[Cite as *In re R.J.D.*, 2010-Ohio-1277.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN THE MATTER OF:	:	**O P I N I O N**
R. J. D., IV., DELINQUENT CHILD	:	**CASE NO. 2009-L-071**
	:	

Juvenile Appeal from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2008 DL 01511.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Appellee).

Paul R. LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, R. J. D., IV, a delinquent child, appeals from the judgment of the Lake County Court of Common Pleas, Juvenile Division, adopting the decision of the magistrate finding the charges of burglary and theft to be true. For the reasons below, the judgment is affirmed.

{¶2} On July 23, 2008, the state of Ohio filed a complaint alleging appellant was a delinquent child. As a foundation for the complaint, the state alleged appellant committed two burglaries, in violation of R.C. 2911.12(A)(2), felonies of the second degree if committed by an adult; and two petty thefts, in violation of R.C. 2913.02(A)(1),

misdemeanors of the first degree if committed by an adult. Appellant entered a plea of "not true" to the complaint.

{¶3} On March 20, 2009, the matter proceeded to trial before the juvenile court magistrate. At trial, the following evidence was adduced:

{¶4} On March 31, 2008, Doug Price discovered that two flat-screen televisions had been taken from a fully furnished apartment owned by his company, the K & G Group. According to Price, the apartment is intermittently occupied and used by guests of tenants of the business complex. Although Price testified it could be occupied at any given time, no occupants were present in the apartment at the time of the incident.

{¶5} Several weeks prior to the incident underlying this appeal, Price's son told him he was spending the night at a neighbor's house. However, Price later learned the boy had spent the night at the apartment with several friends. C.P., another juvenile who knew Price's son as well as appellant, was at the apartment for the overnight party. C.P. testified numerous people were at the apartment that night but appellant was not among them.

{¶6} According to C.P., late on March 29, 2008, he, appellant, K.D. (another juvenile), and Eric Rocco (an adult), were at a friend's house when they decided to go to the apartment and take "some TV's." C.P. testified he drove the entire group to the property and parked down the street. The group walked through a wooded area and arrived at a fence that encircled the property. A tree had fallen over the fence and the group used the tree as a means to scale the fence. They entered the apartment, and "*** just started looking around and *** [appellant] picked up the first TV and then I asked if I could get a second one and I got a second one." They carried the T.V.s out of

the apartment and over the fence. According to C.P., appellant spent the rest of the night with the group, away from home.

{¶7} K.D. provided similar testimony of the events on the evening of the episode; he further confirmed that appellant was involved in the theft of the T.V.s. K.D. stated he was "100 percent sure" appellant stayed with the group the remainder of the night sleeping at K.D.'s house.

{¶8} Appellant presented three witnesses in his defense. First, appellant's former girlfriend and her sister testified they lived two houses away from appellant's home at the time of the incident. They testified appellant was at their house throughout the day of March 29 and stayed at their house overnight. Appellant's mother also testified appellant spent the evening in question at the neighbor's house, returning home "intermittently" when she asked him to "do things."

{¶9} After receiving evidence and hearing closing arguments, the magistrate found one charge of burglary and one charge of theft to be not true. However, the magistrate found one charge of burglary and one charge of theft to be true. Appellant filed objections to the magistrate's decision; the objections were overruled and the decision was adopted by the trial court.

{¶10} Appellant now appeals and assigns two errors for our review. His first assignment of error provides:

{¶11} "The trial court erred to the prejudice of the delinquent child-appellant when it denied his motion for acquittal made pursuant to Crim.R. 29(A)."

{¶12} An inquiry into the sufficiency of the evidence asks whether the state introduced adequate evidence to support the verdict as a matter of law. *State v. Ansell*, 11th Dist. No. 2008-P-0111, 2009-Ohio-4802, at ¶43. "An appellate court reviewing whether the evidence was sufficient to support a criminal conviction examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the mind of the average juror of the defendant's guilt beyond a reasonable doubt." *State v. Troisi*, 179 Ohio App.3d 326, 329, 2008-Ohio-6062. A reviewing court may not reweigh or reinterpret the evidence; rather, the proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶13} Under his first assigned error, appellant challenges the state's proof of the burglary charge. Appellant was found guilty of burglary in violation of R.C. 2911.12(A)(2), which states:

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

{¶15} "* * *

{¶16} "(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 the purpose to commit in the habitation any criminal offense."

{¶17} Appellant claims the state failed to prove that any person "[was] present or likely to be present" in the home from which the T.V.s were taken.

{¶18} In determining whether persons are likely to be present under the statute a court does not look to the defendant's subjective knowledge. Rather, the issue is whether it was objectively likely that persons were likely to be there. *In re Meatchem,* 1st Dist. No. C-050291, 2006-Ohio-4128, ¶16. The State must present specific evidence that people were present or likely to be present. Id; *State v. Kilby* (1977), 50 Ohio St.2d 21, paragraph one of the syllabus. Courts have held that "'[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. Miller*, 2d Dist. No. 2006 CA 98, 2007-Ohio-2361, ¶15, quoting *State v. Green* (1984), 18 Ohio App.3d 69, 72.

{¶19} The evidence offered at trial indicated that, although the apartment was not actually occupied on the night of the crimes, Doug Price, owner of the property, testified tenants of the business complex where the apartment was located had regular access to the premises and it "[c]ould be occupied at any point in time." The apartment was fully furnished with furniture and appliances to meet the goal of having it "ready to be occupied at any point in time."

