

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: D.L.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

APPEAL OF: D.L.

No. 938 EDA 2011

Appeal from the Order of Disposition Entered on March 24, 2010
In the Court of Common Pleas of Philadelphia County
Family Division, Juvenile Branch at No(s): CP-51-JV-0001627-2010.

BEFORE: PANELLA, OLSON AND FITZGERALD,* JJ.

MEMORANDUM BY OLSON, J.:

Filed: February 12, 2013

Appellant, D.L., appeals from the order of disposition entered on March 24, 2011, following his delinquency adjudication for acts constituting burglary.¹ We are constrained to vacate both the order of disposition and the adjudication of delinquency.

On October 5, 2010, Appellant was arrested and accused of committing burglary. Appellant proceeded to an adjudicatory hearing, where the following evidence was produced.

At around 2:00 p.m. on the afternoon of September 2, 2010, Ms. Norma Smith walked into her Alcott Street house, in the City of Philadelphia. As Ms. Smith testified, she had just finished her first job and had come home to "pick something up" before beginning her second job. N.T. Adjudicatory Hearing, 10/15/10, at 5. Ms. Smith testified that she picked up

¹ 18 Pa.C.S.A. § 3502(a)(2).

*Former Justice assigned to the Superior Court.

the item, secured her house by “mak[ing] sure that all of the doors were locked, the windows were closed,” and then left her home. *Id.* at 6.

At approximately 5:45 p.m., Eric Smith – who is Ms. Smith’s son – returned to the Alcott Street home and noticed that both the basement door and the first-floor front window were uncharacteristically open. *Id.* at 10 and 14. After walking upstairs and discovering that some of his watches, hats, jewelry, and shoes were missing, Mr. Smith telephoned his mother and informed her that someone had burglarized their house. *Id.* at 10 and 15. When Ms. Smith returned home, she saw that the street-facing, first-floor front window was halfway open and that her digital camera was missing. *Id.* at 7 and 12.

The police were notified of the burglary and Philadelphia Police Officer Timothy Fitzgibbon arrived on scene with a latent fingerprint kit. N.T. Adjudicatory Hearing, 11/17/10, at 5. Officer Fitzgibbon dusted the outside of the open, first-floor front window for fingerprints. As Officer Fitzgibbon testified, this window was at eye-level and was located in the “front porch” area of the house. *Id.* at 8-9.

Officer Fitzgibbons successfully lifted a number of fingerprints from the “outside glass pane of the window” and submitted the prints for analysis.²

² Officer Fitzgibbons testified that he investigated the interior of the house, but determined that “there was nothing that a print could be lifted from.” N.T. Adjudicatory Hearing, 11/17/10, at 14.

Id. at 12 and 15. Analysis revealed that “all of the prints match[ed]” Appellant’s fingerprints.³ *Id.* at 18-20.

Appellant testified at the adjudicatory hearing. As Appellant testified, he lives on Alcott Street and his friend lives next door to the Smiths. *Id.* at 27. Although Appellant testified that he did not remember what he did on September 2, 2010, Appellant speculated that his fingerprints might have ended up on the Smiths’ window when he solicited business for his personal, summertime lawn-mowing job. *Id.* at 31-32.

The juvenile court determined that Appellant had committed the acts that were alleged and, thus, adjudicated Appellant delinquent. Order of Adjudication, 11/17/10, at 1. On March 24, 2011, the juvenile court entered its order of disposition, placing Appellant on probation under the supervision of the Philadelphia Juvenile Probation Department. Order of Disposition, 3/24/11, at 1. Appellant filed a timely notice of appeal and now raises the following claim to this Court:⁴

Was not the evidence insufficient to sustain [A]ppellant’s adjudication of delinquency for burglary . . . where the only evidence linking [A]ppellant to the crime was the juvenile’s

³ Ms. Smith testified that she did not know Appellant and that she never gave Appellant permission to be inside of her house. N.T. Adjudicatory Hearing, 10/15/10, at 8.

⁴ The juvenile court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Appellant complied and preserved the claim he currently raises before this Court.

fingerprints located on the outside of a front window facing the street?

Appellant's Brief at 3.

Appellant challenges the sufficiency of the evidence supporting his adjudication of delinquency. We review Appellant's sufficiency challenge under the following standard:

When a juvenile is charged with an act that would constitute a crime if committed by an adult, the Commonwealth must establish the elements of the crime by proof beyond a reasonable doubt. When considering a challenge to the sufficiency of the evidence following an adjudication of delinquency, we must review the entire record and view the evidence in the light most favorable to the Commonwealth.

