, which sentenced appellant, Howard A. Chapman, after he was convicted by a jury of violating R.C. 2911.11(A)(2), aggravated burglary, and R.C. 2903.11(A)(2), second degree felonious assault. Upon consideration of the

assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

{¶ 2} "Assignment of Error No. I

{¶ 3} "IN AN AGGRAVATED BURGLARY TRIAL, A TRIAL COURT VIOLATES A DEFENDANT'S DUE PROCESS RIGHTS, COMMITS PLAIN ERROR, AND REVERSIBLE ERROR WHEN THE TRIAL COURT FAILS TO INSTRUCT A JURY ON THE CULPABLE MENTAL STATES AND ON THE ELEMENTS OF FORCE, STEALTH, DECEPTION, TRESPASS AND THE UNDERLYING CRIME OF THE [SIC] BURGLARY.

{¶ 4} "Assignment of Error No. II

{¶ 5} "THE TRIAL COURT ERRED, AND ABUSED ITS DISCRETION, BY NOT ESTABLISHING A TRIAL DATE AT THE ARRAIGNMENT AND THEN FAILING TO GRANT A REASONABLE CONTINUANCE WHEN COUNSEL IS ORALLY NOTIFIED OF TRIAL LESS THAN TEN DAYS PRIOR TO TRIAL.

{¶ 6} "Assignment of Error No. III

{¶ 7} "DEFENSE COUNSEL WAS INEFFECTIVE AND THE TRIAL COURT INVITED INEFFECTIVE ASSISTANCE OF COUNSEL BY, INTER ALIA, SETTING A TRIAL DATE WITHIN TEN DAYS AND DELAYING A RULING ON A CONTINUANCE UNTIL THE EVE OF TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SEC. 10 OF THE OHIO CONSTITUTION.

{¶ 8} "Assignment of Error No. IV

{¶ 9} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY NOT APPOINTING NEW COUNSEL AND RECUSING ITSELF WHEN DEFENSE COUNSEL AND THE COURT KNEW THAT THE DEFENDANT WAS UNAWARE THAT DEFENSE COUNSEL WAS UNPREPARED FOR TRIAL THEREBY DENYING DEFENDANT A MEANINGFUL HEARING."

{¶ 10} On November 6, 2009, appellant was charged in a bill of indictment with violating R.C. 2911.11(A)(2), aggravated burglary, and two counts of violating R.C. 2903.11(A)(1), felonious assault. At his arraignment, appellant appeared without counsel, entered a plea of not guilty, and counsel was appointed to represent him.

{¶ 11} On December 4, 2009, appellant moved for a continuance of the trial scheduled for December 10, 2009, stating that his counsel had been orally notified of the trial date on December 2, 2009, had met with appellant briefly on December 3 and 4, 2009, and required additional time to prepare for trial. Following a hearing on appellant's oral request for substituted counsel, the motion for a continuance was denied. However, the court agreed to allow appellant to represent himself with his appointed counsel's assistance as stand-by counsel. The case proceeded to trial the next day with appellant's appointed counsel representing appellant. Appellant was convicted by a jury on two of the charges, aggravated burglary and one of the felonious assault charges (R.C. 2903.11(A)(2)).

{¶ 12} The following evidence was submitted at trial. Amy Swade, the victim, testified that she had recently ended a year-long relationship with appellant who had been upset and had even sent his sister to threaten Swade. Appellant did not reside at Swade's residence and did not have a key to her apartment. On September 22, 2009, she had arisen at 5:30 a.m. and was smoking outside the backdoor of her apartment when she heard a noise outside. Thinking that she also heard something inside, she turned and walked toward the front door of her apartment. When she turned to return to the back door, appellant jumped out from behind a kitchen chair. He jumped on the chair and then toward her, knocking her down. He started hitting her as he pinned her down. She immediately recognized the shadow of appellant's body and later could see his face. He beat, scratched, and choked her while accusing her of cheating on him. At first she thought he was hitting her with his fists, but then she realized that she was being hit with something hard and noticed a rock she recognized as being from her landscaping. She tried to block the blows with her forearms. When he dropped the rock, she sat on it so he could not get it. He told her to get up, but she refused. She asked him not to kill her and he told her that he was not going to kill her. He then left the area and went to her bedroom and opened a drawer to her night stand. She grabbed the rock, unlocked her front door deadbolt, and ran across the street. She verified that the photographs that were taken of her that day and several days later accurately represented the injuries done to her. When she returned to her apartment, she found that appellant had pried out the entire window frame in the kitchen.