{¶20} Moreover, Price testified his son, a juvenile not involved in the burglary and theft, has regular access to the apartment. Specifically, Price stated his son had a key to the main property and had controlled access to the apartment, i.e., if Price gave his son permission, he could go into the apartment. Furthermore, Price testified that, approximately three weeks before the incident, Price's son entered the apartment without Price's permission and hosted a party for various other children.

{¶21} The evidence therefore established, the apartment could, at any time, be properly occupied by guests of the various tenants of the business complex. It could also be occupied at any given time by Price's son, with or without Price's authorization. Under these circumstances, it is objectively clear one could have a logical expectation that a person could be present. See *State v. Allen* (May 1, 1998), 11th Dist. No. 97-L-043, 1998 Ohio App. LEXIS 1937; *Miller,* supra; see, also, *State v. Cravens* (June 25, 1999), 1st Dist. No. C-980526, 1999 Ohio App. LEXIS 2873. When viewed in a light most favorable to the state, we hold there was sufficient evidence to prove appellant trespassed in the apartment and someone was likely to be present.

{¶22} Appellant's first assignment of error is overruled.

{¶23} His second assignment of error provides:

{¶24} "The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of true against the manifest weight of the evidence."

{¶25} While a test of evidential sufficiency requires a determination of whether the state has submitted enough evidence to meet its burden of production, a manifest weight inquiry examines whether the state met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52. (Cook, J., concurring). That is, a manifest weight challenge concerns:

{¶26} "'[T]he inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible* evidence sustains the issue which is to be established before them. Weight is not a question of

mathematics, but depends on its *effect in inducing belief*.'" (Emphasis sic.) Id. at 387, citing Black's Law Dictionary (6th Ed. 1990).

{¶27} The appellate court must bear in mind the trier of fact's superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances, when "the evidence weighs heavily against the conviction." *Thompkins*, supra. As a result, a reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Johnson* (1991), 58 Ohio St.3d 40, 41.

{¶28} Appellant asserts the trial court lost its way in adopting the magistrate's decision due to various inconsistencies or uncertainties in the evidence. First, appellant points out that K.D. was unsure where the building in which the incident took place was located. We do not believe the fact that one of the juvenile perpetrators could not precisely name the particular political subdivision in which the crime took place impacts his remaining testimony about the details of the crime. K.D. was able to provide specific information about the crime and these details were corroborated by other evidence. Accordingly, his uncertainty regarding where the buildings were located is of little consequence.

{¶29} Further, appellant points out K.D. indicated the group entered the building through an unlocked door; however, Price testified the locks on the apartment were "smashed off." Although this evidence is inconsistent, inconsistencies do not render a

conviction, or a determination that a complaint is true, against the manifest weight of the evidence. See, e.g., *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236, 1996 Ohio App. LEXIS 2245. It is the factfinder's province to take note of the inconsistencies and resolve or discount them accordingly. "A factfinder is free to believe all, some, or none of the testimony of each witness appearing before it." *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29.

{¶30} Here, K.D.'s testimony that the door was unlocked was corroborated by Det. Begovic, i.e., that the door was unlocked because there was no evidence of forced entry. In this regard, the factfinder reasonably chose to believe this testimony and overlook Price's statement regarding the condition of the lock.

{¶31} Next, appellant notes that K.D. testified that each individual took turns carrying the T.V.s so each would be equally culpable. Alternatively, C.P. testified the T.V.s were passed from person to person simply because they were too heavy. This does not represent a necessary inconsistency. K.D. stated the group "kind of" talked about shared culpability; in so doing, it is reasonable to conclude that in "kind of" discussing this, not everybody was aware of the motivation to which K.D. testified. Regardless of the reason(s) why the T.V.s were passed to each member of the group, the underlying evidence was consistent about appellant's participation. The same is true for K.D.'s poor recollection of the time of night the T.V.s were taken; appellant points out that, on direct, K.D. testified he was on Price's property around midnight. On redirect, however, he stated the T.V.s were taken around 9:00 p.m. This deviation is minor considering K.D. was consistent in his testimony that the crime occurred at night.

{¶32} Appellant next contends that C.P.'s credibility is dubious because he admitted to trading his testimony for consideration in the case. Simply because he reached an agreement with the state regarding his testimony does not imply K.D. was lying. After all, C.P.'s version of salient events was essentially corroborated by K.D.'s.

{¶33} Finally, appellant asserts the weight of the evidence supports his alibi defense which was espoused by two neighbors and his mother. However, as discussed above, the factfinder is free to discount witness' testimony which it believes is not credible. *Thomas,* supra. Further, even where a defendant's version of events differs completely from the prosecution's theory of the case, the factfinder does not lose its way if it finds the prosecution's position more credible. *State v. Jenkins,* 11th Dist. No. 2006-T-0058, 2007-Ohio-4227, at ¶71. Given these points, the trial court's decision to believe the state was not a manifest miscarriage of justice.

{¶34} Viewing appellant's points in their totality, we hold the evidence presented to the trial court is supported by the weight of the evidence.

{¶35} Appellant's second assignment of error is overruled.

{¶36} For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas, Juvenile Division, is hereby affirmed.

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.