In determining whether the Commonwealth presented sufficient evidence to meet its burden of proof, the test to be applied is whether, viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences therefrom, there is sufficient evidence to find every element of the crime charged. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by wholly circumstantial evidence.

The facts and circumstances established by the Commonwealth need not be absolutely incompatible with a [juvenile's] innocence. Questions of doubt are for the hearing judge, unless the evidence is so weak that, as a matter of law, no probability of fact can be drawn from the combined circumstances established by the Commonwealth.

In re A.V., 48 A.3d 1251, 1252-1253 (Pa. Super. 2012) (internal quotations and citations omitted). Further, in order for circumstantial evidence to support an adjudication of delinquency, the evidentiary inferences "must flow from facts and circumstances proven in the record, and must be of such volume and quality as to overcome the presumption of innocence and satisfy

the [factfinder] of an accused's [actions] beyond a reasonable doubt." *Commonwealth v. Matthews*, 870 A.2d 924, 928 (Pa. Super. 2005) (*en banc*) (internal quotations and citations omitted). The factfinder "cannot base a conviction [or an adjudication] on conjecture and speculation and a verdict [or an adjudication] which is premised on suspicion will fail even under the limited scrutiny of appellate review." *Id.* (internal quotations and citations omitted).

According to Appellant, the Commonwealth failed to satisfy its burden of production in this case. As Appellant argues, he was adjudicated delinquent for acts that would have constituted burglary "based solely on fingerprints found on the **outside** of a front window at a property which had been burglarized." Appellant's Brief at 8 (emphasis in original). Appellant claims that this evidence was insufficient to sustain his delinquency adjudication because there was no evidence as to when he placed his fingerprints on the window. Further, Appellant claims that, because the window was in a generally accessible location (in front of the house and at eye-level), "the possibility of innocent contact with [the victims'] window [was] too great to sustain" the delinquency adjudication. *Id.* at 8 and 9 (internal quotations and citations omitted). We are compelled to agree.

The courts of this Commonwealth "recognize the accuracy of fingerprint evidence for purposes of identification." *Commonwealth v. Cichy*, 323 A.2d 817, 818 (Pa. Super. 1974) (*en banc*). Thus, when a defendant's latent fingerprints are found at or near the scene of the crime,

the fingerprint evidence tends to show that the defendant was physically present in that specific location. Yet, such evidence does not necessarily show that the defendant was present at the time the crime was committed or that the defendant committed the crime. Rather, as we have held, “the probative value of [fingerprint] evidence depends entirely on the circumstances of each case. Unless those circumstances are such that the fingerprint could only have been impressed at the time and place the crime was committed such evidence is insufficient to sustain a conviction.” *Id.* In following, we have explained:

If the Commonwealth’s expert can establish that the prints were impressed at or about the time the crime was committed or other circumstances indicate impression at that time, and the defendant’s innocent presence is excluded, such evidence has been held sufficient to convict. On the other hand, the evidence loses all probative value if the time of impression is not reasonably limited to the time of the crime, and the prints [are] found in a generally accessible location.

Id. at 819 (internal citations omitted).

For example, in *Cichy*, an *en banc* panel of this Court concluded that the attendant circumstances and totality of the evidence – surrounding the discovery of the defendant’s latent fingerprints in a burglarized gasoline station – were insufficient to support the defendant’s burglary conviction. *Cichy*, 323 A.2d at 819.

In *Cichy*, a gasoline station was burglarized and a cigarette machine in the station was partially pried open. During the ensuing investigation, the

police discovered a package of Marlboro cigarettes on the floor of the station, lodged between the cigarette machine and the wall. The defendant's fingerprints were lifted from this cigarette package and, based entirely upon this evidence, the defendant was convicted of burglarizing the station. The defendant appealed to this Court and we vacated the defendant's conviction. *Id.* at 818.

In vacating the defendant's conviction, the *Cichy* Court emphasized that – although the defendant's fingerprints were found at the scene of the crime – there was simply no proof as to **when** the fingerprints were impressed. *Id.* at 818-819. Specifically, the *Cichy* Court held, the attendant circumstances did not support an inference that the defendant was present in the station at the time the crime was committed because the fingerprint was lifted from a readily movable object, the fingerprint was found “in a public place with which a number of people may have had innocent contact,” the owners of the station could not eliminate the possibility that the cigarette package was on the floor prior to the burglary, and “the Commonwealth's expert did not offer an opinion as to when the print was impressed.” *Id.* at 819. As a result, this Court vacated the defendant's conviction.

