[Cite as *State v. Broyles*, 2010-Ohio-1837.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 0072
	:	
	:	
WADE BROYLES	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Richland County Court of Common Pleas Case No. 2009 CR 138D
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	April 21, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. KIRSTEN GARDNER Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902	JOHN C. O'DONNELL 12 Park Avenue West, Ste. #300 Mansfield, Ohio 44902

Edwards, P.J.

{¶1} Defendant-appellant, Wade Broyles, appeals his conviction and sentence from the Richland County Court of Common Pleas on one count each of burglary and tampering with evidence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 6, 2009, the Richland County Grand Jury indicted appellant on one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree, and one count of tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree. At his arraignment on March 17, 2009, appellant entered a plea of not guilty to the charges.

{¶3} Subsequently, a jury trial commenced on April 30, 2009. The following testimony was adduced at trial.

{¶4} On February 11, 2009 at approximately 11:30 a.m., Jamie Lynn Payne stopped home from class to eat lunch. Payne, whose husband was at work in Delaware, testified that she did not normally go home at such time. When Payne pulled into her driveway, she found a strange car parked very close to her house. Payne described the car as being a 1990's Caprice silver station wagon that was in good condition and was "full of stuff." Transcript at 111. After parking her car next to the Caprice, Payne got out of her car and went to unlock the door to her house. When she put the keys in the door, she discovered that the door already was unlocked. Payne testified that she always locked the door before she left.

{¶5} At trial, Payne testified that she then looked up and saw that one of the six panes of glass in her door had been popped out and that the trim was pried off the door.

The entire windowpane had been removed. Payne then ran to her car and used the cell phone to call her husband. As she was on the phone with her husband, a man came running out of the house and "got in my face and started asking me, who the "F' are you,…" Transcript at 114. According to Payne, the man, who was approximately three feet away from her, seemed frantic. When asked, Payne stated that she had never seen this man before and that his tone was erratic and hostile.

{¶6} Payne then told the man, who she identified at trial as appellant, that she was the owner of the house and asked him what he had been doing in the same. The man told Payne that he had been driving by and saw someone enter Payne's house to rob it and that that he followed the person into the house to chase him out. The man did not provide Payne with a description of this person and did not call 9-1-1 to report the alleged break-in. Payne further testified that she did not see signs of any other people other than appellant at her house.

{¶7} Payne's husband told her to try and take a picture of appellant with her cell phone. As appellant ran and got into his car, Payne got into her car and moved it behind appellant's car in an attempt to block appellant in. After Payne jumped out of her car and went to take a picture of appellant's license plate, appellant tore off the 30 day tags on his car and then jumped back into his car. Payne testified that she was able to take a picture of appellant in his vehicle before he pulled out of her driveway at a high rate of speed.

{¶8} Payne did not enter her house until after the police arrived. The following testimony was adduced when she was asked what she found on the first floor:

{¶9} "On the first floor, all the doors were open. One of the bedrooms on the first floor is where my cats' bedroom is. And when we checked there, they were hiding under their beds, because they were definitely stirred up. I mean, you could tell that something was going on. Every door in that, closet doors, hallway doors, everything downstairs was open. So it looked like it was rummaged through basically." Transcript at 128.

{¶10} Payne also testified that the door leading to the stairs to the second floor, which was normally kept closed when it was cold outside, was open and that the door leading to the stairs to the third floor also was open. Nothing was missing from the house.

{¶11} At trial, Rosalee Beathler testified that she was driving when her vehicle was nearly struck by a car coming out of a driveway at a high rate of speed. The driveway was Payne's. Beathler, who swerved out of the way, was able to get a look at the driver who she identified as a white male with a beard wearing a ball cap. Beathler testified that she thought the man was crazy and that when she saw Jamie Lynn Payne coming down the drive with a phone in her hand, she told Payne to call the police. Payne told Beathler that appellant had robbed her. Once she was at home, Beathler called 9-1-1 to report the incident. When asked to describe the car that had nearly hit her car, Beathler testified that it was a very large light colored station wagon.

