

[Cite as *Columbus v. Parks*, 2011-Ohio-2164.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-574
v.	:	(M.C. No. 2010 CR B 3580)
	:	
Preston Parks,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 5, 2011

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, *Melanie R. Tobias*, and *Orly Ahroni*, for appellee.

Lorie L. McCaughan, for appellant.

Willis Law Firm, LLC, *Dimitrios G. Hatzifotinos*, and *Michael J. Cassone*, for amicus curiae.

APPEAL from the Franklin County Municipal Court.

FRENCH, J.

{¶1} Defendant-appellant, Preston Parks, appeals the judgment of the Franklin County Municipal Court, which found Parks guilty of criminal trespass and sentenced him to pay a \$100 fine and court costs.

{¶2} On March 1, 2010, Parks was charged with criminal trespass on the premises of the Royal James Plaza apartment complex ("Royal James"), in violation of Columbus City Code 2311.21(A)(1). Identical to R.C. 2911.21(A)(1), Columbus City Code 2311.21(A)(1) states, "[n]o person, without privilege to do so, shall * * * [k]nowingly enter or remain on the land or premises of another." Parks entered a plea of not guilty. On May 19, 2010, Parks waived his right to a jury trial, and the matter was tried to the court. At the conclusion of trial, the court found Parks guilty and sentenced him to pay a \$100 fine and court costs. The trial court filed a written opinion and judgment entry on May 21, 2010.

{¶3} The parties stipulated that Parks knowingly entered or remained on the Royal James premises on March 1, 2010, leaving for trial only the question of whether Parks lacked privilege to do so. The parties also stipulated that the management company for the Royal James had hired police officers to issue trespass warnings and take action against alleged trespassers, and that Officer Phillip M. Rogers gave Parks notice not to be on the Royal James premises on April 26, 2009 and February 7, 2010.

{¶4} Officer Rogers, an employee of the City of Columbus, Division of Police, testified that, on the morning of March 1, 2010, he was contracted by Plaza Properties to provide security to its apartment complexes, including the Royal James. When Officer Rogers drove by the 1139 building of the Royal James on his way to buy gasoline, he observed three to four black males standing in the second-floor foyer through the building's windows.¹ Shortly thereafter, Officer Rogers returned to the

¹ The foyer Officer Rogers refers to is actually the stairway landing between the second and third floors.

Royal James and positioned his unmarked car where he could observe the individuals on the second-floor foyer with binoculars. Officer Rogers identified Parks as one of the individuals. Based on his previous interactions with Parks and the owner of the Royal James, Officer Rogers testified that Parks did not have permission to be on the premises.

{¶5} A deadbolt lock secures the front door of the 1139 building. To the left of the door is a keypad and intercom. To the right of the door is a sign that states, "NO TRESPASSING[,] NO LOITERING[,] VISITOR PASSES REQUIRED." The rear of the building has a similar entrance. Inside both entrances are stairways. From the stairways, unsecured, steel doors lead to hallways on each floor, where the individual apartments are located.

{¶6} After observing the individuals for approximately ten minutes, Officer Rogers radioed Officer Sanderson and Officer Zachary D. Scott, who were positioned in the rear of the 1139 building, and they decided to approach the individuals. Officer Rogers approached from the front, maintaining visual contact with the individuals, and climbed the front stairway. Officers Sanderson and Scott climbed the rear stairway, traversed the third-floor hallway toward the front of the building, and entered the front stairwell from the top. Upon entering the front stairwell, Officer Scott observed four individuals "[h]anging out; smoking a joint." (Tr. 34.) None of the individuals attempted to leave or indicated he was permitted to be on the premises, and all four individuals were cited.

{¶7} Officer Rogers testified that he previously encountered Parks on February 7, 2010, sitting inside apartment 24, which Parks claims was leased by his

cousin. At that time, Officer Rogers spoke with the tenant of apartment 24, who did not indicate she wanted Parks to leave. Nevertheless, Officer Rogers issued Parks a trespass notice later that day. At trial, Officer Rogers could not initially recall the tenant's name, but he subsequently testified that her name was Ms. Butler. On March 1, 2010, while the officers were detaining Parks in the foyer, the woman known by Officer Rogers as the tenant of apartment 24 walked up the front stairway, through the foyer, and into the hallway. Some time later, she walked back down the front stairway. The tenant did not make eye contact with any of the individuals or say anything either time she passed.

{¶8} Parks testified on his own behalf. Although Parks admitted that he had previously been told that he was not permitted on the premises, he testified that, on March 1, 2010, he was visiting his cousin, Shawnee, who lived in apartment 24. Parks believed his cousin's last name was Walker, but stated that the name Butler could be "like a marital thing." (Tr. 48.) He testified that he went to the Royal James, as he frequently did, to watch television and to use his cousin's telephone. Parks pushed apartment 24 on the keypad next to the front door, identified himself over the intercom, was buzzed in, and proceeded to the apartment. Parks claims he later exited the apartment to smoke, but that he planned to return to the apartment after smoking. Parks testified that his cousin did not permit him to smoke in the apartment and that the stairway and foyer were commonly used for smoking. According to Parks, he was only in the stairway for two or three minutes before the police arrived.

{¶9} On cross-examination, Parks testified that his cousin was not present at the apartment when he arrived, but that his cousin's sisters and mother, as well as

some children, were in the apartment. According to Parks, his cousin's sisters lived with her in the apartment. Parks did not specifically know who buzzed him into the apartment. Parks identified the woman who walked through the foyer, and whom Officer Rogers identified as the tenant in apartment 24, as his cousin.

{¶10} In its written opinion, the trial court noted Parks' argument that a landlord cannot prevent a tenant from having guests and cannot preclude guests from traversing the property. The court, however, rejected Parks' reliance on *Kent v. Hermann* (Mar. 8, 1996), 11th Dist. No. 95-P-0042, stating that it "does not stand for the proposition that, once invited by a tenant, [a] guest has an unlimited license to roam the entire premises for as long as he or she may see fit." Based on Officer Rogers' testimony that Parks had been on the landing for ten minutes and was not passing through the common area to or from his cousin's apartment, the trial court found Parks guilty. The trial court also found that, because Parks' cousin did not personally admit him to the building, "he had no colorable privilege to be in the apartment or the common areas."

{¶11} Parks filed a timely notice of appeal and now asserts the following assignments of error:

[I.] The trial court erred when it held that (1) property owners who have leased their land or premises to another remain in control of the common area with the narrow exception that the privileged person is permitted to be in transit between one place and another * * *; and (2) a leaseholder not being in the building at the time the purportedly privileged person enters the building excludes that leaseholder from being able to privilege a person to enter or remain in the building * * *.

[II.] The trial court erred when it found [Parks] guilty of violating Columbus City Code 2311.21 despite the fact [Parks] was invited to the premises and had privilege to be there * * *.

{¶12} We first address Parks' second assignment of error, by which he essentially claims that his conviction, and specifically the trial court's factual finding that he lacked privilege to be on the Royal James premises, was against the manifest weight of the evidence. "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.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, quoting Black's Law Dictionary (6th ed.1990) (emphasis sic). In reviewing a manifest weight challenge, the appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses, and determines whether the trier of fact clearly lost its way in resolving conflicts in the evidence and created such a manifest miscarriage of justice that the conviction must be reversed. *Id.*, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. When an appellate court reverses a judgment as against the manifest weight of the evidence, it sits as a " 'thirteenth juror' " and disagrees with the resolution of conflicting evidence. *Thompkins* at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175.

