[Cite as *In re D.M.C.*, 2009-Ohio-6667.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	Nos. 09AP-484 (C.P.C. No. 08JU-01-03)
D.M.C.,	:	09AP-486 (C.P.C. No. 09JU-02-2128)
(Appellant).	:	09AP-487 (C.P.C. No. 07JU-10-15039)
	:	09AP-488 (C.P.C. No. 07JU-12-17536)
	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on December 17, 2009

Giorgianni Law LLC, and *Paul Giorgianni*, for appellant D.M.C.

Ron O'Brien, Prosecuting Attorney, and *Katherine J. Press*, for appellee State of Ohio.

APPEALS from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

McGRATH, J.

{¶1} Defendant-appellant, D.M.C., appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, wherein the trial court adopted the magistrate's decision reaffirming appellant a delinquent minor on a charge of burglary in violation of R.C. 2911.12(A)(2), a second-degree felony.

{¶2} This case arises out of a burglary that occurred on February 18, 2009, at the home of Kay Penn, who testified a 42-inch flat-screen television and a 32-inch television were taken from her home. Though both televisions were returned the same evening and were functional, the larger of the two had been damaged.

{¶3} Two persons who witnessed the burglary, Chris Young and Kelly Myers, also testified at appellant's hearing. Ms. Young and Ms. Myers both lived in an apartment building adjacent to Ms. Penn's home. Ms. Myers was visiting Ms. Young when Ms. Young asked Ms. Myers to look at something out the back window.

{¶4} Ms. Young testified that near Ms. Penn's home she saw a young black male wearing a "royal blue jogging suit, pants and jacket" with "a real bright orange" piping on it and a toboggan hat. (Apr. 2, 2009 Tr. 20.) Ms. Young saw another man hand a flat-screen television from Ms. Penn's home to the male in the jogging suit who ran out of the yard with it. Two other men carrying a larger flat-screen television then exited Ms. Penn's home. The men dropped the television then picked it up and ran with it.

{¶5} Ms. Myers testified in a manner similar to that of Ms. Young. Ms. Myers described seeing a man exit Ms. Penn's house and hand a big television to another man wearing a blue and orange jacket and a black toboggan hat, who then ran away with the television. Ms. Myers also described seeing two men leave the house with a larger television. Both Ms. Young and Ms. Myers identified a photograph of appellant taken later that evening as wearing the same clothing they observed being worn by the man who ran away with the first television taken from Ms. Penn's home.

{¶6} Columbus Police Officer Chris Cline responded to the burglary call and saw three individuals, including a male in a colorful jacket, standing by a car. The men were

attempting to put a large flat-screen television into the car, but when they saw the police, they dropped the television and ran. Columbus Police Officer Robert Reffitt also responded to the burglary call. As he approached, Officer Reffitt saw appellant, who was wearing "a blue and orange type coat, pretty distinctive" run across the street near Ms. Penn's residence. (Apr. 2, 2009 Tr. 62.) Officer Reffitt was able to apprehend appellant on the south side of Ms. Penn's home.

{¶7} Appellant testified on his own behalf. Appellant denied knowing his co-defendant and denied taking part in the burglary. Appellant admitted he was wearing the clothing identified by Ms. Myers and Ms. Young as that worn by one of the burglars, but said he was in the area only to look for his girlfriend.

{¶8} Appellant's counsel has advised this court that he has reviewed the record and cannot find a meritorious claim for appeal. As a result, appellant's counsel has filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, and has moved this court to withdraw as counsel. Framed as potential issues for our review under *Anders* are the following:

> [1.] The juvenile court's adjudication is contrary to the manifest weight of the evidence.
>
> [2.] Because D.M.C.'s conduct does not constitute "burglary," the juvenile court's adjudication is not supported by sufficient evidence.

{¶9} In *Anders***,** the United States Supreme Court held that if, after a conscientious examination of the record, a defendant's counsel concludes that the case is wholly frivolous, counsel should so advise the court and request permission to withdraw. Id. at 744. Counsel must accompany the request with a brief identifying anything in the

record that could arguably support the client's appeal. Id. Counsel also must: (1) furnish the client with a copy of the brief and request to withdraw; and (2) allow the client sufficient time to raise any matters that the client chooses. Id.

{¶10} Upon receiving an *Anders* brief, we must conduct a full examination of all the proceedings to decide whether the case is wholly frivolous. *Penson v. Ohio* (1988), 488 U.S. 75, 80, 109 S.Ct. 346, 350, citing *Anders* at 744. After fully examining the proceedings below, if we find only frivolous issues on appeal, we then may proceed to address the case on its merits without affording appellant the assistance of counsel. *Penson* at 80. However, if we conclude that there are non-frivolous issues for appeal, we must afford appellant the assistance of counsel to address those issues. *Anders* at 744; *Penson* at 80.

{¶11} Here, appellant's counsel satisfied the requirements in *Anders*. Appellant did not file a pro se brief. Accordingly, we will examine the potential assignments of error and the entire record below to determine if this appeal lacks merit. In his potential assigned errors, appellant challenges both the sufficiency and the weight of the evidence pertaining to his conviction. Because these two assignments of error are interrelated, we will address them together.

{¶12} The Supreme Court of Ohio described the role of an appellate court presented with a sufficiency-of-the-evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant

> inquiry 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)

{¶13} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. Thus, a jury verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks,* supra.

{¶14} A manifest-weight argument is evaluated under a different standard. "The 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. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16, citation omitted. In order for a court of appeals to reverse the judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court must disagree with the fact finder's resolution of the conflicting testimony. *Thompkins* at 387. The court, 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 jury 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} A defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17.

{¶16} We find that based on the evidence and testimony of all the witnesses, viewed in a light most favorable to the prosecution, as is required, the evidence

introduced at trial was sufficient to support the trial court's finding that appellant was a delinquent minor having committed the offense of burglary.

{¶17} Similarly, we do not find that the trial court's findings are against the manifest weight of the evidence. A conviction is not against the manifest weight of the evidence simply because the trier of fact chose to believe the prosecution's witnesses and chose not to believe appellant. *State v. Rippey*, 10th Dist. No. 04AP-960, 2005-Ohio-2639. The weight given to the evidence and the determination of the credibility of the witnesses was within the province of the trial court as the trier of fact. *DeHass* at paragraph one of the syllabus. Furthermore, it was within the province of the trial court to resolve not only the inconsistencies within the individual testimony of the witnesses, but also the inconsistencies between them. *State v. Lakes* (1964), 120 Ohio App. 213, 217. After review of the entire record, we cannot conclude here that the trial court lost its way and created a manifest miscarriage of justice. Accordingly, we determine that the trial court's finding appellant a delinquent minor was not against the manifest weight of the evidence.

{¶18} Because our review of the entire record reveals no non-frivolous issues for appeal, and the issues assigned in appellant's brief lack merit, we grant the motion of appellant's counsel to withdraw. Consequently, appellant's two potential assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is hereby affirmed.

Motion to withdraw granted; judgment affirmed.

BRYANT and KLATT, JJ., concur.

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