{¶12} Testimony was adduced at trial that the Bureau of Motor Vehicles (BMV) was contacted to search for a silver Caprice Classic or a Buick Roadmaster station wagon that had been issued temporary tags within the last thirty days. Sally Durnwald, the general manager of the Richland Carousel License Bureau, testified that two days

later, two people with a vehicle matching the description came in to the Bureau. There was a temporary tag in the left back window of the vehicle. Durnwald testified that she saw a man standing near the car who was 5'6" to 5'7" with brown hair. She identified appellant as the man. Durnwald then called the police and passed on the suspect's information as well as an address where the vehicle was registered.

{¶13} Based on the information obtained from the BMV and the photograph that Payne had taken, a warrant was issued for appellant's arrest. Appellant was pulled over while driving a 1992 silver Caprice Classic station wagon. A search of appellant's mobile home yielded a baseball hat in a bucket outside. Glass was lying across the bucket. Appellant's girlfriend, who lived in the mobile home with appellant, told the police that the hat "had not been there for like a day or so. She just noticed it." Transcript at 197.

{¶14} When questioned by police, appellant initially denied being at Payne's house. Once confronted with the pictures that Payne had taken, appellant admitted being at the house, but said that he had been there to do yard work. Appellant, however, was unable to provide the police with the name of the person who allegedly asked him to do the same or his or her address or phone number. When questioned by Detective William Bushong, appellant never said anything about seeing someone attempting to break into Payne's house or that he had attempted to chase that person off. Appellant next told the Detective that he had been at Payne's house to do sexual favors for her and that he had been "satisfying her for a while." Transcript at 223.

{¶15} Appellant then told Detective Bushong that he had known Payne since 2000 and that she was his drug dealer. Detective Bushong testified that appellant said

that he had bought crack from Payne since 2000. Bushong testified that appellant told him that he had seen Payne driving on February 11, 2009, and had followed her home to buy crack from her.

{¶16} At the conclusion of the evidence and the end of deliberations, the jury, on May 1, 2009, found appellant guilty of burglary and tampering with evidence. As memorialized in an Entry filed on May 5, 2009, appellant was sentenced to an aggregate sentence of seven years in prison.

{¶17} Appellant now raises the following assignment of error on appeal:

{¶18} "THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶19} While appellant, in the statement of his sole assignment of error, argues that his conviction for burglary in violation of R.C. 2911.12(A)(2) was against the manifest weight of the evidence, appellant, in the body of his assignment of error, argues that his conviction was against the manifest weight and sufficiency of the evidence. We note that appellant does not challenge his conviction for tampering with evidence.

{¶20} On review of a sufficiency of the evidence claim "[t]he 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶21} "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. Again, 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." *Id.*

{¶22} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine 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 judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, citing *State v. Martin* (1983), 20 Ohio App. 3d 172, 175, 485 N.E.2d 717.

{¶23} Appellant was convicted of one count of burglary in violation of R.C. 2911.12(A)(2). R.C. 2911.12(A)(2), reads as follows: "No person, by force, stealth, or deception, shall * * * [t]respass 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." R.C. 2909.01 defines "occupied structure" as follows: C) "Occupied structure" means any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer,

tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

{¶24} "(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

{¶25} "(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

{¶26} "(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

{¶27} "(4) At the time, any person is present or likely to be present in it."

{¶28} Appellant specifically argues that the evidence does not indicate that the victim, Jamie Lynn Payne, was present or likely to be present and that there was no evidence that he had intended to commit a criminal offense in Payne's house. Appellant notes that Payne testified that she would not normally be at home at 11:30 a.m. and that her husband worked in Delaware, Ohio. Appellant further notes that nothing was missing from Payne's home and that she testified that she did not see anything in appellant's hands when he came running out of her house.

{¶29} In *State v. Holt* (1969), 17 Ohio St.2d 81, 86, 246 N.E.2d 365, the Supreme Court of Ohio defined "likely" as follows: "In the case of *Robards v. Kansas City Public Service Co.,* 238 Mo.App. 165, 170, 177 S.W.2d 709, 712, it is said in the opinion:

{¶30} "'* * * that the word 'likely' is not equivalent to the words 'reasonably certain'; that 'reasonably certain' is a stronger expression than the word "likely."'

