

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-125 (C.P.C. No. 08CR-02-1265)
Luis G. Hernandez,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 29, 2009

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

Davis Law Offices Co., L.P.A., and *Jeffrey R. Davis*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Luis G. Hernandez, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of burglary in violation of R.C. 2911.12(A)(4), a felony of the fourth degree. Because sufficient evidence and the manifest weight of the evidence support the trial court's judgment, we affirm.

I. Procedural History

{¶2} In a single count indictment filed February 25, 2008, defendant was charged with aggravated burglary in violation of R.C. 2911.11, a felony of the first degree. The indictment alleged that on January 9, 2008, defendant trespassed into an occupied structure with the purpose to commit a criminal offense, having inflicted or attempted to inflict or threatened to inflict physical harm on the victim.

{¶3} Defendant entered a not guilty plea, and the matter was tried to a jury beginning December 4, 2008. The jury found defendant guilty of the lesser included offense of burglary, a felony of the fourth degree. The trial court sentenced defendant to three years of community control.

II. Assignments of Error

{¶4} Defendant assigns two errors:

ASSIGNMENT OF ERROR ONE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RULE 29 AND ENTERING JUDGMENT AGAINST APPELLANT ON THE LESSER INCLUDED OFFENSE OF BURGLARY AS THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION.

ASSIGNMENT OF ERROR TWO

THE VERDICT ENTERED WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. First Assignment of Error—Sufficiency of Evidence

{¶5} Defendant's first assignment of error raises two issues: (1) denial of his Crim.R. 29 motion, and (2) sufficiency of the evidence. Because they are interrelated, we discuss them jointly.

{¶6} Crim.R. 29(A) provides that the court "on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." We apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence. *State v. Turner*, 10th Dist. No. 04AP-364, 2004-Ohio-6609, ¶8, citing *State v. Ready* (2001), 143 Ohio App.3d 748, 759.

{¶7} Generally, a review of the sufficiency of the evidence is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. We construe the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

{¶8} The jury's verdict largely was premised on the testimony of Beatriz Martinez, who resided at 494 Elaine Road in Whitehall. She met defendant in July or August of 2007 when she took her car to him for mechanical work. They began seeing each other, and by the first week of September she considered him her boyfriend.

{¶9} Although Martinez lived with her mother, her mother temporarily had returned to Mexico. Sometime in October, while her mother was in Mexico, Martinez allowed defendant to use her mother's cell phone if he agreed to pay her for using it. Because he failed to pay her, she reported it as lost, obtained another phone, and kept the same number. Defendant's wife called the number and advised Martinez that defendant was married with three children.

{¶10} As a result of the call, Martinez told defendant to stay away and not return to the house. He nonetheless came back to the alley every night, not only playing music in his car so loudly that the neighbors became upset, but revving his car's engine almost every night. Although Martinez' future husband moved into her home on January 1, 2008, defendant continued the nightly activity.

{¶11} On January 9, 2008, Martinez was sleeping in her basement bedroom when her dog's barking awoke her. Her future husband was working, a brother who resided with them was at school, and her mother was still in Mexico. She heard someone knocking strongly at the door and walked upstairs to answer the door because the dog continued to bark. Although the curtain over the window in the back door prevented her from seeing who was outside the door, she opened the door.

{¶12} When she did, she saw defendant. She tried to close the door, but he pushed her back, and she became frightened. She ran from the door into the living room and scraped her arm in the process. He followed her into the living room where she began to call 911 for assistance. Defendant told her if she called the police, he was "going to beat [her] up." (Tr. 68.) She was able to complete the call, but defendant grabbed the phone from her. She told him to get out of her house and then ran outside to a next door neighbor where she knocked on the neighbor's door; nobody answered. When defendant came out of her home, she was standing at her neighbor's door; defendant again said he would "beat [her] up." (Tr. 70.) Defendant did not remain at her home, and on her return she called the Whitehall police. They arrived within a couple of minutes, searched for defendant, and were unable to find him in the area.

{¶13} Defendant was convicted of violating R.C. 2911.12(A)(4), which provides that "[n]o person, by force, stealth, or deception, shall * * * [t]respass 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." With the testimony of Martinez, the state presented sufficient evidence to support the offense for which defendant was convicted.

{¶14} Initially, the state's evidence, if believed, demonstrated that defendant, by force, attempted to gain entry into Martinez' home. The victim testified she opened the door, saw defendant, and attempted to push the door shut. Defendant, however, forced his way into her home and chased her into the living room. The state also was required to prove defendant trespassed into the home. R.C. 2911.21 defines criminal trespass and provides that "[n]o person, without privilege to do so, shall * * * [k]nowingly enter or remain on the land or premises of another[.]" The state presented evidence that, once Martinez learned defendant was married, she ordered defendant to stay away from her house and never revoked the prohibition. Finally, the evidence of record supported a finding that a person other than an accomplice of the defendant was present or likely to be present at the home: Martinez lived in the home and was asleep in her basement bedroom at the time.

{¶15} As a result, the state's evidence, if construed in the state's favor, supports a finding that defendant committed a violation of R.C. 2911.12(A)(4) on January 9, 2008. Defendant's first assignment of error is overruled.

IV. Second Assignment of Error—Manifest Weight of Evidence

{¶16} Defendant's second assignment of error asserts his conviction is against the manifest weight of the evidence. When presented with a manifest weight argument,

we engage in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley*, supra; *Thompkins*, at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶17} In this case, the state presented its evidence, subject to defendant's cross-examination; defendant presented no witnesses. While Martinez' testimony demonstrated she had some difficulty in speaking English, cross-examination revealed, at best, discrepancies between her testimony and the details she provided to the officer who arrived on the scene following the incident. In light of those inconsistencies, defendant asks that we, in effect, substitute our judgment for that of the jury in assessing Martinez' credibility. Contrary to defendant's contentions, he "is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was offered at trial," as "[t]he trier of fact is free to believe or disbelieve any or all of the testimony presented." *State v. Favor*, 10th Dist. No. 08AP-215, 2008-Ohio-5371, ¶10. Although discrepancies in the victim's testimony may have impeached Martinez' credibility, the jury nonetheless

chose to believe her, and this record presents no basis to set aside the jury's assessment. Defendant's second assignment of error is overruled.

{¶18} We note the trial court's judgment entry finds defendant guilty of burglary, but classifies it as a felony of the first degree. Because all agree defendant was found guilty of burglary as a fourth-degree felony, we modify the trial court's judgment, in that sole respect, to reflect defendant was convicted of a felony of the fourth degree. With that modification, and having overruled both of defendant's assignments of error, we affirm the judgment as modified.

Judgment affirmed as modified.

SADLER and CONNOR, JJ., concur.