{¶13} It is well-settled that the prosecution bears the burden of establishing all material elements of a criminal offense with proof beyond a reasonable doubt. *State v. Adams* (1980), 62 Ohio St.2d 151, 153. A defendant's lack of privilege to be lawfully present on the property is an essential element of criminal trespass; privilege is not an affirmative defense that a defendant must prove. *Columbus v. Andrews* (Feb. 27,

1992), 10th Dist. No. 91AP-590. Thus, to sustain a conviction for trespass, the city must prove that the defendant lacked privilege to enter or remain on the premises. *Id.*; *State v. Hites*, 3d Dist. No. 1-2000-22, 2000-Ohio-1695, citing *State v. Newell* (1994), 93 Ohio App.3d 609, 611.

{¶14} Columbus City Code 2301.01(L) defines "privilege" as "an immunity, license, or right conferred by law, or bestowed by express or implied grant, or arising out of status, position, office, or relationship, or growing out of necessity." That definition is substantially similar to the statutory definition of privilege in R.C. 2901.01(A)(12). In this context, privilege includes " 'permission to enter the premises given by a resident of the premises.' " *In re Meachem*, 10th Dist. No. 01AP-1122, 2002-Ohio-2243, ¶16, quoting *State v. Clelland* (1992), 83 Ohio App.3d 474, 490.

{¶15} Parks argues that the trial court erred by finding he lacked privilege to be on the Royal James premises, whereas the city maintains that it met its burden of proof on that issue. The city argues that Parks' conviction was not against the manifest weight of the evidence because there was no evidence that Parks' cousin invited him onto the premises and because Parks' cousin was not present when he entered the premises. The city contends that there was no evidence that Parks had privilege to be on the Royal James property, whether in an apartment or in the common areas. We disagree. Not only does the record contain at least circumstantial evidence that Parks had permission to be on the property, but the evidence relied on by the city does not establish a lack of privilege. Having reviewed the trial testimony and the parties' stipulations, we conclude that the city failed to establish, beyond a reasonable doubt,

that Parks lacked privilege to enter or remain on the Royal James premises on the date in question.

{¶16} Although the parties stipulated that Officer Rogers, as an agent of the property owner, had previously given Parks notice that he was not permitted on the premises, prior warnings by an owner of rental property, or the owner's agent, do not preclude a finding of privilege. Ohio courts have held that an individual invited onto rental property by a tenant cannot be guilty of trespassing on the owner's premises even if the owner expressly instructed the individual not to come onto the property. See *Hermann; Hites* ("an owner of an apartment complex cannot prohibit guests, invited by the tenant, from being present on the property"). These holdings stem from the rationale that trespass is an invasion of the possessory interest in property, which a property owner sacrifices to a tenant, rather than an invasion of title. *Hermann*, citing *State v. Herder* (1979), 65 Ohio App.2d 70, 74.

{¶17} In *Hermann*, the defendant was convicted of trespass when she visited her boyfriend's apartment building, after being advised by the building's owner that she was not permitted on the premises. Although the trial court found that the boyfriend-tenant had no objection to the defendant's presence and may have invited her, it considered those facts irrelevant in light of the building owner's prior prohibition. The Eleventh District reversed the conviction, noting that an owner of rental property sacrifices his possessory interests to a renter and cannot prohibit a tenant from inviting guests to the tenant's abode. *Hermann*, citing *Herder* at 74. The fact that the defendant was not in her boyfriend's apartment, but was in a common area immediately outside the apartment, did not alter the court's conclusion that "the landlord's rights in limiting

common ingress and egress ways to guests of the tenant must also be generally qualified so as to permit access to the renter's apartment." *Id.* Applying that reasoning here, we conclude that Officer Rogers' previous warnings to Parks do not preclude a finding of privilege because permission from a tenant would override those warnings and cloak Parks with privilege.

{¶18} The city attempts to distinguish *Hermann* and *Hites* by arguing that here, unlike in those cases, there is no evidence that a tenant invited Parks onto the premises. As the city correctly asserts, Parks did not specifically testify that his cousin invited him to her apartment on the date in question. Parks did testify, however, that he frequently visited his cousin's apartment to watch television and use the telephone. He stated, "[b]efore that day, I could go use the phone [in the apartment] like every day." (Tr. 46.) Officer Rogers had, himself, observed Parks inside the apartment where Parks testified his cousin lived. On March 1, 2010, Parks identified himself through the front-door intercom and was buzzed into the apartment building by someone in apartment 24. Parks proceeded to apartment 24 and was permitted inside. Parks also intended to return to the apartment after smoking. Contrary to the city's suggestion in its appellate brief, there is no indication that the trial court rejected Parks' testimony that he was in his cousin's apartment on the date in question, before Officer Rogers observed him in the foyer. Based on the evidence presented at trial, we reject the city's contention that the record lacked any evidence that Parks had permission to be on the premises. Moreover, we reiterate that Parks was not required to prove the existence of privilege; it is the city's burden to establish, by proof beyond a reasonable doubt, that Parks lacked privilege.

{¶19} The city relies heavily on the undisputed testimony that Parks' cousin, the tenant in apartment 24, was not in the building when Parks entered the premises. The trial court also stated that this fact precluded any finding of privilege. As with the prior warnings from Officer Rogers, however, the absence of Parks' cousin does not demonstrate a lack of privilege. Although we discern no authority for the city's suggestion that a tenant may not grant a guest permission to enter or remain on the premises in the tenant's absence, even assuming that her absence refutes that she personally gave Parks permission, a grant of permission need not stem exclusively from the property owner or lessee. See *Herder, Mariemont v. Wells* (1986), 33 Ohio Misc.2d 9, 10 (prosecution did not prove lack of privilege where a 16-year-old girl invited the defendant to the apartment she shared with her mother, despite her mother's express warning that she was to have no visitors).

{¶20} This court addressed the issue of who may grant permission to enter property in *Herder*. There, we reversed a trespass conviction where the defendant entered the home occupied as a residence by his wife, from whom he was separated. Although this court ultimately held that, under R.C. 3103.04, one spouse cannot be criminally liable for trespass in the dwelling of the other, a conclusion that the Supreme Court of Ohio subsequently rejected in *State v. Lilly*, 87 Ohio St.3d 97, 1999-Ohio-251, we also addressed the defendant's assignment of error that the trial court improperly charged the jury that only the defendant's wife could validly permit him to enter the premises. Despite evidence that the wife was in possession of the home and had excluded the defendant, we stated, "[i]f, as defendant testified, he knocked on the door and his daughter opened the door and he stepped in, the 'permission' from his daughter

could be sufficient to allow him to enter the premises" without trespassing. *Id.* at 74. Accordingly, we held that the trial court's jury charge was erroneous.

{¶21} The city acknowledges that, for purposes of criminal trespass, privilege generally includes permission to enter the premises granted by a resident, but argues that prior notice from the property owner that an individual is prohibited from entering the property precludes a resident other than the lessee from granting permission and, thus, bestowing privilege. In support of that argument, the city relies on *State v. Boude*, 2d Dist. No. 19945, 2004-Ohio-1176. There, the defendant appealed his conviction for trespassing on property where his on-and-off girlfriend lived with her mother. The defendant argued that his conviction was against the manifest weight of the evidence because his girlfriend had invited him onto the property. The defendant maintained that, as a resident of the property, his girlfriend had authority to grant him privilege despite any previous instruction from her mother not to enter the property. The Second District disagreed and stated, "the law is clear that if the owner of the property * * * has directly told the defendant that he is prohibited from entering the property, any permission granted by [the girlfriend], a mere licensee, would be invalid." *Id.* at ¶34, citing *Mariemont* at 11; see also *State v. Hardges*, 9th Dist. No. 22003, 2004-Ohio-5819.

{¶22} *Boude* is distinguishable and does not compel the conclusion that only the lessee of apartment 24 could grant Parks permission to enter the Royal James premises. Unlike this case, *Boude* did not involve an alleged trespass on rental property. Rather, the sole owner of the property instructed the defendant that he was not permitted on the property. The court held that a mere resident could not trump the owner's explicit denial of permission. Here, the tenant stands in place of the owner in

Boude because she, rather than the owner of the apartment complex, maintains the possessory interest, along with the authority to grant permission for guests to enter. See *Hermann*. Analogizing then, *Boude* suggests that, if the tenant had expressly prohibited Parks from entering the premises, a non-lessee resident would lack authority to override the tenant and grant permission. That is precisely what the Ninth District held in *Hardges*, i.e., that a non-lessee could not grant the defendant permission to enter the property where the sole lessee had expressly prohibited the defendant from entering. In this case, there is no evidence that the tenant had instructed Parks that he was prohibited from visiting or had instructed other residents to deny entry to Parks. Indeed, Parks testified that he visited the apartment frequently, and Officer Rogers previously observed Parks inside the apartment. Moreover, after Parks identified himself, someone in apartment 24 buzzed him into the building and admitted him to the apartment. Accordingly, we conclude that the tenant's absence does not preclude a finding of privilege in this case.

{¶23} The fact that Parks was not in his cousin's apartment when he was charged with trespass but was, instead, in a common area does not affect our analysis in this case. In *Hermann*, the appellate court reversed a conviction for trespass despite the defendant's apprehension in a common area, noting that a landlord's right to limit ingress and egress ways must yield to a tenant's right to have guests. Also instructive on this issue is *State v. Hohman* (1983), 14 Ohio App.3d 142, in which the Twelfth District reversed a conviction for trespassing on the premises of a nursing home. The defendant, a labor organizer, visited the nursing home with current and former employees of the nursing home, talked to employees, and invited them to a union

meeting. The defendant was observed in various areas of the nursing home. When asked to leave, based on lack of permission to be on the premises, the defendant claimed to have been invited by several residents, none of whom he knew personally, and two of whom he did visit. The appellate court stated that the defendant's "obviously ulterior motives" were irrelevant to the question of privilege and concluded that the state failed to show, with proof beyond a reasonable doubt, that the defendant lacked privilege to be on the nursing home premises. *Id.* at 143. Despite the fact that the defendant's presence was neither restricted to the resident rooms to which he had purportedly been invited nor the process of ingress or egress, the court concluded that the state failed to establish lack of privilege.

{¶24} We have no doubt that evidence in some cases could establish that a defendant, despite some privilege to be on property, has exceeded the scope of that privilege and, as a result, is guilty of criminal trespass. See *State v. Smith*, 10th Dist. No. 04AP-859, 2005-Ohio-2560 (finding reasonable suspicion that an appellant exceeded his privilege to remain on public fairgrounds). Here, however, just as there is no evidence that Parks was without permission to be on the premises from a Royal James lessee or resident, there is no evidence to suggest that Parks' presence in the stairway to smoke, a common practice in the building, exceeded the scope of any such privilege.

{¶25} Upon review, we conclude that the city failed to demonstrate, beyond a reasonable doubt, that Parks lacked privilege to be on the Royal James premises, an essential element of criminal trespass. Accordingly, Parks' conviction is against the manifest weight of the evidence, and we sustain Parks' second assignment of error and

reverse the trial court's judgment. Parks' first assignment of error seeks rulings on broad issues regarding a tenant's authority to grant privilege. While we have touched on those issues as they specifically relate to the facts of this case, we decline to make further pronouncements that are unnecessary to our analysis. Having concluded that Parks' conviction must be reversed, further discussion of Parks' first assignment of error is moot. For these reasons, we reverse the judgment of the Franklin County Municipal Court.

*Judgment reversed;
cause remanded.*

BRYANT, P.J., and KLATT, J., concur.