{¶ 13} On cross-examination, Swade testified that she went to the emergency room that morning after the attack. The report indicated that she had bruising on her head, but did not have any broken bones. Although she was lightly bleeding from abrasions, the wounds did not require any stitches. She did not follow up by seeing her own physician because she does not have health insurance.

{¶ 14} Lori Marshall, a co-worker, who happened to be working as an aid in a client's home across the street from Swade's apartment also testified that Swade came to the client's home in the early morning knocking on the door and screaming to be let inside. Swade was acting terrified and frantic, and she was carrying a big rock. Swade told Marshall to lock the door because "he's going to kill me." Marshall noticed that Swade was bruised, had a red mark all around her throat, and her face was swollen. Marshall identified a picture of Swade that depicted her appearance on the morning of the attack. Marshall did not see appellant that day, but she knew he was Swade's boyfriend.

{¶ 15} The investigating officer testified that he photographed the suspected entry point where the kitchen window had been removed from the frame of the window. He also photographed the victim's injuries that morning and another officer photographed the injuries a few days later. He found the victim's purse by the front door with the contents spilled out. He recalled that the front door was locked and that he had to retrieve a key to open it. He further testified that in his career he has observed injuries suffered by people hit by a rock like the one appellant used in this case. The officer had seen serious injuries and also less serious injuries like the victim suffered depending upon how the victim was

hit. The officer did not immediately seek to find appellant. Instead, he met with the prosecutor and a warrant was issued. The officer believed that appellant came to the police station before the warrant was actually delivered.

{¶ 16} In his first assignment of error, appellant argues that the trial court denied appellant due process by failing to instruct the jury on the culpable mental states and on the elements of force, stealth, deception, trespass, and the underlying crime of burglary.

{¶ 17} The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that the state establish "beyond a reasonable doubt every fact necessary to constitute the crime charged." *In re Winship* (1970), 397 U.S. 358, 364. Therefore, "a defendant is entitled to have the jury instructed on all elements that must be proved to establish the crime with which he is charged." *State v. Adams* (1980), 62 Ohio St.2d 151, 153. Jury instructions which alleviate the prosecution's burden of persuasion would violate the defendant's due process rights. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶ 97, certiorari denied (2005), 544 U.S. 1040. Furthermore, the court's failure to instruct the jury on the applicable mental culpability element constitutes error. *State v. Adams* (1980), 62 Ohio St.2d 151, 153.

{¶ 18} Having failed to object to the jury instructions, appellant recognizes that any alleged error with respect to the jury instructions on appeal is reviewable only under a plain error standard of review. Crim.R. 30(A) and *State v. Snyder*, 9th Dist. No. 25157, 2011-Ohio-175, at ¶ 6. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest

miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. "[A] trial court's failure to separately and specifically charge the jury on every element of each crime with which a defendant is charged does not per se constitute plain error nor does it necessarily require reversal of a conviction." *State v. Adams* (1980), 62 Ohio St.2d 151, 154.

{¶ 19} Furthermore, Crim.R. 52(B) provides that: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." However, the appellate court must find that the alleged error denied the defendant a fair trial. *State v. Wade* (1978), 53 Ohio St.2d 182, paragraph one of the syllabus, certiorari granted and judgment vacated on other grounds (1978), 438 U.S. 911. Such prejudice is not shown when, after consideration of the entire trial, it is clear beyond a reasonable doubt that the jury would have found the defendant guilty even if the error had not occurred. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, at 210, certiorari denied (2002), 537 U.S. 1057.

{¶ 20} In order to convict appellant of violating R.C. 2911.11(A)(2), aggravated assault, appellee was required to establish that: (1) appellant trespassed in the victim's home by use of force, stealth, or deception, (2) while someone else was present, (3) with the purpose to commit "any criminal offense" inside, (4) while carrying a deadly weapon or dangerous ordnance. R.C. 2911.21(A)(1), defines criminal trespass as when a "person, without privilege to do so, [k]nowingly enter[s] or remain[s] on the land or premises of another."

{¶ 21} To convict appellant of the felonious assault charges, appellee was required to prove that appellant knowingly caused serious physical harm to the victim, R.C. 2903.11(A)(1), and/or caused or attempted to cause physical harm to the victim by means of a deadly weapon or dangerous ordnance. R.C. 2903.11(A)(2).

{¶ 22} In the case before us, the court instructed the jury on the aggravated burglary charge as follows:

{¶ 23} "Before you can find the defendant guilty of this offense, [you] must find that the State of Ohio has proven beyond a reasonable doubt, that the Defendant, on or about September 22nd, 2009, in Sandusky County, Ohio did by force, stealth, or deception, trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure when another person other than an accomplice of the offender is present. And he had purpose to commit in the structure any criminal offense with a deadly weapon or dangerous ordinance on or about the offender's person or under his control, to-wit: That the Defendant, Howard A. Chapman, did enter the apartment of Amy J. Swade without her knowledge and did attack her with a large rock causing injury to her head."

{¶ 24} Appellant first argues that the trial court erred by failing to define the words, "force, stealth, or deception" or the elements of trespass. We find that the court did not err by failing to define these terms because the terms are of common usage and can be assumed to have been within the knowledge of the jurors. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶ 106, certiorari denied (2003), 538 U.S. 1037.

{¶ 25} Second, appellant argues that when the trial court attempted to define the elements of trespass, it erred by stating that the victim had to be unaware of appellant's presence. Appellant contends that this statement added an additional element to the offense and also reduced appellee's burden of proof. We assume that appellant is arguing that he interpreted the instructions as providing that the "knowing" requirement replaced the other elements of force, stealth, and deception. We agree with appellant that the court's additional comments about the victim's knowledge were erroneous, but not that appellee's burden of proof was reduced as a consequence. If anything, the error added an additional element to the crime. The court clearly instructed the jury to find that appellant entered the premises by force, stealth, or deception.

{¶ 26} Finally, appellant argues that the court erred by not instructing the jury as to what was the underlying criminal offense or, alternatively, if it was so instructed, the court failed to sufficiently define the crime.

{¶ 27} It is preferable that the trial court instruct the jury as to what underlying criminal offense the defendant is accused of committing in an aggravated burglary case, but the court need not do so. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶ 73-74. The aggravated burglary statute prohibits only "a single crime that may be carried out in more than one manner." *Id.* at ¶ 63.

{¶ 28} In this case, the court instructed the jury that they had to find that appellant committed the criminal trespass in order to "commit in the structure any criminal offense with a deadly weapon or dangerous ordinance." The court went on to further explain that

the jury had to find that appellant "did enter the apartment of Amy J. Swade without her knowledge and did attack her with a large rock causing injury to her head."

{¶ 29} The court should have instructed the jury that they had to find that appellant entered the victim's apartment with the purpose of assaulting her and whether he also carried a deadly weapon or ordnance, i.e., the rock. Instead, the court limited the jury to only being able to find that the crime appellant intended to commit was felonious assault with a deadly weapon or dangerous ordnance (R.C. 2903.11(A)(2)). Limiting the jury to the one type of felonious assault did not cause prejudicial error to appellant.

{¶ 30} Finally, appellant failed to show prejudice because when all of the evidence is considered, it is clear beyond a reasonable doubt that the jury would have found the defendant guilty even if the alleged errors had not occurred. Therefore, we find appellant's first assignment of error not well-taken.

{¶ 31} In his second assignment of error, appellant argues that the trial court erred by not setting a trial date at the time of arraignment and by failing to grant a continuance when appellant's attorney had only learned of the trial date ten days prior to trial.

{¶ 32} A warrant for appellant's arrest was issued on September 22, 2009, following the filing of two complaints by the victim. Appellant was unrepresented at the time of his arraignment on September 25, 2009, but counsel was appointed to represent appellant. After a bill of indictment was issued on November 6, 2009, charging one count of aggravated burglary and two counts of felonious assault, appellant was arraigned again on November 10, 2009, and counsel was appointed that day. A pretrial was

scheduled for December 3, 2009, but on December 1, 2009, the trial court set a trial date of December 10, 2009, and notified counsel of the date on December 2, 2009. On December 4, 2009, appellant moved for a continuance of the trial stating that his counsel had been orally notified of the trial date on December 2, 2009, and required additional time to prepare for trial.

{¶ 33} Appellant asserted that there was no hearing on the motion. However, a hearing was held the night before trial based upon appellant's oral motion to substitute his appointed counsel. At that time, appellant's counsel indicated that appellant was not happy with his appointed counsel's representation because they had little contact and the attorney had presented a plea offer that appellant was not interested in accepting. While addressing the issue of appointing new counsel to represent appellant, appellant's attorney indicated that he had conducted discovery, investigated the charges, and spoken with appellant sufficiently to establish a trial strategy. He also believed that appellant wanted new counsel because he had the erroneous conclusion that the attorney had spoken to the victim and because appellant did not like the attorney's proposed defense. The court found that there was no merit to appellant's motion for new counsel and that the request was being made solely to delay trial.

{¶ 34} The trial court has inherent discretionary power to deny or grant a motion for a continuance as part of the authority of the court to hear and determine causes of action. *State ex rel. Buck v. McCabe* (1942), 140 Ohio St. 535, paragraph 1 of the syllabus. Since the decision to grant or deny a continuance rests within the sound

discretion of the court, it will not be reversed on appeal unless we find that the trial court abused its discretion. *State v. Unger* (1981), 67 Ohio St.2d 65, syllabus. An abuse of discretion standard requires appellant to show more than an error of judgment or a mistake of law; appellant must show that the trial court's attitude was arbitrary, unreasonable or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 35} Upon a review of the transcript of the hearing, we find that appellant has failed to demonstrate that the trial court abused its discretion. Appellant's counsel indicated the night before trial that he was prepared for trial. Appellant's second assignment of error is not well-taken.

{¶ 36} In his third assignment of error, appellant alleges that the trial court invited ineffective assistance of counsel when it failed to rule on the motion for a continuance until the eve of trial.

{¶ 37} We find this assignment of error is also without merit. The trial date was scheduled on December 1, 2009, appellant moved for a continuance on December 4, 2009, and on December 9, 2009, the court addressed the issue of whether the trial could proceed the next day. Appellant has failed to demonstrate any unnecessary delay in determining whether the trial should be postponed. Appellant's third assignment of error is not well-taken.

{¶ 38} Finally, appellant argues in his fourth assignment of error that the trial court erred by failing to appoint new counsel and recusing itself when the court knew that appellant's counsel was unprepared for trial.

{¶ 39} The indigent defendant is entitled to appointment of substitute counsel only upon a showing of good cause which would jeopardize the defendant's right to effective assistance of counsel and lead to an unjust verdict. *State v. Coleman* (1988), 37 Ohio St.3d 286, 292, certiorari denied (1988), 488 U.S. 900. The decision of the trial court is reviewed under an abuse of discretion standard as set forth above. *State v. Jones*, 91 Ohio St.3d 335, 342-343, 2001-Ohio-57, certiorari denied (2001), 534 U.S. 1004.

{¶ 40} We find that this assignment of error lacks merit because there was no evidence that appellant's appointed counsel was unprepared for trial. In fact, his counsel stated at the hearing on the eve of trial that he had conducted his investigation and was prepared for trial; but, that he had called for the hearing solely because appellant did not want the attorney to represent appellant at trial. Appellant's fourth assignment of error is not well-taken.

{¶ 41} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the court 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.

Peter M. Handwork, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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