

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	<b>O P I N I O N</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2009-P-0068</b>
RICK J. HAAS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 0229.

Judgment: Affirmed.

*Victor V. Vigluicci*, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*George G. Keith*, 135 Portage Trail, P.O. Box 374, Cuyahoga Falls, OH 44223 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Rick J. Haas, appeals from his conviction and sentence following a bench trial on one count of burglary with a firearm specification and one count of possession of criminal tools. For the following reasons, we affirm the judgment of the trial court.

{¶2} The matter proceeded to a bench trial on August 13, 2009. At trial, Mr. Darlin Liston testified that he noticed two individuals approach the home of his neighbor, Mr. Norman Cable, and knock on the door. Upon investigation, Mr. Liston noticed Mr.

Cable's basement window was broken, and a "nail bar" was lying amongst the broken glass. Mr. Liston testified that he returned home and tried to telephone Mr. Cable, who was attending a meeting in Cuyahoga Falls. Mr. Liston then called the police. Mr. Liston returned to his neighbor's home and testified that he saw two people—a man, later identified as Rick Haas, and a woman, later identified as Shawna Burkett—inside his neighbor's sunroom.

{¶3} Officer Yoker of the Brimfield Police Department was the first to respond. Officer Yoker testified that he saw Haas and Burkett in the breezeway. He instructed both of them to surrender. Complying, Haas and Burkett lay on the ground until back-up arrived. While lying on the ground, Haas informed Officer Yoker that he had a loaded gun, a semi-automatic Beretta .32 caliber handgun, in his front pocket.

{¶4} Mr. Cable also testified. Mr. Cable stated that he and his wife had lived in his home since 1993. Mr. Cable indicated that he is semi-retired, but worked part-time in three different positions in local government—a part-time firefighter and EMT, and he engaged in part-time environmental work for the village of Mogadore. With regard to his work schedule, Mr. Cable stated that he will "sign up for shifts which are usually seldom more than a few days together at a time." He described his work schedule as "highly variable." Mr. Cable testified that, on this particular day, he was attending a meeting, which would have started at 9:00 a.m. and ended at 10:30 a.m. Mr. Cable stated that he would have returned to his home by late morning.

{¶5} At trial, Haas and Burkett were represented by the same counsel. At the conclusion of the evidence, the trial court found Haas guilty of burglary, with a firearm specification, and of possessing criminal tools. The trial court sentenced Haas to one

year in prison for the firearm specification, which was to run consecutive to the six-year term for burglary and a concurrent term of one year in prison for possessing criminal tools.

{¶6} Haas filed a timely notice of appeal and asserts the following assignments of error:

{¶7} “[1.] The trial court violated Mr. Haas’ right to the assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution.

{¶8} “[2.] The trial court erred in failing to grant Mr. Haas’ motion for judgment of acquittal on all charges, as the evidence presented was not legally sufficient to support a conviction.

{¶9} “[3.] Mr. Haas’ convictions are against the manifest weight of the evidence.

{¶10} “[4.] Mr. Haas was denied his constitutional rights as guaranteed by the United States and Ohio Constitutions to effective assistance of counsel when his attorney failed to provide Mr. Haas with the conflict free representation to which he was entitled.

{¶11} “[5.] The trial court erred to the detriment of Mr. Haas when it imposed sentence upon him without any review or consideration of R.C. 2929.11 and 2929.12.

{¶12} “[6.] The cumulative effect of the errors committed by the trial court and by Mr. Haas’ trial counsel combined to deny Mr. Haas due process and a fair trial as guaranteed by the United States and Ohio Constitutions.”

{¶13} As Haas’ first and fourth assignments of error are interrelated, we address them in a consolidated analysis. Under the first and fourth assignments of error, Haas maintains that his trial counsel was ineffective when he proceeded to represent both

criminal defendants in the same case. Haas further alleges that the trial court failed to conduct a meaningful inquiry into the facts of the case to determine whether an actual conflict of interest existed arising from dual representation.

{¶14} The duty to inquire, as set forth by The Supreme Court of Ohio in *State v. Gillard* (1992), 64 Ohio St.3d 304, has been explained as follows:

{¶15} “When reviewing a claim of conflict of interest, this court must resolve two distinct issues. The first issue is whether the trial court had a duty to investigate the potential conflict of interest. \*\*\* If the answer to that inquiry is affirmative and the trial court did not make such an inquiry, then the case must be remanded to the trial court for its inquiry as to whether an actual conflict of interest existed. \*\*\* If the answer to that inquiry is negative, then this court must determine whether an actual conflict of interest adversely affected the attorney’s performance. \*\*\*.” *State v. Walker* (1998), 130 Ohio App.3d 247, 251. (Internal citations omitted.)

{¶16} In the instant case, a pretrial motion hearing was held, during which the prosecutor requested the trial court speak to the parties regarding a potential conflict. At that hearing, the trial court addressed Haas regarding “one Attorney representing two different Defendants out of a similar incident.” Haas informed the trial court that his attorney informed him of this and he wanted to move forward with the dual representation.

{¶17} Thereafter, both Burkett and Haas filed an “affidavit waiving conflict of interest” with the trial court. In said affidavit, Haas averred that he had been “informed of any potential conflict of interest if he and his wife are represented by the same attorney”; that he “waive[d] any said conflict of interest so that he and his wife shall” be

represented by the same attorney; and that he made his decision “knowingly, intelligently, and without any force, threat or deception.”

{¶18} In addition, before the bench trial, Burkett and Haas’ attorney put on the record that before he agreed to represent them, he “explained to them the potential conflict of interest [and] what a conflict of interest is[.]” Thereafter, the trial court, with counsel and co-defendants present, engaged in an inquiry as to the potential conflict. The trial court questioned both Burkett and Haas as to whether they understood that a potential conflict existed, whether they knowingly waived that potential conflict, whether their attorney went over the potential for conflict, and whether they willingly waived the conflict.

{¶19} We further note that Burkett’s and Haas’ defense theories were aligned. A review of the record reveals that their defense was not to escape culpability, but to argue that the crime should not have been indicted as a felony of the second degree based on the facts and circumstances of the case. *State v. Manross* (1988), 40 Ohio St.3d 180, 182. (“There is no conflict where the two defenses did not result in one assigning blame to the other \*\*\*.”)

{¶20} Based on the facts and circumstances of the instant case, we conclude that the trial court did not err, as it conducted a meaningful inquiry into the existence of a conflict of interest arising from dual representation of Burkett and Haas.

{¶21} Although Haas claims he was denied effective assistance of counsel, he did not establish that an actual conflict of interest was present. In his brief, Haas merely states that he was denied effective assistance of counsel when his “trial counsel proceeded to represent both criminal defendants in the same case on the same issue.”

{¶22} “In order to establish a violation of his Sixth Amendment right to effective assistance of counsel, a defendant who raised no objection to joint representation at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance. \*\*\* Until he does so, he has not established the constitutional predicate for his claim of ineffective assistance of counsel. \*\*\* A reviewing court cannot presume that the possibility for conflict resulted in ineffective assistance of counsel. The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. Further, a presumption of ineffective assistance of counsel in every instance of multiple representation would preclude multiple representation even in cases where a common defense gives strength against a common attack. \*\*\*.” *Manross*, supra, at 182. (Internal citations omitted.)

{¶23} As Haas does not demonstrate that an actual conflict of interest adversely affected his lawyer’s performance, his Sixth Amendment right to counsel was not violated. Haas’ argument is without merit.

{¶24} Haas’ first and fourth assignments of error are not well-taken.

{¶25} Under his second assignment of error, Haas challenges the legal sufficiency of the evidence to sustain his conviction of burglary with a firearm specification.

{¶26} When measuring the sufficiency of the evidence, an appellate court must consider whether the state set forth adequate evidence to sustain the jury’s verdict as a matter of law. *Kent v. Kinsey*, 11th Dist. No. 2003-P-0056, 2004-Ohio-4699, at ¶11. A verdict is supported by sufficient evidence when, after viewing the evidence most strongly in favor of the prosecution, there is substantial evidence upon which a jury

could reasonably conclude that the state proved all elements of the offense beyond a reasonable doubt. *State v. Schaffer* (1998), 127 Ohio App.3d 501, 503, citing *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at \*14-15.

{¶27} Haas was convicted under R.C. 2911.12(A)(2), which provides:

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

{¶29} “\*\*\*

{¶30} “(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 purpose to commit in the habitation any criminal offense[.]”

{¶31} Haas maintains that his conviction for second-degree burglary was against the sufficiency of the evidence as the state failed to present evidence that an individual was “likely to be present” in the occupied structure. Instead, Haas argues that the evidence is aligned with burglary, a felony of the third degree, in violation of R.C. 2911.12(A)(3), which provides:

{¶32} “Trespass 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[.]”

{¶33} Therefore, “in order to be convicted of second degree burglary of a residence, the state must prove that it was objectively likely that someone could be present at the time of the break-in. As set forth in R.C. 2911.12(A)(2), the term ‘likely to be present’ “connotes something more than a mere possibility, (\*\*\*). 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. Mitchell*, 183 Ohio App.3d 254, 2009-Ohio-3393, at ¶18. (Citations omitted.)

{¶34} The Supreme Court of Ohio, in *State v. Kilby* (1977), 50 Ohio St.2d 21, paragraph one of the syllabus, has stated:

{¶35} “Where the state proves 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, the state has presented sufficient evidence to support a charge of [burglary under R.C. 2911.12(A)(2)].”<sup>1</sup>

{¶36} Upon review of the record, we find that Haas’ conviction for burglary, a felony of the second degree, is supported by ample evidence. The trial court heard testimony from Mr. Cable that he and his wife had lived in this residence since 1993. Mr. Cable further testified that he was semi-retired with a “highly variable” schedule. Mr.

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1. {¶a} We note that the defendant in *Kilby* was found guilty of aggravated burglary as defined in R.C. 2911.11. At that time, R.C. 2911.11 stated, in pertinent part:

{¶b} “(A) No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in Section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense as defined in Section 2913.01 of the Revised Code, or any felony, when any of the following apply:

{¶c} “\*\*\*

{¶d} “(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any *person is present or likely to be present.*” (Emphasis added.)

{¶e} We further note that the text of 2911.11(A)(3) was deleted pursuant to 1995 Ohio SB2.



Cable noted that he “sign[s] up for shifts which are usually seldom more than a few days together at a time.” Further, Mr. Cable may have to leave his residence to respond to an emergency call. This testimony was bolstered by Mr. Liston who also testified that Mr. Cable’s work schedule varies. Mr. Liston testified that “[Mr. Cable] works different times \*\*\* so no, I’m not familiar with exactly what day they work and what times they work and what times they came home.”

{¶37} On the day in question, Mr. Cable testified that his wife left at approximately 7:20 a.m., while he left his residence at 8:20 a.m. As part of his environmental job, Mr. Cable is required to attend public meetings. Mr. Cable testified that he was attending a meeting, which started at 9:00 a.m., and it “would have been over around 10:30 am.” On this particular day, Mr. Cable noted that he would have returned to his residence “late morning.”

{¶38} Haas also argues that the trial court “lack[ed] understanding” of the distinction between R.C. 2911.12(A)(2) and R.C. 2911.12(A)(3). To support this assertion, Haas points to the trial court’s statement during sentencing that he knew the whereabouts of the victims. We reiterate that whether a person “is present or likely to be present” is not based on a subjective standard. Rather, the issue is whether it was objectively likely that a person was to be present.

{¶39} We find that the state presented sufficient evidence to allow a rational trier of fact to infer that the offense, as indicted, had been committed. Based on the foregoing, this argument is without merit.

{¶40} Haas also argues that the state failed to meet its burden of proof as to the firearm specification. Specifically, Haas asserts that the state failed to prove the firearm

was “capable of expelling or propelling one or more projectiles by the action or an explosive or combustible propellant[.]” R.C. 2923.11(B)(2).

{¶41} Firearm, as defined in R.C. 2923.11(B)(1), means: “\*\*\* any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. ‘Firearm’ includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.”

{¶42} Haas argues that the state failed to present evidence that the firearm recovered from his person was operable. “Laboratory testing results are not the only admissible evidence that can be considered in determining whether or not a firearm was operable. Proof of operability may also be established by circumstantial evidence, which may include the actions of the individual with control over the firearm. \*\*\* Also, a trial court evaluates the evidence of a firearm’s operability by examining the totality of the circumstances. \*\*\* The State need not introduce empirical evidence that the gun is operable; rather, it may establish operability through the testimony of lay witnesses who had an opportunity to observe the weapon and the surrounding circumstances. \*\*\* Furthermore, under R.C. 2923.11(B)(2), in determining whether or not a firearm is operable, the trier of fact may rely upon circumstantial evidence, including the representations and actions of the individual exercising control over the firearm. \*\*\*.” *State v. Cook*, 10th Dist. Nos. 09AP-316 & 09AP-317, 2010-Ohio-2726, at ¶60. (Internal citations omitted.)

{¶43} At trial, the state presented evidence that Haas had a loaded weapon in his front pocket during the commission of the burglary. The weapon was identified as a semi-automatic Beretta .32 caliber handgun. The arresting officer testified that Haas

informed him of the weapon in his front pocket when apprehended. Further, Brimfield Police Chief Blough testified that upon removing the loaded weapon from Haas' front pocket, he "made it safe"; i.e., he "removed the bullet from the chamber and also the magazine." The Beretta semi-automatic handgun, magazine, and bullets were admitted into evidence. See *Cook*, supra, at ¶62. (Loaded weapons were recovered as a result of a traffic stop. "Because operability may be established by circumstantial evidence, at least one Ohio court has held that the recovery of a loaded weapon that is submitted into evidence with the bullets is sufficient to reasonably infer operability. See *State v. Berger* (Feb. 19, 1998), 8th Dist. No. 71618, 1998 Ohio App. LEXIS 596.") We, therefore, find that the state presented sufficient evidence to allow a rational trier of fact to infer that the firearm was operable.

{¶44} Haas' second assignment of error is without merit.

{¶45} Under his third assignment of error, Haas maintains the evidence was against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, the Supreme Court of Ohio has adopted the following language as a guide:

{¶46} "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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. (Citations omitted.)

{¶47} Under this argument, Haas merely states that, when considering the entire record, his guilty verdict created such a miscarriage of justice that his conviction must be reversed. We disagree.

{¶48} The trial court heard the testimony of Mr. Cable, the owner of the home burglarized. Haas argues that Mr. Cable, when asked by the responding officer as to whether he was expected to be home during the day of said incident, answered in the negative. While there was conflicting testimony as to when Mr. Cable would return to his residence on the day of the burglary, the trial court was free to believe that he would have returned home “late morning.” The weight to be given to the evidence and the credibility of witnesses are primarily matters for the jury to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In assessing the witnesses’ credibility, the trial court, as the trier of fact, had the opportunity to observe the witnesses’ demeanor, body language, and voice inflections. *State v. Miller* (Sept. 2, 1993), 8th Dist. No. 63431, 1993 Ohio App. LEXIS 4240, at \*5-6. Thus, in this matter, the trial court was “clearly in a much better position to evaluate the credibility of witnesses than [this] court.” *Id.* at \*6.

{¶49} We defer to the judgment of the trial court and find that its verdict did not create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

{¶50} Haas’ third assignment of error is without merit.

{¶51} Under his fifth assignment of error, Haas maintains the trial court erred by failing to consider R.C. 2929.11 or R.C. 2929.12 either at the sentencing hearing or in its sentencing judgment entry.

{¶52} After the *State v. Foster* decision, “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus.

{¶53} The Supreme Court of Ohio, in a plurality opinion, has recently held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The Court held:

{¶54} “First, [appellate courts] must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.” *Id.*

{¶55} R.C. 2929.12 provides a list of factors that the trial court “shall consider” when imposing a felony sentence. While the trial court is required to consider the R.C. 2929.12 factors, “the court is not required to ‘use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors (of R.C. 2929.12.)’” *State v. Webb*, 11th Dist. No. 2003-L-078, 2004-Ohio-4198, at ¶10, quoting *State v. Arnett* (2000), 88 Ohio St.3d 208, 215. In *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, at ¶28, this court acknowledged its adoption of the pronouncement of the Supreme Court of Ohio in *State v. Adams* (1988), 37 Ohio St.3d 295. The Supreme Court of Ohio in *Adams* held: “[a] silent record raises the presumption that a trial court considered the factors

contained in R.C. 2929.12.” *Adams*, supra, paragraph three of the syllabus. This court recognized that Ohio Appellate Districts have adopted the holding in *Adams*, prior to and after the Supreme Court of Ohio’s decision in *State v. Foster*, supra. *Greitzer*, supra, at ¶29.

{¶56} In its sentencing entry, the trial court stated that it had considered “evidence presented by counsel, oral statements, any victim impact statement, the pre sentence report and Defendant’s statement.” The record also reflects that the trial court considered the overriding purpose of felony sentencing, which is “to protect the public from future crime by the offender and others and to punish the offender.” R.C. 2929.11. Haas’ sentence is within the statutory range, as a prison term range for a second-degree felony is two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). We cannot say that the trial court abused its discretion in the sentencing of Haas.

{¶57} Haas’ fifth assignment of error is without merit.

{¶58} As his sixth assignment of error, Haas claims that the errors committed by the trial court were of such magnitude that, when combined, they warrant reversal of his conviction. We disagree. Haas’ final argument is not well-taken, as we found all of his assignments of error without merit.

{¶59} Based on the opinion of this court, the judgment of the Portage County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O’TOOLE, J., concurs in judgment only.