

[Cite as *State v. Walenciej*, 2009-Ohio-936.]
STATE OF OHIO, JEFFERSON COUNTY

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IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)

PLAINTIFF-APPELLEE,)

VS.)

CASE NO. 07-JE-37

CHARLES WALENCIEJ,

OPINION

DEFENDANT-APPELLANT.)

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common
Pleas of Jefferson County, Ohio
Case No. 06CR178

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JUDGMENT: Affirmed

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

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Hon. Mary DeGenaro

Dated: February 25, 2009

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DONOFRIO, J.

{¶1} Defendant-appellant, Charles Walenciej, appeals from a Jefferson County Common Pleas Court judgment convicting him of burglary following a jury trial.

{¶2} On the morning of September 15, 2006, Paul Mitchell left his house in Steubenville, Ohio to meet his brother for breakfast. When Mitchell returned later that morning, he noticed that the side door of his house was open. Upon entering his house, Mitchell saw that it had been ransacked, i.e. furniture was turned over, dresser drawers had been dumped out, and a living room window was broken out. He attempted to call 911, but his phone was dead. Mitchell then went to a neighbor's house and called the police.

{¶3} Missing from Mitchell's house were a black .22 caliber target pistol and an overnight bag containing 39 ten-dollar rolls of quarters and other change totaling at least \$500. Outside, Mitchell noticed a ladder up against his house with the top near his broken living room window.

{¶4} Sometime between September 15 and 26, appellant contacted his friend Dawnette Miller and asked her if she knew anyone who would like to buy a gun from him. According to Miller and her father, Donald Ringer, Miller brought appellant to her father's house in order to sell him the gun. Once they arrived at Ringer's home, appellant handed Miller the gun. She handed it to her father. Miller then grabbed \$40 from her father and she and appellant left.

{¶5} When questioned by police, Miller stated that she had sold a gun to her father for appellant. Ringer subsequently turned the gun over to police. Mitchell identified the gun as the one that was stolen from his house.

{¶6} Police also recovered five hairs from the broken window at Mitchell's house. DNA testing revealed that appellant and the donor of the hairs shared a common maternal ancestor.

{¶7} On December 6, 2006, a Jefferson County grand jury indicted appellant on one count of burglary, a second-degree felony in violation of R.C. 2911.12(A)(2). The matter proceeded to a jury trial where the jury found appellant guilty as charged.

The trial court subsequently sentenced appellant to seven years in prison to be served consecutive to his sentence in another case. It also ordered appellant to pay restitution in the amount of \$500 to the victim.

{¶18} Appellant filed a timely notice of appeal on July 30, 2007.

{¶19} Appellant's counsel has filed what he termed as a *Toney* brief. This brief is similar to a no-merit brief pursuant to *State v. Toney* (1970), 23 Ohio App.2d 203, 262 N.E.2d 419. However, in this case, unlike in a *Toney* situation, appellant's counsel has not requested to withdraw from this case and has actually analyzed several issues that could be raised on appeal and concluded that they have no merit. After receiving this brief, we granted appellant permission to file a pro se brief, however, we did not receive a brief from appellant.

{¶110} Although not technically a *Toney* brief, the practical effect of appellant's counsel's brief is the same as if it were a *Toney* brief. Therefore, we will apply the procedure set out in *Toney* where it is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of counsel, the arguments pro se, and then determine whether or not the appeal is frivolous.

{¶111} Since appellant's counsel set out and analyzed four "potential" assignments of error, we will review them to determine if any merit exists.

{¶112} The first "potential" assignment of error states:

{¶113} "THE JURY'S VERDICT FINDING APPELLANT GUILTY OF BURGLARY WAS NOT BASED UPON LEGALLY INSUFFICIENT EVIDENCE."

{¶114} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113, 684 N.E.2d 668. In essence, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, the relevant inquiry is 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. *Smith*, 80 Ohio St.3d at 113.

{¶15} The jury convicted appellant of burglary in violation of R.C. 2911.12(A)(2), which provides:

{¶16} “(A) No person, by force, stealth, or deception, shall do any of the following:

{¶17} “* * *

{¶18} “(2) Trespass 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.”

{¶19} The evidence presented at trial was sufficient to convict appellant of burglary. The evidence was as follows.

{¶20} Paul Mitchell testified that around 7:30 a.m. he left his house in Steubenville to meet his brother for breakfast. (Tr. 125-26). When he left his house, everything was in order and the doors and windows were locked. (Tr. 126). Mitchell returned home around 10:45 a.m. (Tr. 127). He noticed that a door was open. (Tr. 127). He entered his kitchen and saw that everything had been thrown onto the floor and his living room window had been busted out. (Tr. 127-28). He attempted to call 911, but the phone was dead. (Tr. 128). Mitchell then went to his neighbor’s house and called the police. (Tr. 128). Once an officer arrived, Mitchell accompanied him back into the house. (Tr. 128). Mitchell then saw that everything had been thrown out of his dresser drawers, his mattress had been turned over, and the whole house had been ransacked. (Tr. 129). Mitchell also noticed that his neighbor’s ladder was up against his house near the broken living room window. (Tr. 130, 133).

{¶21} Mitchell stated that two items were stolen from his house, a .22 caliber target pistol and an overnight bag containing 39 ten-dollar rolls of quarters and other change totaling over \$500. (Tr. 133, 139-40). The prosecutor showed Mitchell

State's Exhibit A, which was a black gun. (Tr. 135). Mitchell identified it as his gun. (Tr. 135).

{¶22} Additionally, Mitchell testified that the house belonged to him and that it was his permanent dwelling. (Tr. 124). He also stated that he did not know appellant and appellant was never a guest in his house. (Tr. 124-25).

{¶23} Dawnette Miller, appellant's friend, testified next. Miller stated that appellant called her sometime between September 15 and September 26 and asked her if she knew anyone who would like to buy a gun. (Tr. 154). Miller took appellant to see her father, Donald Ringer, because he likes guns. (Tr. 154). She stated that when they arrived at her father's house, appellant took the gun out and she then handed the gun to Ringer. (Tr. 154). Ringer agreed to buy the gun. (Tr. 154). Miller stated that appellant wanted \$50 for the gun, but Ringer only had \$40. (Tr. 156). She stated that Ringer gave appellant \$40 and promised to give him the other \$10 the next day. (Tr. 156). Miller stated that she grabbed the \$40 from her father and then left with appellant. (Tr. 156). She stated that she and appellant went to Speedway where they purchased gas, cigarettes, and candy. (Tr. 156). She then gave appellant the change. (Tr. 156-57).

{¶24} Miller testified that it later came to her attention that the police were interested in the gun appellant had sold to Ringer. (Tr. 157). She stated that she told the police appellant had sold the gun to her father. (Tr. 157-58). Miller then identified State's Exhibit A as the same gun appellant sold to her father. (Tr. 158-59). However, appellant's counsel later attempted to impeach Miller's identification of the gun. In another proceeding, Miller testified that the gun appellant sold to her father was silver. (Tr. 183). Yet State's Exhibit A was black. (Tr. 183-84).

{¶25} Donald Ringer was unavailable to testify. However, his testimony from a prior proceeding involving appellant was read into the record. Ringer testified that he bought a .22 caliber automatic pistol from appellant. (Tr. 226). He stated that his daughter had told him that appellant wanted \$50 for the gun. (Tr. 226). Ringer stated that Miller and appellant then came to his house with the gun. (Tr. 226).

Appellant was carrying the gun. (Tr. 227). Appellant handed Miller the gun and she handed it to Ringer. (Tr. 227). Ringer stated that he gave appellant and Miller the money. (Tr. 226).

{¶26} Ringer further testified that Steubenville Detective Regis Holzworth later came to see him about the gun. (Tr. 228). He stated that he gave the gun to Detective Holzworth. (Tr. 228-29). Ringer then identified the gun in question as the gun appellant sold him. (Tr. 229, 275).

{¶27} Detective Holzworth testified as to his investigation. Detective Holzworth stated that he first noticed a ladder outside leaning against Mitchell's house leading up to a broken window. (Tr. 248). He also noticed that the basement door had several dents in it and that the kitchen door was ajar. (Tr. 248). Upon entering the house, Detective Holzworth observed that furniture had been flipped over, dresser drawers had been torn out of the dressers, and things were thrown everywhere. (Tr. 249). While he was dusting the broken window for fingerprints, Detective Holzworth found five hairs on a jagged edge of the window. (Tr. 250). He collected those hairs. (Tr. 250). Detective Holzworth sent the hairs to an FBI lab along with a DNA sample from appellant. (Tr. 253).

{¶28} Detective Holzworth further testified regarding Mitchell's stolen gun. He stated that he met with Miller and she gave a statement to him. (Tr. 266). He then went to Ringer's house and spoke with him. (Tr. 267). Detective Holzworth stated that Ringer gave him the gun in question, which was State's Exhibit A. (Tr. 267-28). He testified that he then showed the gun to Mitchell, who identified it as the gun that was stolen in the burglary. (Tr. 268). Finally, Detective Holzworth testified that the bullets found in the gun and the extra bullets Mitchell had for the gun all contained the same unique markings. (Tr. 276-77).

{¶29} Several witnesses then testified regarding the hairs Detective Holzworth retrieved from the broken window.

{¶30} Dr. Michael Baird, the director of DNA Diagnostic Center, testified that his lab was retained on appellant's behalf to perform independent testing on the

hairs. (Tr. 235). However, Dr. Baird did not perform the actual DNA testing in this case. (Tr. 243). Dr. Baird stated that in this case, because the hairs did not contain the roots, the only kind of test that could be performed was a mitochondrial DNA test, which identifies DNA passed on from a person's mother. (Tr. 236). Dr. Baird testified that his lab found that there was a match between the mitochondrial DNA in the hairs and appellant's mitochondrial DNA. (Tr. 238). This meant that the person who gave the hairs and appellant shared a common maternal relative. (Tr. 238-39). Dr. Baird further testified that the haplotype shared by the hairs and appellant occurs in approximately one in 5,000 people. (Tr. 241, 243).

{¶31} Anita Valiones, a forensic scientist at the FBI mitochondrial DNA lab in Connecticut, analyzed the hairs in question. She concluded that the hairs came from a human Caucasian and that four of the five were body hairs. (Tr. 310). She further found that the roots had been severed from the hairs by a very sharp instrument, which could have been broken glass. (Tr. 313, 316).

{¶32} Kristen Sasinouski, another forensic scientist at the FBI mitochondrial DNA lab also analyzed the hairs in question. She performed a mitochondrial DNA test on the hairs. Sasinouski concluded that the mitochondrial DNA found in the hairs was the same sequence as appellant's mitochondrial DNA. (Tr. 330). Therefore, she stated that appellant could not be excluded as the source of the hairs. (Tr. 330).

{¶33} This evidence was sufficient to support appellant's burglary conviction. The state presented evidence going to each element of the offense. There was no question that someone trespassed into Mitchell's permanent residence by force and that person, once inside, committed a theft offense. The only question was whether appellant was the one who committed the burglary. The evidence demonstrated that soon after Mitchell's house was burglarized, appellant sold Mitchell's stolen gun to Ringer. Additionally, the hairs found on Mitchell's broken living room window came from someone with the same maternal lineage as appellant. The jury could properly rely on these two facts to infer that appellant was the one who burglarized Mitchell's house. Thus, appellant's conviction was supported by sufficient evidence.

{¶34} Accordingly, appellant's first "potential" assignment of error is without merit.

{¶35} The second "potential" assignment of error states:

{¶36} "THE JURY'S VERDICT FINDING APPELLANT GUILTY OF BURGLARY WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶37} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the 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. *Thompkins*, 78 Ohio St.3d at 387. "Weight of the 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.'" *Id.* (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id.* at 390.

{¶38} Still, determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶39} Here we must again consider the evidence set out above. Not only did the state present evidence going to all elements of the offense of burglary, the weight of the evidence also supported appellant's conviction. There was no evidence suggesting that appellant was not the man who burglarized Mitchell's house. None of the witnesses contradicted each other. The only witness that may have had a credibility issue was Miller because she first stated that the gun appellant sold to her father was silver and later she stated that it was black. However, her credibility was an issue for the jury to determine. Appellant's own independent DNA testing revealed that the hairs found at the scene came from someone with appellant's maternal lineage. And just days after the burglary, appellant sold the gun that was stolen from Mitchell's house, which suggests that he was involved in the burglary.

Given this evidence, we cannot conclude that the jury clearly lost its way in finding appellant guilty.

{¶40} Accordingly, appellant's second "potential" assignment of error is without merit.

{¶41} The third "potential" assignment of error states:

{¶42} "APPELLANT RECEIVED EFFECTIVE LEGAL REPRESENTATION THROUGHOUT THE COURSE OF HIS CRIMINAL PROSECUTION."

{¶43} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. Second, appellant must demonstrate that he was prejudiced by counsel's performance. *Id.* To show that he has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus.

{¶44} Appellant bears the burden of proof on the issue of counsel's effectiveness. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289, 714 N.E.2d 905. In Ohio, a licensed attorney is presumed competent. *Id.*

{¶45} In this case, there is no indication that appellant's counsel was ineffective. Counsel filed discovery requests and when discovery was not received in a timely manner, he filed a motion to compel. When counsel learned that the state would be presenting DNA evidence, he requested that funds be allowed so that appellant could obtain independent DNA testing. Counsel objected numerous times throughout the trial. And counsel objected to and put forth a detailed argument against the admission of Ringer's testimony from a prior proceeding.

{¶46} Furthermore, as discussed above, there is a significant amount of evidence of appellant's guilt. Thus, even if counsel was in some way ineffective, the outcome of the trial would not have been any different.

{¶47} Accordingly, appellant's third "potential" assignment of error is without merit.

{¶48} The fourth "potential" assignment of error states:

{¶49} "THE TRIAL COURT PROPERLY OVERRULED DEFENSE COUNSEL'S OBJECTION BY ALLOWING THE PROSECUTION TO THE [sic.] HAVE THE TRANSCRIPT OF THE TESTIMONY OF DONALD RINGER READ INTO THE RECORD OF THE PRESENT TRIAL BECAUSE THE STATE COMPLIED WITH THE REQUIREMENTS OF EVIDENCE RULE 804(B)(1)."

{¶50} At trial, the state read Ringer's testimony from a previous proceeding into the record because Ringer was unavailable to testify. The previous proceeding in which Ringer testified was appellant's trial for, among other things, possession of a weapon while under a disability.

{¶51} Appellant's counsel objected arguing that the state did not give him adequate notice of its intent to use Ringer's prior testimony. (Tr. 197). Furthermore, he argued that Miller's testimony was unreliable to establish her father's unavailability. (Tr. 197-98). Additionally, counsel argued that he should have an opportunity to cross examine Ringer because appellant's counsel in the previous proceeding only asked Ringer four questions on cross examination. (Tr. 199).

{¶52} A trial court has broad discretion in determining whether to admit or exclude evidence and its decision will not be reversed absent an abuse of discretion. *State v. Mays* (1996), 108 Ohio App.3d 598, 617, 671 N.E.2d 553. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶53} Evid.R. 804(B)(1) provides in part:

{¶54} “The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

{¶55} “(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, * * * if the party against whom the testimony is now offered, * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”

{¶56} A witness is unavailable for purposes of Evid.R. 804(B)(1) when, among other things, he or she is unable to be present at the hearing because of a then-existing physical illness or infirmity. Evid.R. 804(A)(4).

{¶57} In order to admit prior testimony of an unavailable witness, the state must make a showing that the declarant is unavailable to testify despite reasonable efforts to secure his or her presence. *State v. Keairns* (1984), 9 Ohio St.3d 228, 460 N.E.2d 245, paragraph one and two of the syllabus. “A showing of unavailability under Evid.R. 804 must be based on testimony of witnesses rather than hearsay not under oath unless unavailability is conceded by the party against whom the statement is being offered.” *Id.* at paragraph three of the syllabus. Additionally, the statement sought to be admitted must bear sufficient indicia of reliability. *Id.* at 230. Prior trial testimony bears this indicia of reliability. *Id.*

{¶58} In this case, the trial court did not abuse its discretion in allowing the state to read Ringer’s previous testimony into the record.

{¶59} Miller’s testimony established that Ringer was unavailable for trial and that the state had used reasonable efforts to secure his presence. Miller testified that her father was hospitalized and unable to attend the trial. (Tr. 204). She stated that Ringer was involved in an automobile accident several months earlier and had been hospitalized ever since. (Tr. 205-206). Miller stated that Ringer had a feeding tube, a tracheotomy tube, was on a respirator, and could not speak. (Tr. 206). Miller also stated that a deputy attempted to serve a subpoena on Ringer at his residence, but that she informed the deputy that her father was in the hospital. (Tr. 209).

{¶60} Additionally, appellant had an opportunity and similar motive to develop Ringer's testimony by cross examination at the prior proceeding. The issue in the prior proceeding in which Ringer testified was whether appellant had possession of a gun. (Tr. 191, 195-96). Appellant's counsel had an opportunity to, and in fact did, cross examine Ringer at the previous trial. (Tr. 195-96, 230-31).

{¶61} Given these facts, the trial court did not abuse its discretion in allowing the state to read Ringer's testimony into the record. Accordingly, appellant's fourth "potential" assignment of error is without merit.

{¶62} The one area that appellant's counsel did not raise a "potential" assignment of error was with his sentencing. This appears to be so because the record amply supports the trial court's sentencing determination. In its decision, the court sets forth and considers all of the statutory factors and notes which ones are applicable.

{¶63} For instance, the court specifically stated that it considered the record, oral statements, victim impact, the purposes and principles of sentencing under R.C. 2929.11, and balanced the seriousness and recidivism factors under R.C. 2929.12 and R.C. 2929.13(B)(1). The court went on to find that the sentence would punish appellant and protect the public from future crime while not demeaning the seriousness of appellant's conduct.¹ It found that none of the R.C. 2929.12(B) and (C) factors indicating that appellant's conduct was more or less serious applied here. Additionally, the court found that appellant was on post-release control when he committed the offense at issue, that appellant has a history of criminal convictions, that appellant has not responded favorably to previous sanctions, and that appellant showed no genuine remorse. The court finally found that this was a daytime burglary of a residence while the occupant was away for the morning, that entrance was

¹ While it might seem that this finding implies an error in violation of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, such is not the case. The trial court did not cite to the severed statutory section from which it derived this language, R.C. 2929.14(B). And this court has "specified that a sentencing court's mention of factors that were previously required by the excised statutes is not erroneous because the trial court can now consider any factors it wants in sentencing defendants." *State v. Love*, 7th Dist. No. 06-MA-130, 2007-Ohio-7210, at ¶9.

gained by placing a ladder at a second-story window and breaking it, and that appellant ransacked the residence stealing money and a pistol.

{¶64} The court then sentenced appellant to seven years in prison. This sentence was within the two-to-eight year sentencing range for a second-degree felony. R.C. 2929.14(A).

{¶65} In conclusion, none of appellant's "potential" assignments of error have merit. Moreover, based on a thorough review of the record, there is no error worthy of merit.

{¶66} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.