[Cite as *In re D.P.*, 2011-Ohio-285.]

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

In the Matter of: D.P.

Court of Appeals No. L-10-1054

Trial Court No. 09200803 01

DECISION AND JUDGMENT

Decided: January 21, 2011

* * * * *

James J. Popil, for appellant.

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeremy P. Carnes, Assistant Prosecuting Attorney, for appellee.

* * * * *

COSME, J.

{¶ 1} Appellant, D.P., a juvenile, appeals from a judgment of the Lucas County Court of Common Pleas, Juvenile Division, finding him delinquent for committing burglary. We affirm the juvenile court's decision.

I. BACKGROUND

{¶ 2} On December 28, 2009, the state filed a complaint against appellant in the juvenile court. The complaint alleges that appellant was delinquent for having committed burglary in violation of R.C. 2911.12(A)(2). The alleged conduct occurred on December 24, 2009, when a witness observed appellant leave a private residence belonging to Dana Henderson. The witness identified appellant as the individual leaving the residence.

{¶ 3} After an adjudication hearing on April 13, 2010, the juvenile court found that appellant was a delinquent juvenile due to his commission of burglary. The court ordered that appellant be committed to the custody of the Ohio Department of Youth Services for a minimum time period of one year and a maximum time not to exceed appellant's 21st birthday. Appellant now appeals the juvenile court's decision, assigning four errors.

II. SUFFICIENCY OF EVIDENCE

{¶ 4} In his first assignment of error, appellant argues that:

{¶ 5} "The trial court erred in adjudicating appellant to be delinquent of burglary pursuant to R.C. 2911.12(A)(2) absent proof of every element of the charge against him by sufficient, competent and credible evidence."

{¶ 6} We disagree.

{¶ 7} In his first assignment of error, appellant argues there was insufficient evidence as a matter of law to convict him of burglary in violation of R.C. 2911.12(A)(2).

Appellant contends that the state failed to produce sufficient evidence to prove an essential element of burglary as a second-degree felony—namely, that someone had been "present or likely to be present" at the time of the offense.

{¶ 8} Under R.C. 2911.12(A)(2), "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."

{¶ 9} When reviewing the sufficiency of the evidence, we must examine the evidence in the light most favorable to the state and determine whether that evidence could have convinced any rational trier of fact that the essential elements of the crime had been proved beyond a reasonable doubt. See *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus (superseded by statute and constitutional amendment on other grounds); *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶ 10} Thus, the issue before this court is whether any person other than an accomplice of appellant was present or likely to be present at Dana's house. 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." *State v. Brown* (Apr. 28, 2000), 1st Dist. No. C-980907. "The issue is not whether the burglar subjectively believed that persons were likely to be there, but whether it was objectively likely. The significant inquiry is the 'probability or improbability of actual occupancy

which in fact exists at the time of the offense, determined by all the facts surrounding the occupancy.'" *State v. Cravens* (June 25, 1999), 1st Dist. No C-980526, quoting *State v. Durham* (1976), 49 Ohio App.2d 231, 239. See *In re Meatchem*, 1st Dist. No C-050291, 2006-Ohio-4128, ¶ 16; *State v. Fowler* (1983), 4 Ohio St.3d 16, 18-19.

{¶ 11} The fact that a permanent or temporary habitation has been burglarized does not give rise to the presumption that a person was present or likely to be present. *State v. Wilson* (1979), 58 Ohio St.2d 52, 59-60; *Fowler*, supra. 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. *Fowler*, supra, at 18; *Cravens*, supra.

{¶ 12} In *In re M.T.*, 6th Dist. No. L-08-1321, 2009-Ohio-3391, ¶ 22, this court 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."

{¶ 13} In *State v. Frock*, 2d Dist. No. 2004 CA 76, 2006-Ohio-1254, ¶ 20, the court discussed whether a person is "likely" to be present in the context of R.C. 2911.12(A)(2), as follows:

{¶ 14} "Although the term 'likely' connotes something more than a mere possibility, it also connotes something less than a probability or reasonable certainty. See *State v. Holt* (1969), 17 Ohio St.2d 81, at 85, 246 N.E.2d 365 [46 O.O.2d 408]. 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. Thus, "likely" means more likely than not. That is, there must be a greater than 50 percent likelihood that someone will be in the dwelling at the time of the burglary.

{¶ 15} At appellant's trial, there was sufficient testimony on this issue. Dana, Darius and Nathaniel all testified that they lived at the house. Dana testified that she, Nathaniel, and Nathaniel's dad went to visit her parents around 4:00 p.m. that day. Darius was not with them. They were only temporarily absent when the burglary occurred and Darius arrived home while appellant was inside. It was likely they would be at home, particularly on Christmas Eve. The burglary occurred between 7:00 p.m. and 8:00 p.m. on December 24, 2009.

{¶ 16} In this case, consideration of all the circumstances would seem to justify a logical expectation that a person could be present at the house. More importantly, Darius testified that he arrived during the burglary.

{¶ 17} Accordingly, appellant's first assignment of error is not well-taken.

III. MANIFEST WEIGHT OF THE EVIDENCE

{¶ 18} In his second assignment of error, appellant contends that:

{¶ 19} "The trial court erred in adjudicating appellant to be delinquent of burglary pursuant to R.C. 2911.12(A)(2) as that finding was against the manifest weight of the evidence."

{¶ 20} Appellant argues that the juvenile court's decision finding him delinquent due to his commission of burglary was against the manifest weight of the evidence because he had an alibi at the time the burglary allegedly occurred.

{¶ 21} We disagree.

{¶ 22} When reviewing a manifest weight of the evidence claim, an appellate court must examine the evidence presented, including all reasonable inferences that can be drawn from it, and consider the credibility of the witnesses, to determine whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the decision must be reversed and a new trial ordered. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. The weight to be given the evidence presented and the credibility of the witnesses are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶ 23} The juvenile court found that appellant was delinquent for committing burglary in violation of R.C. 2911.12(A)(2). Accordingly, the juvenile court found that appellant "trespass[ed] in an occupied structure * * * that is a permanent or temporary habitation of any person * * * with purpose to commit in the habitation any criminal offense." R.C. 2911.12(A)(2).

{¶ 24} At trial, four witnesses testified for the state: Detective Scott, Dana, and her sons Nathaniel and Darius. All four witnesses testified that there was a broken window, a brick lying in that room, and belongings that had been moved. Darius, who lived at the residence with his mother, testified that he was across the street when he heard a door slam shut, and noticed movement in the house. Darius, who was locked out of the house, went to the door and knocked, trying to see who was inside. He heard someone running up the steps. According to Darius, he went around to the back of the house and saw appellant jump off the roof of the house and run away. Darius, who had been friends with appellant, recognized him. Darius also saw another unknown individual run away. Darius stated that he had not given appellant permission to enter his residence. Dana and Nathaniel also testified that they had not given appellant permission to enter the residence.

{¶ 25} Six witnesses testified for the defense: appellant, Taje Scott, Tammy Brooks, Essence Scott, and Jessica Snuggs. Appellant testified that he did not commit the crime, and asserted that he had an alibi. He testified that he was babysitting six young children during the time period the burglary allegedly occurred, and that with the number of people in and out of his home, he could not have possibly left unnoticed. Further, he did not have a car and could not have walked from his residence to the victim's residence in such a short amount of time. Only one witness testified that she saw appellant during the time period the alleged burglary was taking place. Taje, the mother

of appellant's child, testified that she was home all day with appellant except for a short time in the middle of the day when appellant went to the store.

{¶ 26} We find that the juvenile court did not clearly lose its way and create a manifest miscarriage of justice when it found appellant delinquent due to his commission of burglary. Darius' eyewitness testimony weighed heavily against appellant's own testimony and the testimony of other defense witnesses. Darius' eyewitness testimony was competent, credible evidence of appellant's guilt. Additionally, the juvenile court was in the best position to determine the credibility of the witnesses and to resolve factual conflicts. It is apparent that the juvenile court chose to believe the account of Darius instead of appellant's version of events. We find no reason to upset that determination. The juvenile court's decision was not against the manifest weight of the evidence.

{¶ 27} Accordingly, appellant's second assignment of error is not well-taken.

IV. DISCLOSURE OF STATE'S WITNESS

{¶ 28} In his third assignment of error, appellant maintains that:

{¶ 29} "The trial court erred in permitting the testimony of a witness on behalf of the State of Ohio who was not disclosed by the State of Ohio to appellant's counsel prior to the adjudication hearing."

{¶ 30} Appellant's assignment of error challenges the juvenile court's decision to allow Nathaniel to testify on behalf of the state at trial. Nathaniel was not identified to defense counsel as a potential witness prior to trial as required by the rules of criminal procedure. Appellant asserts that he was prejudiced by Nathaniel's testimony.

{¶ 31} We disagree.

{¶ 32} Crim.R. 16(B)(1)(e) provides, "[u]pon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial."

{¶ 33} When confronted with a violation of the discovery rules, the trial court "may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances." Crim.R. 16(E)(3); *State v. Ballentine* (Nov. 29, 1996), 11th Dist. No. 95-L-076 ("the trial court has discretion in fashioning a remedy to suit the particular case before it"). Moreover, the trial court "must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery." *City of Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, paragraph two of the syllabus.

{¶ 34} In situations where the prosecution fails to disclose a witness prior to trial, the Supreme Court of Ohio has held "the testimony of the undisclosed witness can be admitted if it can be shown that the failure to provide discovery was not willful, foreknowledge of the statement would not have benefited the defendant in the preparation of the defense, and the defendant was not prejudiced by the admission of the evidence." *State v. Heinish* (1990), 50 Ohio St.3d 231, 236, citing *State v. Parson* (1983), 6 Ohio St.3d 442, 445-446.

{¶ 35} Appellant does not allege that the prosecution's violation of the discovery rule was willful, but asserts that Nathaniel's testimony was crucial to the state's case and unfairly prejudicial. We disagree.

{¶ 36} Nathaniel's testimony was not essential to the case against appellant, as the prosecution took the case to trial without the intention of using him as a witness. The substance of Nathaniel's testimony was not damaging. Nathaniel testified that he had received several phone calls from appellant during the time frame it was alleged the burglary took place. Nathaniel testified that he had received four or five calls from appellant, the first around 2:30 or 3:00 pm and during those calls, appellant kept asking him where he was, and when he would be back home. Presumably, the state wanted to show that appellant was trying to find out whether anyone was home so that he could commit the burglary without being caught.

{¶ 37} Appellant argues that had Nathaniel been disclosed as a witness, counsel would have subpoenaed Nathaniel's cell phone records to impeach his testimony that appellant had placed most of the calls, and when. The state argues that the timing of the calls is not important, but instead, Nathaniel's recollection of the content of the calls themselves, which cannot be documented by cell phone records. The state also argues that there was no prejudice because appellant's counsel cross-examined Nathaniel about the content of the phone calls and his prior friendship with appellant. Further, appellant himself testified about the number, timing, and content of the calls.

{¶ 38} Before permitting Nathaniel to testify, the juvenile court considered appellant's objections and specifically asked appellant's counsel how appellant would be prejudiced if Nathaniel were permitted to testify. Appellant's counsel asserted that he could have subpoenaed Nathaniel's cell phone records and that those records would show a discrepancy between the number of calls and the timing of the calls.

{¶ 39} The juvenile court concluded that it would determine the credibility of the testimony and the weight to be accorded the parties' testimony concerning who placed the phone calls, when the calls were made, and the content of the phone calls. We agree that the juvenile court was in the best position to judge the credibility of the witnesses presented at trial. The question of credibility regarding conflicting testimony and the weight to be accorded evidence are primarily for the trier-of-fact. *DeHass*, supra. See *State v. Scott* (1986), 26 Ohio St.3d 92, 102.

{¶ 40} Observing that both parties had been fairly "loose" with discovery, the juvenile court not only permitted the state to call Nathaniel as a witness, but also allowed appellant's counsel to call several alibi witnesses who had not been listed on discovery.

{¶ 41} Under the circumstances of this case, we find that the state's violation of the discovery rule was not willful and that Nathaniel's testimony was not unfairly prejudicial to appellant's defense.

{¶ 42} Accordingly, appellant's third assignment of error is not well-taken.

V. DISCLOSURE OF WITNESS'S MISDEMEANOR RECORD

{¶ 43} In his fourth assignment of error, appellant contends that:

{¶ 44} "The trial court erred in denying appellant's motion to reconsider its finding of delinquency as the criminal record of the State of Ohio's key witness was not disclosed to appellant's counsel prior to the adjudication hearing."

{¶ 45} Appellant complains that he was not informed that Darius, who identified appellant as the individual jumping from the roof of his mother's home, had a misdemeanor criminal record for violations of the Toledo Safe School Ordinance, criminal trespass, obstructing official business, and a traffic offense. Appellant asserts that such evidence is material under Juv.R. 24(A)(6).

{¶ 46} We disagree.

{¶ 47} Juv.R. 24(A)(6) provides:

{¶ 48} "(A) Request for discovery. Upon written request, each party of whom discovery is requested shall, to the extent not privileged, produce promptly for inspection, copying, or photographing the following information, documents, and material in that party's custody, control, or possession:

{¶ 49} "* * *

{¶ 50} "(6) * * * In delinquency and unruly child proceedings, the prosecuting attorney shall disclose to respondent's counsel all evidence, known *or that may become known to the prosecuting attorney*, favorable to the respondent and material either to guilt or punishment." (Emphasis added.)

{¶ 51} Concerning alleged violations of the exculpatory criminal discovery rule, the Supreme Court of Ohio has held that violations of Crim.R. 16 are only to be reversed

on a showing of the following: "(1) the prosecution's failure to disclose was a willful violation of the rule, (2) foreknowledge of the information would have benefited the accused in the preparation of his defense, and (3) the accused suffered some prejudicial effect." *State v. Joseph* (1995), 73 Ohio St.3d 450, 458, certiorari denied *Joseph v. Ohio* (1996), 516 U.S. 1178, citing *State v. Parson* (1983), 6 Ohio St.3d 442, 445.

{¶ 52} In the instant case, there is no indication that the violation was willful. The state maintains that it was unaware of Darius' misdemeanor conviction at the time of trial, but asserts that its oversight did not affect appellant's right to a fair trial since evidence of Darius' misdemeanor conviction was inadmissible.

{¶ 53} Evid.R. 609 does not provide for the wholesale admission of a criminal defendant's prior convictions, but instead creates two categories of admissible prior convictions: (1) felonies, and (2) those involving dishonesty or false statement.

{¶ 54} Evid.R. 609(A)(3) provides:

{¶ 55} "[N]otwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance."

{¶ 56} However, Darius' misdemeanor convictions do not involve crimes of dishonesty within the meaning of Evid.R. 609(A)(3) and may not be used to impeach his credibility in the present case. *State v. Tolliver* (1986), 33 Ohio App.3d 110, 113; *State v. Johnson* (1983), 10 Ohio App.3d 14, 16. See *State v. Evans*, 9th Dist. No. 07CA0057,

2008-Ohio-4772, ¶ 9 (the crime of obstruction of official business does not involve dishonesty as contemplated by Evid.R. 609(A)(3)).

{¶ 57} Thus, the juvenile court did not err in refusing to reconsider appellant's delinquency based upon the state's failure to disclose Darius' misdemeanor conviction.

{¶ 58} Accordingly, appellant's fourth assignment of error is not well-taken.

VI. RESTITUTION

{¶ 59} In his fifth assignment of error, appellant maintains that:

{¶ 60} "The trial court erred in ordering restitution against appellant without competent, credible evidence to support the court's order in the record."