Similarly, in *Commonwealth v. Henry*, we concluded that the attendant circumstances surrounding the discovery of the defendant's fingerprints failed to support the inference that the defendant was present at the time the crime was committed. We thus concluded that the evidence

was insufficient to support the defendant's conviction. ***Commonwealth v. Henry***, 875 A.2d 302, 306 (Pa. Super. 2005).

In ***Henry***, a vehicle possessed by an agent from the Bureau of Alcohol, Tobacco, and Firearms ("ATF") was stolen. Two days later, the police discovered the agent's vehicle sitting on the side of the highway, with the driver's side door lock broken. The defendant's fingerprints were discovered inside of the vehicle, on an ATF placard that was "normally situated in the window of [the] ATF vehicle to avoid ticketing by local authorities while [the AFT agent was] on official business." ***Id.*** at 303-304. Based upon the fingerprint evidence, the defendant was arrested and convicted of unauthorized use of a motor vehicle – which is a crime that requires the Commonwealth to prove that the defendant "operated" the vehicle in question. ***Id.*** at 304.

On appeal to this Court, the defendant claimed that the evidence was insufficient to support his conviction, as the fingerprint evidence did not support an inference that he operated the vehicle. We agreed and vacated the defendant's conviction. As we explained:

[The defendant's] fingerprint on the placard reveals only that at some point Appellant was present in the vehicle and nothing more. Since the vehicle was found more than a day after being reported stolen with the driver's side door lock broken, Appellant could have had access to the interior of the vehicle after it was abandoned by the perpetrator who stole the car. The fingerprint alone is insufficient to establish operation, *i.e.*, [conscious] control or dominion over the vehicle, beyond a reasonable doubt. As operation of the vehicle is an essential element of the crime of

unauthorized use of automobiles, and the evidence presented was insufficient to establish this element, we must reverse.

Id. at 306.

We applied the teachings of both *Cichy* and *Henry* in the case of *In the Interest of M.J.H.*, 988 A.2d 694 (Pa. Super. 2010). There, a clothing store was burglarized and, during the burglary, two clothing racks were overturned. *In the Interest of M.J.H.*, 988 A.2d at 695. The police lifted M.J.H.'s fingerprints from one of the overturned clothing racks and M.J.H. was arrested. During the adjudicatory hearing, the Commonwealth's fingerprint expert testified that M.J.H.'s latent fingerprints – discovered on the overturned clothing rack – were “fresh” and were located “on the back of the rack where customers would not need access.” *Id.* Moreover, the shop owners testified that they habitually wiped down their clothing racks every Sunday night and that they “did not think” M.J.H. had been in their store between the time of the cleaning and the early-Tuesday morning burglary. *Id.* at 696. The juvenile court adjudicated M.J.H. delinquent and M.J.H. appealed to this Court.

On appeal, we held that the evidence was insufficient to establish that M.J.H. was present in the store at the time of the burglary and, thus, we vacated M.J.H.'s delinquency adjudication. As was true in *Cichy*, essential to our holding in *M.J.H.* was the fact that the accused's fingerprints were discovered in a public place and upon an “object with which he could have had innocent contact.” *In the Interest of M.J.H.*, 988 A.2d at 698.

Further, since it was possible that M.J.H. was legitimately present in the store during the time between the cleaning and the burglary, we concluded that “the circumstances [could not] reasonably exclude the possibility that [M.J.H.’s latent] fingerprint was impressed at a time and place other than that of the offense.” *Id.* at 699. We thus vacated the delinquency adjudication and concluded our opinion with a warning:

To affirm the disposition in this matter would stand for the proposition that a customer who leaves a fingerprint after touching a clothing rack in a store open to the public, that store subsequently is burglarized, can be adjudicated of that offense beyond a reasonable doubt solely on the presence of his fingerprint. Such a result is untenable.

Id.

Contrariwise, this Court has rejected sufficiency challenges where the attendant circumstances surrounding the discovery of the latent fingerprints supported the inference that the accused was present at the scene of the crime and “at or about the time the crime was committed.” *Cichy*, 323 A.2d at 819. The most obvious example of this proposition, as epitomized by both *Commonwealth v. Wilson* and *Commonwealth v. Price*, is where an accused’s fingerprints are inexplicably found inside of – and near the point of illegal entry of – a burglarized, private residence. *See Commonwealth v. Wilson*, 392 A.2d 769 (Pa. Super. 1978); *Commonwealth v. Price*, 420 A.2d 527 (Pa. Super. 1980). In such circumstances, we have concluded that “[t]here is simply no logical explanation for finding [the accused’s] fingerprints [inside of the victim’s

private] residence, except that [the accused] inadvertently placed them there while burglarizing the [residence]. *See, e.g., Wilson*, 392 A.2d at 771.

