[Cite as *In re M.T.*, 2009-Ohio-3391.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In the Matter of: M.T.

Court of Appeals No. L-08-1321

Trial Court No. 08183974 01

DECISION AND JUDGMENT

Decided: July 10, 2009

* * * * *

Timothy Young, Ohio Public Defender, and Amanda J. Powell, Assistant State Public Defender, for appellant.

Julia R. Bates, Lucas County Prosecuting Attorney, and Frank H. Spryszak, Assistant Prosecuting Attorney, for appellee.

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PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Juvenile Division, which adjudicated appellant, M.T., delinquent for committing the offense of burglary and ordered him conveyed to the Ohio Department of Youth

Services for a minimum period of one year until the age of 21. Appellant now challenges that judgment through the following assignments of error:

{¶ 2} "Assignment of Error I

{¶ 3} "The trial court violated M[.] T.'s right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, Section 16 of Article I of the Ohio Constitution, and Juvenile Rule 29(E)(4) when it adjudicated him delinquent of burglary absent proof of every element of the charge against him by sufficient, competent, and credible evidence. 2911.12(A)(2).

{¶ 4} "Assignment of Error II

{¶ 5} "The trial court violated M[.] T.'s right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Section 16 of Article I of the Ohio Constitution when it adjudicated him delinquent of burglary when that finding was against the manifest weight of the evidence."

{¶ 6} On June 26, 2008, a complaint was filed in the lower court charging appellant with delinquency in connection with an alleged burglary which occurred on June 25, 2008. The case proceeded to an adjudicatory trial at which the following evidence was presented.

{¶ 7} On June 25, 2008, Officers Scott Bailey and Jason Lenhardt, patrol officers for the Toledo Police Department, responded to a call of a burglary at 1307 Elmwood, in Toledo, Ohio. When Officer Bailey arrived, he walked around one side of the house while his partner walked around the other side of the house. As the officers reached the

back of the house, they saw that a window had been broken out of the back door and there were signs of a forced entry. Their investigation quickly led them to a house two blocks away, at 1327 Grand Avenue, where they arrived approximately five minutes after first arriving at the Elmwood home. The Grand Avenue house looked vacant and dilapidated, but when the officers entered the house, they found approximately six African-American individuals, including appellant, inside. They also found a number of TVs, stereos, a karaoke machine, and other property inside. Upon placing appellant into custody, Officer Bailey searched his pockets and found jewelry, which was subsequently determined to belong to Deborah Gregory, the resident of 1307 Elmwood. Officer Lenhardt testified that their investigation revealed that other property discovered at the Grand Avenue house also belonged to Gregory. Gregory described in detail a jewelry box that was taken from her home and that was recovered from the Grand Avenue address. Gregory also provided detailed descriptions of the TVs that were taken. Those were also recovered from the Grand Avenue address.

{¶ 8} Gregory also testified at the trial below. She stated that she normally works from 9:00 a.m. until 5:30 p.m., and that she worked that schedule on June 25. On that day, however, she went elsewhere after work and did not arrive home until approximately 8:15 p.m. Gregory also stated that she sometimes comes home for lunch but that she did not on this particular day. When she arrived home, she saw that the back door was open and the glass from the door had been shattered, with glass being tracked all over the house. The house had been ransacked and Gregory described the items that had been

taken from the home, including two televisions, a DVD/VCR combination player, a jewelry box and the jewelry in the box.

{¶ 9} Finally, D.P., a youth who was involved in the burglary, testified for the state. D.P. admitted that he had entered into an agreement with the state that in exchange for his truthful testimony, the state would not recommend that he be committed to the Department of Youth Services. D.P.'s testimony was at times inconsistent, but he did testify to the following events. D.P. stated that earlier in the day on June 25, but sometime after 12:00 noon, he, appellant, appellant's brother M., and two other individuals were at appellant's grandmother's house when they came up with a plan to break into the house on Elmwood. Initially that afternoon, M. and the two other individuals broke into the house while D.P. stood watch. Later, however, they returned to the house to take more items from the home. Again, D.P. was the look-out man. D.P. testified that although appellant did not go with the group back to the house, he was there removing things from the house. D.P. did not know when appellant had arrived at the house on Elmwood, but when appellant came out of the house he was carrying televisions and a karaoke machine. D.P. then helped appellant carry items back to the house on Grand Avenue.

{¶ 10} Based on this evidence, the lower court concluded that appellant was delinquent for committing the offense of burglary, a violation of R.C. 2911.12(A)(2) and a second degree felony if committed by an adult. The court then committed appellant to the Department of Youth Services as stated above.

{¶ 11} Appellant's assignments of error will be discussed together. Appellant challenges the weight and sufficiency of the evidence presented below. In particular, he contends that the state failed to prove beyond a reasonable doubt that any person was "present or likely to be present" at the Elmwood house at the time of the crime because the state failed to prove when the crime occurred.

{¶ 12} Due process affords juveniles the same protections afforded criminal defendants, notwithstanding the civil nature of juvenile proceedings. *In the Matter of: Jesse A.C.* (Dec. 7, 2001), 6th Dist. No. L-01-1271. Accordingly, "we review juvenile delinquency adjudications using the same weight and sufficiency standards that we would use for criminal defendants." Id.

{¶ 13} Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency of the evidence is purely a question of law. Id. Under this standard of adequacy, a court must consider whether the evidence was sufficient to support the conviction, as a matter of law. Id. The proper analysis 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. Williams* (1996), 74 Ohio St.3d 569, 576, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A conviction that is based on legally insufficient evidence constitutes a denial of due process, and will bar a retrial. *Thompkins*, supra at 386-387.

{¶ 14} In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion. Id. at 387. In making this determination, the court of appeals sits as a "thirteenth juror" and, after "'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 [trier of fact] 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.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 15} Appellant was found delinquent for conduct which, if he were an adult, would constitute burglary, in violation of R.C. 2911.12(A)(2). That statute reads:

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

{¶ 17} "* * *

{¶ 18} "(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[.]"

{¶ 19} Appellant asserts that there was insufficient evidence presented at the trial below to establish that any person was present or likely to be present at the time of the offense because the state never established the time of the offense.

{¶ 20} In *State v. Frock*, 2d Dist. No. 2004 CA 76, 2006-Ohio-1254, ¶ 20-21, the Second District Court of Appeals discussed the "likely to be present" element of the crime of second degree felony burglary as follows:

{¶ 21} "'Although the term "likely" connotes something more than a mere possibility, it also connotes something less than a probability or reasonable certainty. A person is likely to be present when a consideration of all the circumstances would seem to justify a logical expectation that a person could be present.' *State v. Green* (1984), 18 Ohio App.3d 69, 72, 480 N.E.2d 1128. In determining whether persons were present or likely to be present under R.C. 2911.12(A)(2), 'the defendant's knowledge concerning habitation is not material. The issue is not whether the burglar subjectively believed that persons were likely to be there, but whether is was objectively likely.' *State v. Brown* (Apr. 28, 2000), Hamilton App. No. C-980907. Merely showing that people dwelled in the residence is insufficient; the state must adduce specific evidence that the people were present or likely to be present at the time of the burglary. *State v. Fowler* (1983), 4 Ohio St.3d 16, 18, 445 N.E.2d 1119.

{¶ 22} "The supreme court has held that the 'likely to be present' element is satisfied where the structure is a permanent dwelling house which is regularly inhabited, the occupants were in and out of the house on the day in question, and the occupants were

temporarily absent when the burglary occurred. *State v. Kilby* (1977), 50 Ohio St.2d 21, 23, 361 N.E.2d 1336. See, also, *Fowler*, 4 Ohio St.3d at 19, 445 N.E.2d 1119; *State v. Baker*, Butler App. No. CA2003-01-16, 2003-Ohio-5986. On the other hand, courts have found insufficient evidence that the occupants were likely to be present when they were absent for an extended period, such as a vacation, and no one else was regularly checking on the house. See, e.g., *State v. Cantin* (1999), 132 Ohio App.3d 808, 726 N.E.2d 565; *State v. Brightman*, Montgomery App. No. 20344, 2005-Ohio-3173; *State v. Hibbard*, Butler App. Nos. CA2001-12-276 and CA2001-12-286, 2003-Ohio-707, ¶ 13; *State v. Weber* (Dec. 23, 1997), Franklin App. No. 97APA03-322; *State v. Cochran* (Jan. 30, 1996), Cuyahoga App. No. 50057. Similarly, if the occupants of a house are gone for the entire work day, they are not 'likely to be present' during the day. See *Brown*, supra."

{¶ 23} Deborah Gregory, the victim of the burglary, testified that she normally works from 9:00 a.m. until 5:30 p.m. and that she usually comes home immediately after work. She further stated that there was a possibility that she could have come home during the day because she sometimes comes home for lunch. On the day of the burglary, she did not come home immediately after work but finally arrived home around 8:15 that evening, when she found her home had been ransacked. D.P., the look-out man, testified that his accomplices stole items from the Elmwood house twice on June 25, 2008. The exact times of the offenses were never established at the trial below. D.P., however, stated that appellant was involved in the second break-in, and that they left the home when "it was about to get nighttime." From this evidence, and the common

knowledge that in the month of June it does not begin "to get nighttime" until later in the evening, we determine that the trier of fact could have found, beyond a reasonable doubt, that Gregory had already left work and was objectively "likely to be present" when the second burglary occurred. It was by pure chance that she did not come home immediately after work that day. Had she, she may very well have interrupted the burglary as it was occurring.

{¶ 24} We, therefore, conclude that the lower court's judgment that appellant was delinquent for committing the offense of burglary was supported by sufficient evidence and was not against the manifest weight of the evidence. Accordingly, the two assignments of error are not well-taken.

{¶ 25} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.
CONCUR.

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JUDGE