DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	)	1 CA-JV 09-0167
	)	
	)	DEPARTMENT E
	)	
IN RE: JAMES A.	)	**MEMORANDUM DECISION**
	)	
	)	
	)	Not for Publication –
	)	(Ariz. R.P. Juv. Ct.
	)	103(G); ARCAP 28)
	)	
_____	)	

Appeal from the Superior Court in Maricopa County

Cause No. JV 176293

The Honorable Cathy M. Holt, Judge
The Honorable Eddward Ballinger, Jr., Judge

AFFIRMED

James J. Haas, Maricopa County Public Defender — Phoenix
by Terry J. Reid, Deputy Public Defender
Attorneys for Appellant

Andrew P. Thomas, Maricopa County Attorney — Phoenix
by Linda Van Brakel, Assistant Attorney General
Attorneys for Appellee

W E I S B E R G, Judge

¶1 James A. ("the Juvenile") appeals from an order of the juvenile court adjudicating him to be delinquent for attempted

burglary in the second degree, a class 4 felony, and a disposition order placing him on probation. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The State filed a petition charging the Juvenile with attempted burglary in the second degree, a class 4 felony. At an adjudication hearing, the following facts were presented. On March 5, 2009, M. was at home with his young child when he heard his dogs barking outside. He looked out the window and saw two people walking in the park next to his house peering through the fence next door. A few minutes later, another juvenile, later identified as I., knocked on the door twice and rang the doorbell.

¶3 M., a former security consultant, had three outdoor security cameras placed in different locations, a video recorder and a closed circuit television system inside his house that allowed him to see what was happening outside. When M. looked at the monitor, he saw I. at the front door and the Juvenile in the driveway "playing with a cell phone or just kind of standing there."

¶4 A minute or two later, M. noticed that one of the cameras was not facing the driveway where it should face, but was facing the wall, indicating that someone had turned it. M. ran out the door and saw two people running away "really fast."

M. called the police. When M. later reviewed the video footage, he saw I. jiggle the doorknob on the front door and then the garage door handle to see if either door was open. He also saw the Juvenile "looking around and fidgeting" and thought he might be a lookout for I.

¶5 I. testified at the hearing that he was "trying to get in" the victim's house and "planning on getting into the house to take something." He admitted that he knocked on the front door, attempted to enter the house through the front door or garage door and turned the security camera away to avoid getting caught.[1] I. said he did not know if the Juvenile knew what he intended to do and said he could not remember if they talked about it beforehand. He stated that the Juvenile did not say anything to him while he was attempting to burglarize the victim's house and did not know what the Juvenile was doing during that time. At first, I. testified that he did not know if the Juvenile was "looking out" for him, but later said he was not his lookout. I. further testified that when the victim came out of his house, they both ran away. I. said that he and the Juvenile were walking home from school to I.'s house and that the Juvenile was not familiar with the neighborhood.

[1]I. was also charged with attempted burglary, but accepted a plea to misdemeanor trespass. The Juvenile refused the same plea offer.

¶6 A police officer called to the scene located I. and the Juvenile about ten minutes after arriving at the victim's house and viewing the video. He interviewed I. who reported that while he and the Juvenile were on their way home, I. told the Juvenile, "I'm going to see if this guy's home." He told the officer that "he was just going to take some stuff."

¶7 Officer Dennison watched the video at the victim's house and interviewed the Juvenile after he was detained. The officer asked the Juvenile where he was coming from and if he had stopped anywhere. The Juvenile said he was coming home from school and did not make any stops. Having seen the video, the officer told the Juvenile that he knew he had made a stop. The Juvenile then admitted that he stopped at the victim's house. He told the officer that a man on the street asked them to look for a dog and that I. knocked on the victim's door to see if the victim had seen the dog. When the officer asked the Juvenile if his story would match I.'s story, the Juvenile recanted the story about the dog. He eventually admitted that I. had given him a "look" indicating that I. was going to break into the house. The Juvenile could not explain "that look," but he knew it was a "I'm going to break into a house look." When asked why he stayed with I. during the attempted burglary, he initially said it was because he was not familiar with the neighborhood,

but later said that if he left I., "he was going to be made fun of at school."

¶8 The Juvenile testified that he and I. were walking home from school in a neighborhood with which he was not familiar. He said that I. told him he was going to stop at his cousin's house, that I. told the Juvenile to "wait for me," and that he waited in the driveway and played a video game. He said he did not remember telling Officer Denny about going to the house to find a dog or telling the officer that I. gave him a "look." He denied that I. gave him a "look."

¶9 The Juvenile further testified that he saw I. knock on the door but did not see him try to open the garage door or turn the surveillance camera away and did not know what I. was doing. He stated that he never had a conversation with I. about burglarizing the victim's house and did not tell Officer Denny that he knew I. intended to do so. The Juvenile claimed the officer was "mak[ing] up stories on his own" and that he was not involved in the attempted burglary.

¶10 Following the hearing, the juvenile court found that the officers' testimony was credible, that neither I.'s testimony nor the Juvenile's testimony was credible and that both juveniles lied to the police. The court stated that "[o]ne thing that does not lie is the video . . . I did get a good view of it. You can see [the Juvenile] looking back and forth."

The court concluded that "based on the video and the testimony of the officers, in particular what the juvenile told Officer Dennison, that he knew that [I.] was going to break into that house that day . . . that he was acting as a lookout." The court noted that that the one truth the Juvenile told the police was that "he was afraid to do anything else in that he [would] be made fun of at school." The court found that the State proved the charged beyond a reasonable doubt, and adjudicated the Juvenile delinquent as to the attempted burglary charge. At a disposition hearing, the court placed the Juvenile on standard probation. The Juvenile timely appealed.

¶11 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 8-235(A)(2007) and Ariz. R.P.Juv.Ct. 103.

DISCUSSION

¶12 The Juvenile argues that (1) there was insufficient evidence to support a finding of a delinquent act on the charge or attempted burglary; and (2) the Juvenile's did not receive effective assistance of counsel because counsel did not request a voluntariness hearing or move to suppress statements the Juvenile made to police based on an alleged *Miranda* violation.

Sufficiency of the Evidence

¶13 "In reviewing the sufficiency of the evidence, we examine the evidence in the light most favorable to sustaining

the judgment, and we consider whether the evidence sufficed to permit a rational trier of fact to find the essential elements of the offense beyond a reasonable doubt." *In Re Dayvid S.,* 199 Ariz. 169, 170, ¶ 4, 15 P.3d 771, 772 (App. 2000). We will not reweigh the evidence and "all reasonable inferences are resolved against the juvenile." *Maricopa County Juvenile Action No. J-123196,* 172 Ariz. 74, 78, 834 P.2d 160, 164 (App. 1992). The trier of fact determines the credibility of witnesses. *State v. Dickens,* 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996). Insufficient evidence exists to support a finding by the juvenile court "only if there [is] a complete absence of probative facts to support the conclusion." *In re John M.,* 201 Ariz. 424, 427, ¶ 14, 36 P.3d 772, 775 (App. 2001).

¶14 "A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." A.R.S. § 13-1507(A) (2001). "A person commits attempt if, acting with the kind of culpability otherwise required for commission of an offense, such person . . . [e]ngages in conduct intended to aid another to commit an offense, although the offense is not committed or attempted by the other person, provided his conduct would establish his complicity under chapter 3 if the offense were committed or attempted by the other person." A.R.S. § 13-1001(A)(3) (2001).

¶15 A person is "criminally accountable for the conduct of another if . . . [t]he person is an accomplice of such other person in the commission of an offense including an offense that is a natural and probable or reasonably foreseeable consequence of the offense for which was the person was an accomplice." A.R.S. § 13-303(A)(3) (Supp. 2009). "If causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense if . . . [t]he person aids, counsels, agrees to aid or attempts to aid another person planning or engaging in the conduct causing such result." A.R.S. § 13-303(B)(2). The statute "imposes criminal accountability on an accomplice defendant only for those offenses the defendant intended to aid or aided another in planning or committing." *State v. Phillips,* 202 Ariz. 427, 436, ¶ 37, 46 P.3d 1048, 1057 (2002).

¶16 A person who acts as a "lookout" for a person committing a burglary may be guilty as an accomplice to the burglary. *See State v. Sears,* 22 Ariz. App. 23, 24, 522 P.2d 784, 785 (1974). However, a defendant's mere presence at the scene of a crime, along with the knowledge that a crime is being committed is insufficient to establish guilt. *See State v. Noriega,* 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996) ("guilt cannot be established by the defendant's mere presence

at crime scene or mere association with another person at a crime scene").

¶17 Here, the State's theory of the case was that the Juvenile knew that I. intended to and was attempting to commit a burglary at the victim's home and that the Juvenile was an accomplice to the attempted burglary by acting as a lookout for I. The evidence was sufficient to support this theory. The Juvenile and I. were walking home together from school and both went onto M.'s property. The Juvenile stood on the driveway while I. attempted to gain entrance into the house. The surveillance video shows that the Juvenile was looking back and forth and fidgeting while I. was doing so. When M. came out of his house, both juveniles fled.

¶18 Further, when first confronted by Officer Dennison, the Juvenile lied and said he did not make any stops on his way home from school. Then he said that he did stop at the victim's house to look for a lost dog. He then recanted that story and admitted that he knew I. was going to break into M.'s house. At trial, however, he denied telling the officer any of those stories and claimed the officer made them up. Instead, he said I. told him he was going to his cousin's house and to wait outside. However, I. neither testified nor told police that he was going to his cousin's house. The testimony presented at the hearing, the pretrial statements and all reasonable inferences

therefrom, together with the video of the Juvenile's conduct, was sufficient evidence from which a rational trier of fact could find that the Juvenile knew I. was attempting a burglary, that the Juvenile was acting as a lookout for I., and that he was an accomplice to the attempted burglary.

Ineffective Assistance of Counsel

¶19 The Juvenile also argues that his counsel was ineffective when she failed to challenge an alleged *Miranda* violation and the voluntariness of the Juvenile's statements to the police. In advancing this claim, the Juvenile relied on a Phoenix Police Department report and the Juvenile's affidavit, neither of which is part of the record on appeal. In furtherance of the appeal and to expedite its disposition, on January 12, 2010, this court suspended the appeal until February 18, 2010, and remanded the matter to the juvenile court to consider these documents in connection with the Juvenile's claim of ineffective assistance of counsel and to "conduct such proceedings as it deem[ed] appropriate." *See* Ariz. R. P. Juv. Ct. 103(C). By order of this court dated February 2, 2010, the stay was continued until March 1, 2010.

¶20 Pursuant to this court's remand, at a status hearing on February 11, 2010, the juvenile court set the matter for an evidentiary hearing on February 22, 2010 "regarding the effectiveness of prior counsel for the juvenile's trial

strategy." The Juvenile's mother appeared telephonically at that hearing. At the same time, the juvenile court released the Juvenile, aged sixteen, from probation.

¶21 On February 22, 2010, both counsel informed the court that the Juvenile would not be present for the evidentiary hearing because the Juvenile was residing in California. The judge stated that "the State has a right to require that the juvenile be present and testify." He indicated that "the Court is willing to accommodate the juvenile by granting a short continuance that the juvenile must appear at" but that "if the person requesting relief will not come to the Court, then the Court has to consider dismissing the request for relief." The Juvenile's counsel informed the court that "there is no time in the foreseeable future that the juvenile could come to court." Concluding that "there could be no date at which there be guaranteed an appearance by the juvenile," and because "the State will not waive the juvenile's appearance at the evidentiary hearing," the Court "dismiss[ed] the juvenile's request for relief." After the appeal was reinstated on March 1, 2010, the Juvenile filed a motion to proceed with the appeal.

¶22 The Juvenile was afforded an opportunity to testify at the evidentiary hearing in order to establish his alleged claim of ineffective assistance of counsel. The Juvenile chose not to attend and indicated through counsel that he would not attend a

hearing in the foreseeable future. The Juvenile has forfeited his claim of ineffective assistance of counsel. *See Willie G. v. Ariz. Dep't of Econ. Sec.,* 211 Ariz. 231, 234-35, ¶¶ 13-20, 119 P.3d 1034, 1037-38 (App. 2005) (in a contested dependency action, where the court advised parents they must personally appear at the hearing and their absence would be deemed an admission to the dependency petition's allegations, and where parents left the state and failed to appear, they "effectively forfeited the rights" they claimed had been denied). The juvenile court properly dismissed this claim and we will not address the issue on appeal.

CONCLUSION

¶23 Finding sufficient evidence to support the juvenile court's adjudication and disposition of this matter and the Juvenile having forfeited his claim of ineffective assistance of counsel, we affirm.

/s/_____
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

/s/_____
PHILIP HALL, Judge

/s/_____
JOHN C. GEMMILL, Judge