We have also rejected sufficiency challenges where the latent fingerprint was impressed in a location that was “not susceptible to an inference of innocent contact.” *Commonwealth v. Marrero*, 914 A.2d 870, 872 (Pa. Super. 2006). For example, in *Marrero*, the victim’s vehicle was stolen and, two days later, the vehicle was recovered – but with the engine removed. Subsequent investigation revealed the defendant’s latent fingerprints under the hood of the vehicle, “in the interior of the engine compartment.” *Id.* at 872. As a result of this discovery, the defendant was arrested and convicted of theft crimes. *Id.* The defendant appealed and claimed that the evidence was insufficient to support his convictions.

In affirming the defendant’s judgment of sentence, we reasoned that the theft involved the removal of the vehicle’s engine and that the defendant’s latent fingerprints were found in a location that was consistent with such a theft. Moreover, and importantly, we explained:

the location [of the latent fingerprints] under the hood was not susceptible to an inference of innocent contact. [The victim] testified that he did not know [the defendant] and did not know of any reason why [the defendant] would have legitimately been under the hood of his vehicle. . . . Accordingly, the presence of [the defendant’s] fingerprints under the hood allowed for an inference that he was the person who removed the engine.

Id. at 872-873. Therefore, in *Morrero*, we concluded that the evidence was sufficient to support the convictions, as the defendant's fingerprints were inexplicitly found at the scene of the crime and in a location that was "not susceptible to an inference of innocent contact." *Id.* at 872. We concluded that, under these circumstances, the factfinder could permissibly infer that the fingerprints were impressed at the time the crime was committed. *Id.* at 873.

In *Commonwealth v. Hunter*, this Court employed a similar analysis to rebuff the defendant's challenge to the sufficiency of the evidence. *Commonwealth v. Hunter*, 338 A.2d 623 (Pa. Super. 1975) (*en banc*). In *Hunter*, an electronics plant was burglarized. To illegally enter the plant, the burglar removed a piece of sheet metal that "had been positioned a week earlier [to cover] a broken [window]." *Id.* at 624. Moreover, as this Court highlighted, "[t]he distance between the window and the ground was approximately ten feet." *Id.*

Following an investigation, the police discovered that Mr. Hunter's fingerprints were impressed on the piece of sheet metal, that Mr. Hunter was a former employee of the electronics plant, and that, six months prior to the burglary, the employer-employee relationship between Mr. Hunter and the plant had ended. *Id.* Mr. Hunter was then arrested and convicted of burglary and other, related theft crimes.

Mr. Hunter appealed to this Court and claimed that the evidence was insufficient to support his convictions. We rejected Mr. Hunter's challenge

and held that the attendant circumstances surrounding the latent fingerprints were sufficient to support the inference that Mr. Hunter was present at the time of the burglary. *Id.* at 625. As this Court emphasized, the most important of these attendant circumstances – and the fact that distinguished *Hunter* from *Cichy* – was that Mr. Hunter’s latent fingerprints were impressed at the point of illegal entry “**some ten feet above ground level.**” *Hunter*, 338 A.2d at 624-625 (emphasis added). We concluded that this fact made it “extremely” unlikely that Mr. Hunter could have had “legitimate innocent contact” with the sheet metal. *Id.* at 625. Therefore, we held that, under these facts, the factfinder could reasonably have inferred that Mr. Hunter left his fingerprint impressions at the time of the burglary. *Id.*

Applying the above line of cases to the facts at bar, we conclude that the evidence was insufficient to support Appellant’s delinquency adjudication. Specifically, we conclude that the evidence was insufficient to prove that Appellant’s latent fingerprints were impressed “at or about the time the crime was committed.” *Cichy*, 323 A.2d at 819. We, therefore, vacate both the order of disposition and the adjudication of delinquency.

In this case, “viewing the evidence in the light most favorable to the Commonwealth[] and drawing all reasonable inferences therefrom,” the relevant evidence is as follows. *In re A.V.*, 48 A.3d at 1253 (internal quotations and citation omitted). Appellant’s latent fingerprints were discovered on the “outside glass pane” of the Smiths’ first-floor, street-

facing, front window. N.T. Adjudicatory Hearing, 11/7/10, at 8-9 and 12. This window was at eye-level and was located in the “front porch” area of the Smith’s City of Philadelphia house. *Id.* at 8-9. Moreover, and finally, this window served as the point of illegal entry into the Smiths’ private residence at the time of the burglary. N.T. Adjudicatory Hearing, 10/15/10, at 7 and 12.

To be sure, the above facts support the inference that Appellant – at some point – touched the Smiths’ window. Yet, as was true in *Cichy*, *Henry*, and *M.J.H.*, the facts of this case do not establish beyond a reasonable doubt that Appellant touched the Smiths’ window “at or about the time the crime was committed.” *Cichy*, 323 A.2d at 819.

First, the “location” of Appellant’s latent fingerprints does not support the inference that Appellant was present at the time the crime was committed. Rather, in this case, Appellant’s latent fingerprints were found on the outside pane of an **eye-level, street-facing, front house window in a city neighborhood**. Thus, and in contrast to *Hunter* – where the defendant’s fingerprints were impressed on an object that was ten feet above the ground – Appellant’s fingerprints were found “in a public place [and in an area in] which a number of people may have had innocent

contact.” *Cichy*, 323 A.2d at 819; *In the Interest of M.J.H.*, 988 A.2d at 698.⁵

Moreover, the Commonwealth’s remaining evidence simply does not support the inference that Appellant’s contact with the window was anything other than innocent. For example, the Commonwealth presented no evidence as to the “positioning” of Appellant’s fingerprints. Thus, there is no

⁵ Within its brief to this Court, the Commonwealth relies heavily on *Hunter*. Indeed, the Commonwealth claims that its case is even stronger than *Hunter*, as Appellant’s fingerprints were found at the point of illegal entry into a private residence – as opposed to a public business. Commonwealth’s Brief at 5. We agree that the character of the premises where the fingerprint was impressed is a relevant factor in determining whether the attendant circumstances, surrounding the latent fingerprint, are “susceptible to an inference of innocent contact.” *See Marrero*, 914 A.2d at 872. However, as was explained above, this is not the only factor. Rather, when a defendant’s latent fingerprints are discovered at the scene of the crime, the court must determine whether the totality of the evidence supports the inference that the defendant was present “at or about the time the crime was committed.” *Cichy*, 323 A.2d at 819. In *Hunter*, the attendant circumstances supported the inference, as the latent fingerprints were discovered on an object that was ten feet above the ground. *Hunter*, 338 A.2d at 624. Thus, in *Hunter*, the fingerprints were located on an object and in a place that was “not susceptible to an inference of innocent contact” – and, because of this, the factfinder could reasonably infer that the fingerprints were impressed at the time of the burglary. *Id.* at 624-625. In the case at bar, however, Appellant’s latent fingerprints were impressed on the outside pane of an eye-level, street-facing, front house window in a city neighborhood. Therefore, in contrast to *Hunter*, Appellant’s fingerprints were discovered “in a generally accessible location” and upon an object that was “susceptible to an inference of innocent contact.” As such, the location of Appellant’s fingerprints does not support the inference that Appellant touched the window “at or about the time the crime was committed.” *Cichy*, 323 A.2d at 819.

evidence that Appellant's fingerprints were placed in such a way as to suggest that Appellant was attempting to push the window up from the outside. There was also no evidence that Appellant's latent fingerprints were recovered from the window latch, handle, or locking mechanism. Further, no other, independent evidence exists that would demonstrate that Appellant's fingerprints were placed on the window "at or about the time the crime was committed." **Cichy**, 323 A.2d at 819. For instance, there is no evidence as to when the Smiths last washed their windows and the Commonwealth's forensic officer did not provide an opinion as to the "freshness" of the prints.

The attendant circumstances, therefore, do not support the inference that Appellant placed his fingerprints on the Smiths' window "at or about the time the crime was committed." **Cichy**, 323 A.2d at 819. To echo **M.J.H.**:

Viewing all the evidence in the light most favorable to the Commonwealth, it is simply not sufficient to find [A]ppellant culpable beyond a reasonable doubt. To affirm the disposition in this matter would stand for the proposition that [a pedestrian] who leaves a fingerprint after touching [an eye-level, street-facing, front window in a city neighborhood], that house subsequently is burglarized, can be adjudicated of that offense beyond a reasonable doubt solely on the presence of his fingerprint. Such a result is untenable.

In the Interest of M.J.H., 988 A.2d at 699.

We are constrained to vacate both Appellant's order of disposition and delinquency adjudication.

Order vacated. Appellant discharged. Jurisdiction relinquished.