{¶ 61} Appellant contends that no witnesses were called during the restitution hearing and that no evidence was given. He claims that the receipt submitted to the juvenile court was insufficient proof upon which an award of restitution could be ordered.

{¶ 62} We disagree.

{¶ 63} In *State v. Riley*, 184 Ohio App.3d 211, 2009-Ohio-3227, ¶ 27, this court discussed the required proof to support an order of restitution:

{¶ 64} "'In an order of restitution, the amount of restitution must bear a reasonable relationship to the loss suffered. *State v. Marbury* (1995), 104 Ohio App.3d 179, 181[, 661 N.E.2d 271]; see, also, R.C. 2929.18(A)(1). Thus, it is held that restitution is limited to the actual loss caused by the defendant's criminal conduct for which he was convicted. *State v. Brumback* (1996), 109 Ohio App.3d 65, 82[, 671 N.E.2d 1064]. There must be competent and credible evidence in the record from which the court may

ascertain the amount of restitution to a reasonable degree of certainty. Id. at 83[, 671 N.E.2d 1064]; *State v. Warner* (1990), 55 Ohio St.3d 31, 69, 564 N.E.2d 18.'" Id. quoting *State v. Riley*, 6th Dist. No. WD-03-076, 2007-Ohio-879, ¶ 45.

{¶ 65} In this case, appellant was entitled to a hearing pursuant to R.C. 2929.18(A)(1), which provides that a court "shall hold a hearing on restitution if the offender, victim or survivor disputes the amount." An appellate court reviews an order of restitution for an abuse of discretion. *Marbury*, supra. *State v. Cicerchi*, 182 Ohio App.3d 753, 2009-Ohio-2249, ¶ 35.

{¶ 66} Although appellant disputed the amount of damages, he failed to appear at the hearing. Dana was present to testify to her damages and the cost of the damages. She presented the juvenile court with a receipt from the Glass Doctor for the cost of the repairs in the amount of $351.45, as evidence of the amount of damages without objection from appellant's counsel. Appellant's counsel stated, "I have no reason to dispute that. I've had no figures to the contrary." The state asserts that it was not an abuse of discretion for the juvenile court to accept the receipt as evidence of the amount of damages at a restitution hearing where appellant did not appear.

{¶ 67} In *State v. Cook*, 6th Dist. No. OT-07-020, 2008-Ohio-89, ¶ 70, this court held that the failure to object to the amount at sentencing results in waiver. See *State v. Stewart*, 3d Dist. No. 16-08-11, 2008-Ohio-5823, ¶ 7 ("failure to object to trial court's award of restitution waives all but plain error"). Similarly, in *State v. Bobo*, 2d Dist. No. 21012, 2006-Ohio-4147, ¶ 10, the court held that appellant "waives his right to raise this

issue on appeal absent plain error" when he fails to object to the restitution amount at the sentencing hearing. Id., quoting *State v. Delong*, 2d Dist. No. 20656, 2005-Ohio-1905, ¶ 17. See *State v. Coburn*, 6th Dist. No. S-09-006, 2010-Ohio-692, ¶ 17. Appellant in this case has waived his right to contest the amount of restitution by failing to appear for the restitution hearing.

{¶ 68} We conclude that there was competent and credible evidence in the record supporting the juvenile court's determination that the window in the house was broken as a direct and proximate result of the commission of the burglary. The evidence in the record establishes the amount of the economic loss caused by the burglary to a reasonable degree of certainty. The receipt from the Glass Doctor is sufficient evidence of the amount of restitution.

{¶ 69} Accordingly, appellant's fifth assignment of error is not well-taken.

VII. CONCLUSION

{¶ 70} We conclude that the trial court did not err in adjudicating appellant to be delinquent for committing burglary. The adjudication of appellant as delinquent was not against the sufficiency or manifest weight of the evidence. The trial court did not abuse its discretion in permitting the testimony of a witness who had not been disclosed by the state, denying appellant's motion for reconsideration based on the state's failure to disclose a witness's misdemeanor criminal record, or ordering restitution.

{¶ 71} Wherefore, based upon the foregoing, 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. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE