[Cite as *State v. Rothrock*, 2010-Ohio-4102.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93602

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT K. ROTHROCK

DEFENDANT-APPELLANT

JUDGMENT:
MODIFIED IN PART AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515606

BEFORE: Jones, J., Dyke, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: September 2, 2010

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LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, Robert K. Rothrock ("Rothrock"), appeals his burglary conviction. Having reviewed the arguments of the parties and the pertinent law, we hereby modify in part and remand to the lower court for sentencing on third degree burglary.

STATEMENT OF THE CASE

{¶ 2} On September 25, 2008, Rothrock was indicted on charges of burglary, in violation of R.C. 2911.12(A)(2); aggravated arson, in violation of R.C. 2909.02(A)(2); and illegal possession of a dangerous ordnance, in violation of R.C. 2923.17(B). Rothrock entered a plea of not guilty. The state later dismissed the dangerous ordnance count, and on June 9, 2009, the case proceeded to a jury trial on the burglary and arson charges. On June 12, 2009, the jury found Rothrock guilty on the second degree burglary charge, but not guilty on the aggravated arson charge. On July 10, 2009, Rothrock was sentenced to two years in prison. Rothrock now appeals.

STATEMENT OF THE FACTS

{¶ 3} On June 30, 2007, North Royalton resident Aaron Martin ("Martin") called 911 to report a suspicious silver Honda CRV driving back and forth along Akins Road. Martin lives across the street and several houses east of the home of the victim, Kathy Masson ("Masson"). Martin told the 911 operator that the Honda was driven by an individual with gray hair who dropped off two teenagers. At approximately 12:34 p.m., North Royalton Police Officer Redrup ("Redrup") responded to the scene and observed a silver Honda CRV pulling out of Camelot Estates.

{¶ 4} Redrup initiated a stop of the vehicle and identified the driver as Rothrock. Redrup learned that Rothrock lived approximately twenty to twenty-five miles away in Avon Lake. Rothrock told Redrup that he was in the area looking for

property and did not drop anyone off. After clearing Rothrock for outstanding warrants, Redrup let Rothrock leave. Rothrock left and turned westbound on Akins. Almost immediately after pulling away, Redrup observed Rothrock talking on his cell phone. Redrup approached a stop sign at the intersection of Akins and Edgerton Roads, and observed two teenage males walking toward the road coming from between Masson's house and the house immediately to the west.

{¶ 5} Redrup stopped the males and they identified themselves as Kyle Kadow ("Kadow") and Zachary Rothrock ("Zachary").[1] Zachary is Rothrock's son. Zachary denied any knowledge that his father was in the area and stated that he and Kadow were given a ride to North Royalton by someone named "Matt" or "Mark." Redrup transported Zachary and Kadow to a nearby park, where they met Rothock. Rothrock again denied knowing anything about Zachary or Kadow being in the area. Redrup instructed Rothrock to leave the area with Zachary and Kadow. Approximately three hours later, at 4:10 p.m., an explosive device detonated in the kitchen of Masson's home causing significant damage to the structure and its contents.

ASSIGNMENTS OF ERROR

{¶ 6} Rothrock assigns one assignment of error for our review:

[1]Kadow testified at trial pursuant to a plea agreement and stated that Rothrock drove him and Zachary to Masson's house. Kadow further testified that he acted as a lookout while Zachary entered the house and that Zachary gave him black gloves to wear. Kadow testified that he threw the gloves in the backyard pond before walking toward the road.

{¶ 7} "[1.] The evidence was insufficient to sustain a conviction, or, in the alternative, the verdict was not supported by the weight of the evidence."

LEGAL ANALYSIS

{¶ 8} Rothrock argues that the evidence was insufficient to sustain his conviction and was against the manifest weight of the evidence.

{¶ 9} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. Id. 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 10} In evaluating a challenge to the verdict based on the manifest weight of the evidence, a court sits as the thirteenth juror and intrudes its judgment into proceedings that it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a jury that has "lost its way." *Thompkins,* supra, at 387, 678 N.E.2d 541. As the Ohio Supreme Court declared:

> "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. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on

> weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.' * * *
>
> "('The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.')" (Internal citations omitted.) Id.

{¶ 11} In *State v. Bruno*, Cuyahoga App. No. 84883, 2005-Ohio-1862, this court stated that the court must be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact. A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the prosecution proved the offense beyond a reasonable doubt. See, also, *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus; *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132.

{¶ 12} In the instant case, Rothrock was convicted of burglary, a second degree felony. R.C. 2911.12(A)(2), Burglary, provides the following:

> "(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 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 * * *."

{¶ 13} Here, an investigation at the scene revealed an open back door with a broken window to its immediate right, a pile of coins in the backyard near a pond, and paper currency floating in the pond. Police also located three black gloves on the property.

{¶ 14} A review of the record demonstrates substantial direct testimony to support Rothrock's conviction. For example, Kadow testified that Zachary gave him black gloves to wear and that he threw the gloves in the backyard pond before walking toward the road. The gloves contained the DNA of Kadow, Zachary, and Rothrock.

{¶ 15} Masson testified that the money found in the backyard was from a shoebox in her closet, that she did not know Zachary, and she had not given permission for anyone to be in her house that day. Masson also testified that Rothrock had been at her house twice before the date in question, and that he had helped her ex-boyfriend move some things out of her house the previous day.

{¶ 16} Carson DeCarlo ("DeCarlo") testified that Rothrock and Zachary paid him approximately 40 Oxycontin pills to drop Zachary off at Masson's house to set off a "firecracker" inside.[2] DeCarlo further testified that he dropped Zachary off, along with the explosive device, and later picked up Zachary. Accordingly, review

[2]Tr. 316-19.

of the record demonstrates significant evidence to support the conviction for burglary.

~~{¶ 17}~~ Rothrock further argues that Masson was unlikely to be present during the commission of this crime and therefore second degree burglary was not proven.

{¶ 18} "Where the state proves 'that an occupied structure is a permanent dwelling house which is regularly inhabited, that the occupying family was in and out on the day in question, and that such house was burglarized when the family was temporarily absent, the state has presented sufficient evidence to support a charge of * * * burglary.'" *State v. Hibbard*, Butler App. Nos. CA2001-12-276 and CA2001-12-286, 2003-Ohio-707, quoting *State v. Fowler* (1983), 4 Ohio St.3d 16, 19, 445 N.E.2d 1119, citing *State v. Kilby* (1977), 50 Ohio St.2d 21, 361 N.E.2d 1336, paragraph one of the syllabus. "The state must show that the victim was or usually is 'in and out' of the home at varying times" to prove that the victim was likely to be home. *State v. McKnight*, Vinton App. No. 01CA556, 2002-Ohio-1971, at ¶16, citing *State v. Lockhart* (1996), 115 Ohio App.3d 370, 685 N.E.2d 564.

{¶ 19} A review of the record demonstrates that Masson or another person was not present or likely to be present during the burglary. Masson testified that, on the day of the burglary, she left for work around 7:30 a.m. and did not get off work until 5:00 p.m. Review of the evidence in the record demonstrates that Masson was at work during her regularly scheduled hours and not likely to be present in the home on the day in question. Moreover, further review of the record does not demonstrate that the victim was usually in and out of the home at varying

times during her typical workday. Accordingly, the evidence is insufficient to support the "likely to be present" element of Rothrock's burglary conviction. See *Lockhart* at 370.

{¶ 20} As the record demonstrates that Masson or another person was not present, or likely to be present, during the burglary, we do not find the evidence legally sufficient to sustain Rothrock's conviction for second degree burglary. Although we do not find the conviction legally sufficient to sustain a conviction for second degree burglary, we do find the evidence sufficient to prove a third degree felony conviction for burglary. Accordingly, we modify the conviction from second degree burglary and remand for sentencing on third degree burglary.

{¶ 21} Accordingly, Rothrock's assignment of error is granted in part.

{¶ 22} Judgment modified in part and case remanded for resentencing.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

ANN DYKE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR