

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-200209
	:	TRIAL NO. B-1904777
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
DUNG DAO,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Dung Dao appeals his conviction for burglary under R.C. 2911.12(B), a fourth-degree felony. For the reasons that follow, we affirm.

Dao was arrested for burglary after he was found inside the sunroom of Judith Mack's home in the early morning hours of August 26, 2019. At his bench trial, Dao asserted the affirmative defense of duress. He testified that he broke into Mack's home in the middle of the night to flee two individuals who had hit him after he exited from his work van, which he left on the street near Mack's home after running out of gas. The trial court did not believe Dao and found him guilty.

In his first assignment of error, Dao argues his conviction must be reversed because the trial court did not correctly apply the law on duress. In his second assignment of error, he argues the trial court lost its way when evaluating the evidence of duress, resulting in a conviction that was against the manifest weight of the evidence.

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A defendant asserting the affirmative defense of duress must establish five elements by a preponderance-of-the-evidence standard. *See* R.C. 2901.05(A); *State v. White*, 1st Dist. Hamilton No. C-190262, 2020-Ohio-1231, ¶ 17 and 20. This includes (1) harm due to the pressure of human force; (2) the harm sought to be avoided was greater than or at least equal to that sought to be prevented by the law defining the offense charged; (3) the actor reasonably believed at the moment that his act was necessary and was designed to avoid greater harm; (4) the actor was without fault in bringing about the situation; and (5) the threatened harm was imminent, leaving no alternative by which to avoid the greater harm. *Id.* at ¶ 17.

The record shows the trial court properly applied the law of duress in the case but found Dao did not meet his burden, including showing that “human force” compelled his conduct of breaking into Mack’s home.

Further, upon our review of all the evidence, we cannot say the trial court lost its way when resolving the facts against Dao. Mack observed Dao trying to get inside her home, but she did not report seeing others. And while Dao offered into evidence photographs showing a cut that he claimed was inflicted by his assailants, those photographs were taken a week after his arrest. Conversely, close-up footage captured by a police officer’s body-worn camera on the night of the offense did not reveal any blood on Dao’s light-colored shirt. Further, Dao never complained of any injury at that time, and the arresting officers observed no injury. Finally, the arresting officers relayed that Dao was “not all there” and sweating profusely, signs of drug use that explained his unusual behavior. We note the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *See State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

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Ultimately, Dao failed to demonstrate error in the record that would support a reversal of his conviction. Accordingly, we overrule both assignments of error and affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

ZAYAS, P.J., CROUSE and WINKLER, JJ.

To the clerk:

Enter upon the journal of the court on August 18, 2021,
per order of the court _____.
Administrative Judge