{¶31} "It has also been held that in law 'likely' means something less than 'probable.' *Conchin v. El Paso & Southwestern Rd. Co.,* 13 Ariz. 259, 264, 108 P. 260, 262, 28 L.R.A.,N.S., 88, 91, and *Blaine v. State,* 196 Miss. 603, 609, 17 So.2d 549, 550. Compare *Howard v. State,* 108 Ala. 571, 577, 18 So. 813, 816, where it was held that charges using the words 'likely' and 'likelihood' as a substitute for 'probable' and 'probability' were properly refused to avoid misleading and confusing the jury." See also *State v. Green* (1984), 18 Ohio App.3d 69, 72, 480 N.E.2d 1128.

{¶32} Further, in *Green,* supra at 72, the Tenth District found that a person "is likely to be present when a consideration of all the circumstances would seem to justify a legal expectation that a person could be present." Typically, where a burglary occurs and the occupying family is temporarily absent, a showing that the occupied structure is a permanent dwelling, which is regularly inhabited and the occupants were in and out on the day in question, will be sufficient evidence to support a conviction for aggravated burglary under R.C. 2911.11(A)(3).[1] *State v. Kilby* (1977), 50 Ohio St.2d 21, 25, 361 N.E.2d 1336.

{¶33} As noted by the court in *State v. Cantin*, (1999), 132 Ohio App.3d 808, 812, 726 N.E.2d 565, "[t]he fact that a residential dwelling has been burglarized does not lead to the presumption that someone was present or likely to be present in the structure. *State v. Fowler* (1983), 4 Ohio St.3d 16, 17, 445 N.E.2d 1119, 1119-1120. It must be shown that another person was present or likely to be present."

{¶34} In the case sub juice, the victim, Jamie Lynn Payne, testified that she was not normally home when the burglary occurred, but that she decided to stop home after

[1] Such section requires the State to show that, at the time of the trespass, a person was present or likely to be present.

class to eat lunch. She did not testify that she or anyone in her family was in and out on the day in question or that she or anyone in her family was likely to return home at "varying times." See *State v. Lockhart* (1996), 115 Ohio App.3d 370, 373, 685 N.E.2d 564. The victim, in *Lockhart*, came home from work on December 16, 1993, to find her home broken into. The court, in *Lockhart*, held, in relevant part as follows:

{¶35} "In the case *sub judice,* the only testimony regarding the victim's work hours was given by the victim, Redd. She testified that the burglary occurred on Thursday, December 16, 1993, and that on that day, she worked from approximately 8:30 a.m. until 5:00 p.m. Redd also testified that she does not work on Fridays. Redd did not testify that she was in and out of the house on the day in question or that she was likely to return home at varying times. The state, as a matter of law, failed to meet its burden of proving that a person was present or that there was a likelihood of a person being present within the occupied structure." Id at 373-374. See also *State v. McCoy,* Franklin App. No. 07AP-769, 2008-Ohio-3293. In *McCoy*, the appellant, who was convicted of one count of burglary in violation of R.C. 2911.12(A)(2), appealed. The appellant argued that his conviction was against the sufficiency and manifest weight of the evidence because no evidence was offered establishing that anyone was present or likely to be present in the Haydens' house at the time of the burglary. The court, in *McCoy*, stated in relevant part, as follows:

{¶36} "The only testimony on the issue of whether anyone was likely to be present at the Hayden home came from Loretta Hayden. She testified that when the burglary occurred, she was at work at her job at Berwick Alternative Elementary School, and never testified as to whether it was ever her practice to come home from the school

during the day, nor did she testify regarding the time she normally left for work. Hayden testified that her husband and two children also occupied the house, but no testimony was ever elicited as to what their daily schedules were and what the likelihood that they may have been home at the time of the burglary was…Appellee argues that we should … find that a jury could have made the inference that someone was likely to be present in the Hayden home because of the possibility that Hayden's husband or one of her children may have stayed home sick, or not have gone to work or school yet at the time of the burglary. However, the requested inference does not rise above the level of a mere possibility that someone may have been present." Id at paragraphs 24, 26.

{¶37} We find, based on the foregoing, that the State failed to meet its burden of proving that a person was present or was likely to be present when appellant trespassed in an occupied structure that was a permanent habitation of any person. We find, on such basis, that, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could not have found the essential elements of the crime of burglary proven beyond a reasonable doubt and that the evidence was insufficient to support a burglary conviction under R.C. 2911.12(A)(2).

{¶38} Appellant's sole assignment of error is, therefore, sustained.

{¶39} However, R.C. 2911.12(A)(3) sets forth a lesser-included offense to the offense of burglary in violation of R.C. 2911.12(A)(2). R.C. 2911.12(A)(3) states as follows: "No person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense."

{¶40} As noted by the court in *In re Meatchem*, Hamilton App. No. C-050291, 2006-Ohio-4128, "[t]hus, R.C. 2911.12(A)(3) omits the one element on which the state had failed to present sufficient evidence in this case-the presence or likely presence of someone other than an accomplice of the offender." Id at paragraph 23. Because burglary as defined in R.C. 2911.12(A)(2) cannot be committed without also having committed the lesser offense set forth in R.C. 2911.12(A)(3), we find that there was sufficient evidence to convict appellant of the lesser offense of burglary. While appellant contends that there was no evidence that he intended to commit a criminal offense while inside Payne's residence, we note that there was testimony that doors in the house, which were normally kept shut, were open and that the house appeared to have been rummaged through. Thus, there was circumstantial evidence that appellant was looking for something to steal and was discovered before he had the opportunity to do so.

{¶41} As appellant notes in his brief, when the evidence shows that a defendant is not guilty of the degree of the crime for which he was convicted, but is guilty of a lesser-included offense, a court may, instead of granting a new trial, modify the conviction. See Crim.R. 33(A)(4), *Meatchem*, supra, *State v. Brown*, Franklin App. No. 05AP-601, 2006-Ohio-2307, and *State v. Miller*, Clark App. No. 2006 CA 98, 2007-Ohio-2361.

{¶42} Accordingly, we reverse appellant's conviction for burglary in violation of R.C. 2911.12(A)(2), and we remand to the trial court with instructions to enter a conviction on the lesser-included offense of burglary in violation of R.C. 2911.12(A)(3) and to resentence appellant.

By: Edwards, P.J.

Delaney, J. concurs and

Gwin, J. dissents

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES

JAE/d0127

Gwin, P.J., dissenting

{¶43} I respectfully dissent from the majority's opinion.

{¶44} I find that the appellant in his sole assignment of error does not challenge the sufficiency of the evidence; rather he challenges the manifest weight of the evidence.

{¶45} "The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E. 2d 541. Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Wilson,* 713 Ohio St.3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26; 865 N.E.2d 1264, 1269-1270. "In other words, a reviewing court asks whose evidence is more persuasive--the state's or the defendant's? Even though there may be sufficient evidence to support a conviction, a reviewing court can still reweigh the evidence and reverse a lower court's holdings." *State v. Wilson,* supra. However, an appellate court may not merely substitute its view for that of the jury, but must find that "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." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins,* supra.

{¶46} In *State v. Thompkins*, supra, the Ohio Supreme Court further held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." 78 Ohio St.3d 380 at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." Id. at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498.

{¶47} In his assignment of error, appellant expressly raised a manifest-weight-of-the-evidence instead of a sufficiency-of-the-evidence claim. The Ohio Supreme Court has noted, "Therefore, any error by the court of appeals in treating the claim as a manifest-weight claim was invited by [appellant]. '[A] party is not permitted to take advantage of an error that he himself invited or induced the court to make.' See *Davis v. Wolfe* (2001), 92 Ohio St.3d 549, 552, 751 N.E.2d 1051." *Webber v. Kelly*, 120 Ohio St.3d 440, 442, 900 N.E.2d 175, 176, 2008-Ohio-6695 at ¶ 7. The Court has further held, "While elsewhere calling it a sufficiency argument, the court of appeals ultimately held that 'appellant's [defendant's] argument that his conviction for felony-murder was against the *manifest weight* of the evidence is sustained, albeit for different reasons than set forth in his brief.' (Emphasis added.) In reviewing the basis for its reversal, we find that the court of appeals clearly weighed the evidence to reach its conclusion as to the appropriateness of the felony murder charge. Thus, the court of appeals' reversal of the judgment of the trial court based on the manifest weight of the evidence was

unconstitutional with the concurrence of only two judges." *State v. Miller*, 96 Ohio St.3d 384, 391, 775 N.E.2d 498, 505, 2002-Ohio-4931 at ¶ 39.

{¶48} As appellant does not challenge the sufficiency of the evidence in his appeal, I find our review is limited to "whether 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." I would find from a review of the entire record that no manifest miscarriage of justice has occurred under the facts of this case.

{¶49} Upon review of the record, a majority of this panel finds the evidence does not support appellant's conviction beyond a reasonable doubt and conclude that the jury clearly lost its way. We recognize, however, that Section 3(B) (3) of Article IV of the Ohio Constitution provides in part: "* * * No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause." Since I do not agree that the conviction is against the manifest weight of the evidence, I believe that the majority, which does, is prohibited from sustaining this assignment. *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 292-293, 874 N.E.2d 1198, 1200, 2007-Ohio-4918 at ¶ 4.

{¶50} My opinion would not change, however, even if appellant had raised a challenge to the sufficiency of the evidence presented during his jury trial.

{¶51} In determining what constitutes sufficient proof that a person is "likely to be present," the Ohio Supreme Court held the state meets its burden if it presents evidence "that an occupied structure is a permanent dwelling house which is regularly inhabited, that the occupying family was in and out on the day in question, and that such house was burglarized when the family was temporarily absent [.]" *State v. Kilby* (1977),

50 Ohio St.2d 21, 361 N.E.2d 1336, paragraph one of the syllabus (construing former R.C. 2911.11(A) (3)); see, also, *State v. Fowler* (1983), 4 Ohio St.3d 16, 19, 445 N.E.2d 1119. The Court in *Kilby* stated that the "likely to be present" requirement is intended to target "the type and use of the occupied structure and not literally whether individuals will be home from work or play at a particular time." *Kilby,* 50 Ohio St. 2d at 25-26, 361 N.E.2d 1336. The Court in *Kilby* went on to note,

{¶52} "If the latter is accepted, there could be no aggravated burglary, for example, if members of a family happened to be at a neighbor's house, social event, church service or whatever because, in fact, they would not be 'present or likely to be present.' Such interpretation would not only defeat the intent of the General Assembly-*to protect families from burglaries and the resulting potential harm by attempting to deter the criminal*-but would also needlessly hamper future trials with factual issues irrelevant to the question of guilt." (Emphasis added).The Court cited an earlier holding,

{¶53} "Since the statute speaks alternatively of persons present or likely to be present, it is difficult to conceive of a factual situation which more clearly falls in the latter category. In *State v. Mason* (1906), 74 Ohio St. 65, 77 N.E. 283 this court in reaching a similar conclusion, at pages 75-76, 77 N.E. at page 284, stated:

{¶54} 'Counsel for the defendants present the view that the distinction which the statute makes between an inhabited dwelling-house and an uninhabited dwelling-house, and the imposition of the graver penalty for burglariously entering a house of the former description, is for the protection of human life, giving consideration to the liability to personal encounters between burglars and occupants who may be in the house when it is entered. No case, they say, can be within that purpose unless the persons who

inhabit the house are actually in it when it is burglariously entered. Since the statute contains no technical words affecting the question, the purpose of the legislature can be ascertained only by regarding its words in their ordinary sense. If we assume that counsel has stated that purpose correctly, we must still recur to the terms of the statute to ascertain what has been enacted for its accomplishment, that is, for the protection of human life. Did the legislature contemplate only those collisions which are likely to occur between burglars and persons who are within when they enter? *Or did it also contemplate the collisions likely to occur when persons who have been absent from their homes return to find burglars already within?* No suggestion is made which can excuse us from considering the ordinary meaning of the words used by the legislature in defining the offense for which it has provided the graver penalty.'" *Kilby,* 50 Ohio St.2d 21 at n. 3,361 N.E.2d 1336. (Emphasis added).

{¶55} In *State v. Fowler*, a *per curiam* opinion, the Ohio Supreme Court noted, "'If we were to agree with the appellant that [*State v.*] *Kilby,* supra [(1977), 50 Ohio St.2d 21 [361 N.E.2d 1336] (4 O.O.3d 80)], stands for the proposition that, once the state proves that a permanent or temporary habitation has been burglarized, it is presumed that a person is likely to be present, R.C. 2911.11(A)(3), as construed, would indeed violate the Due Process Clause in that it would unconstitutionally *presume* the existence of an element of the offense. [Citations omitted.]' *State v. Wilson* (1979), 58 Ohio St.2d 52, 59, 388 N.E.2d 745 [12 O.O.3d 51]. (Emphasis added.)."*Fowler*, 4 Ohio St.3d at 18-19, 445 N.E.2d at 1121.

{¶56} It seems obvious, if only to me, that the evil against which the Supreme Court was speaking in *Fowler*, was the use of an evidentiary presumption that has the

effect of relieving the state of its burden of proof on an element of the offense with which the accused is charged. The Due Process of Clause of the Fourteenth Amendment "protects" the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* (1972), 397 U.S. 358, 364. *See also, Mullaney v. Wilber,* (1975), 421 U.S. 684. This basic constitutional principle "prohibits the State from using evidentiary presumptions that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." *Francis v. Franklin*, (1985), 471 U.S. 307, 313. See also, *Sandstrom v. Montana*, (1979), 442 U.S. 510, 520-524. With this basic tenant of criminal law, I completely agree. However, I find that the state did not rely on a *presumption* that the victim was present or likely to be present in the case at bar. Rather, the jury in this case was free to infer from the evidence presented that the victim was present or likely to be present at the time of the trespass.

{¶57} Evidence was presented below that the premises was a place of permanent habitation that was regularly occupied by the victim, the victim was home on the day of the crime, and that she went to work in the morning. Evidence was also presented that upon her arrival home, regardless of the hour, she noticed evidence that her home had been invaded, and further, that the intruder was still inside. From these facts, a permissive inference could be drawn by the jury regarding the likelihood of the victim being present at the time of the burglary.

{¶58} There is nothing in the record indicating that appellant had any knowledge of the victim's schedule or the "likelihood" of her presence in her home. While his knowledge is not controlling, it is a factor that may be considered by the fact finder.

State v. Edwards, Jackson App. No. 06CA5, 2006-Ohio-6288 at ¶ 14; *State v. King* (May 30, 1996), Cuyahoga App. No. 68978. The fact that the victim was not home at the time the appellant initially entered the home was merely fortuitous and should not reduce the gravity of his crime. *Id. (C*iting *Kilby,* supra at 25, 361 N.E.2d 1336).

{¶59} Clearly, the chief evil that this specific statute is designed to prevent is a confrontation between a resident and an intruder. That confrontation is precisely what occurred in the case at bar! The case law cited by the majority simply does not address the situation where a homeowner arrives home *while the burglary is still in progress.* The majority prefers to protect only hypothetical encounters, i.e. because the victim in the case at bar did not testify that she *might* come home at lunchtime on any given day there can be no violation of the statute.[2]The majority simply ignores the clear and present danger that faced the victim in this case-*who did in fact come home while the burglary was still in progress.* Further, this holding will needlessly hamper future trials with factual issues irrelevant to the question of guilt.

[2] In the real world, people often do go home at unexpected times. For example, in *State v. Stevens* (Mar. 22, 1994), Muskingum App. No. CA-93-30, this Court found that where a family went camping overnight ten miles away in December and they had on other occasions in the past cut their trip short if the weather conditions turned unfavorable, they were "likely to be present" for purposes of applying burglary statute; and State *v. King* (May 30, 1996), Cuyahoga App. No. 68978 where the victim testified that she would be home from work if she or one of her children were sick. From this testimony, the court found a permissive inference could have been drawn by the jury regarding the likelihood of the victim or her children being present in the residence at the time of the burglary and thereby confronting the very danger that the statute was designed to minimize, citing *Kilby, supra,* at 25; *Fowler, supra,* at 19.

{¶60} I would find that when a homeowner arrives at her residence to find evidence that the home has been invaded and that the intruder is still on the premises, the evidence is sufficient to allow the jury to infer the victim was present or likely to be present at the time of the burglary. A finding that no person would be present or likely to be present during the burglary would have been unreasonable under the facts presented in this case. Accordingly, I would uphold the jury's verdict and affirm the decision of the lower court.

s/W. Scott Gwin

HON. W. SCOTT GWIN

[Cite as *State v. Broyles*, 2010-Ohio-1837.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
WADE BROYLES	:	
Defendant-Appellant	:	CASE NO. 2009 CA 0072

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is reversed as to appellant's conviction for burglary in violation of R.C. 2911.12(A)(2). This matter is remanded to the trial court to enter a judgment of conviction on the lesser included offense of burglary in violation of R.C. 2911.12(A)(3) and to resentence appellant. Costs assessed to appellee.

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES