[Cite as *State v. Graves*, 2001-Ohio-3252.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	**CASE NO. 99-CA-113**
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	**O P I N I O N**
	)	
JIMMY L. GRAVES	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	**Criminal Appeal from Mahoning County Court of Common Pleas Mahoning County, Ohio Case No. 99-CR-165**
JUDGMENT:	**Affirmed.**

APPEARANCES:

For Plaintiff-Appellee:	**Atty. Paul J. Gains Prosecuting Attorney Atty. Michael T. Villani Asst. Prosecuting Attorney 120 Market Street Youngstown, Ohio 44503**
For Defendant-Appellant:	**Atty. James Lanzo 4126 Youngstown-Poland Road Youngstown, Ohio 44514**

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: May 1, 2001

WAITE, J.

{¶1} This timely appeal arises from a jury verdict finding Appellant, Jimmy Graves, guilty of burglary in violation of R.C. §2911.12(A)(2). For the following reasons, we affirm the judgment of the trial court.

{¶2} In the early morning hours of January 1, 1999, Doretha Bankston and her boyfriend Paul Jackson discovered that their apartment at 51 Wirt Street Apt. 278 (the apartment), had been burglarized. A window had been broken and a door unlocked. Two television sets, a VCR, a video game and other items were missing. Later that day, Jackson stopped at the apartment of his neighbor Terry Benson. Jackson inquired if anyone had tried to sell her any stolen items. Jackson then noticed his television set in Benson's apartment. Benson told Jackson that Appellant came to her apartment and sold her two televisions, a VCR and a video game for $100.00. Jackson gave money to Benson so that he could immediately claim some of the property. Benson eventually returned all of the property as well as Jackson's money.

{¶3} On March 4, 1999, Appellant was indicted on one count of burglary in violation of R.C. §2911.12(A)(2), a second degree felony. Jury trial commenced on April 7, 1999. At the close of the evidence, Appellant moved for acquittal pursuant to Crim.R. 29, which the trial court denied. On April 9, 1999, the jury found Appellant guilty and on April 13, 1999, the trial court filed a judgment entry sentencing Appellant to a definite term of six years in prison. On May 3, 1999, Appellant filed his notice of appeal.

{¶4} Appellant's first assignment of error alleges:

{¶5} "MR. GRAVES' DUE PROCESS RIGHTS UNDER ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED AND HE WAS IMPROPERLY DENIED A CRIM.R. 29 ACQUITTAL WHEN HIS CONVICTION FOR BURGLARY (R.C. 2911.12(A)(2)) WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶6} R.C. §2911.12 provides:

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

{¶8} "* * *

{¶9} "(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 * * *"

{¶10} Appellant challenges that the state failed to produce

evidence that a person was present or likely to be present at the time of the offense. Appellant states that both occupants of the home, Jackson and Bankston, were gone from the apartment on December 31, 1998, and that they did not return until the following day around 1:30 a.m. (Tr. pp. 142-143, 198-199).

{¶11} Appellant argues that there is no presumption that a person is likely to be present in a structure merely because it is a residential building. *State v. Fowler* (1983), 4 Ohio St.3d 16, 17. According to Appellant, "[i]t is not * * * the knowledge of the defendant concerning habitation which is significant, but rather 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. Durham* (1976) 49 Ohio App.2d 231, 229.

{¶12} Appellee agrees that in *State v. Fowler, supra,* the Ohio Supreme Court held that there is no presumption that a person is present or likely to be present merely because a building is a residential structure. However, Appellee argues that a jury can infer a likelihood that someone will be present where the occupants are present at some time on the day of the burglary and are not maintaining a regular schedule of presence and absence. *Id.*, 19. Appellee also proffers a public policy

argument that a judicial finding that a person is not likely to be at home under the present circumstances could lead to a wave of New Year's Eve burglaries.

{¶13} Based on the record before us, we agree with Appellee and hold that this assignment of error lacks merit.

{¶14} Crim.R. 29 provides in part that:

{¶15} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶16} When addressing a claim of insufficient evidence, a reviewi court considers all probative evidence and the reasonable inferences be drawn therefrom in a light most favorable to the prosecution. Us this viewpoint, the court must determine whether a rational trier of could have found all elements of the crime charged beyond a reasonab doubt. *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 247 citing *Stat Jenks* (1991), 61 Ohio St.3d 259 and *State v. Eley* (1978), 56 Ohio St 169.

{¶17} Here, the only disputed element of R.C. §2911.12(A)(2) is whether a person other than the offender or an accomplice was likely be present in the apartment. In *State v. Turner* (June 3, 1996), Mah App. NO. 93 CA 137, unreported, we considered the language, "* * * i which any person is present or likely to be present * * *," with resp

to former R.C. §2911.11, Ohio's former aggravated burglary statute. We adopted the following language:

> {¶18} "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 aggravated burglary under R.C. 2911.11."

{¶19} Id., *3, quoting *State v. Fowler* (1983), 4 Ohio St.3d 16, 19, quoting *State v. Kilby* (1977), 50 Ohio St.2d 21, paragraph one of the syllabus.

{¶20} In *State v. Turner, supra*, a university student apartment was burglarized around 3:45 p.m. We found that a person was likely to be present around that time, as classes the occupants were expected to attend could have been canceled. *Id.*, *3. In *State v. Fowler, supra*, the Ohio Supreme Court found that a jury could infer that a person was likely to be present where the occupants of a burglarized home were present on the day of the crime, occasionally worked at different locations and were not always home at the same time. *Id.*, 19. Moreover, in that case, the occupants left their home at 3:30 p.m. and did not return home until 6:30 a.m. the following day. *Id.*, 16. In *State v. Kilby, supra,* the Ohio Supreme Court found that it was likely for a person to be present when the occupants of a burglarized home were visiting nearby neighbors. *Id.*, 25.

{¶21} In the present case, it is not disputed that the

occupants were home on the day of the burglary. Nor is it disputed that the burglary occurred around 11:30 p.m. when the occupants were at a New Year's Eve party. From this, it is possible to infer that the occupants would not return home until sometime after 12:00 a.m., the time that a New Year's Eve Party usually revolves around. Appellant would have this Court conclude that as a matter of law, no New Year's Eve party-goer would *ever* leave prior to midnight. This is clearly an unreasonable proposition. It is reasonable to infer that a party-goer may leave early for any number of reasons such as illness, lack of interest or emergency. Accordingly, we hold that Appellee presented sufficient evidence that someone other than Appellant or his accomplice was likely to be present at the apartment at the time of the burglary.

{¶22} We also note that Appellee's public policy argument is compelling in light of the enhanced penalties for the burglary of a structure where a person is present or likely to be present. That distinction was codified in former R.C. §2911.11 and former R.C. §2911.12, respectively, Ohio's previous aggravated burglary and burglary statutes. In *State v. Kilby, supra*, the Ohio Supreme Court stated:

{¶23} "It is clear that the difference between aggravated burglary, as defined in R.C. 2911.11(A)(3), and burglary, as defined in R.C. 2911.12, is in the type and use of the occupied

structure and not literally whether individuals will be home from work or play at a particular time. 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."

{¶24} ***Id.***, 25-26.

{¶25} In the matter at bar, the reasonable inference that the occupants were likely to be present may be less reasonable than the inference that they would not return until after midnight. However, in light of the forgoing rationale and in the interest of public safety, the inference that the occupants were likely to be present should be liberally considered.

{¶26} Appellant's second assignment of error alleges:

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

{¶28} In this assignment, Appellant essentially contests the credibility of two witnesses. Appellant states that Lashawn Scott, the only witness who purportedly saw Appellant entering the apartment, testified that she immediately called police and that police found no evidence of a burglary. (Tr. pp. 244-245). Appellant questions the veracity of this testimony considering that the occupants of the apartment testified that a window was

shattered with a brick. (Tr. pp. 144, 199-200). Appellant also argues that Terry Benson, the only state witness who could place Appellant with the stolen property, lacked credibility as she admitted to regularly purchasing stolen goods and did not claim to see Appellant committing the burglary. (Tr. 179-180). Based on our review of the record, this assignment of error also lacks merit.

{¶29} The issue as to whether a trial court judgment is against the manifest weight of the evidence was addressed extensively in *State v. Thompkins* (1997), 78 Ohio St.3d 380.

{¶30} "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. 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.'"

{¶31} *State v. Thompkins*, 387, quoting Black's Law Dictionary (6 Ed.1990) 1594.

{¶32} When reviewing a trial court decision on the basis that the verdict was against the manifest weight of the evidence, a court of appeals acts as a "thirteenth juror," especially when it reviews the trial court's resolution of conflicts in testimony. *State v. Thompkins*, 387 citing *Tibbs v.*

Florida (1982), 457 U.S. 31, 42.

{¶33} "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."

{¶34} *State v. Thompkins*, 387 quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶35} "A reversal based on the weight of the evidence, moreover, can occur only after the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict."

{¶36} *State v. Thompkins*, 387-388, quoting *Tibbs v. Florida* 41-43. (citations and footnotes omitted.) To reverse a jury verdict as against the manifest weight of the evidence, a unanimous concurrence of all three appellate judges is required. *State v. Thompkins*, 389.

{¶37} Appellant discredits the testimony of two witnesses whose testimony tended to support the inference that it was Appellant who entered the apartment and committed the underlying theft. Appellant overlooks the fact that as a reviewing court, we do not determine credibility issues, as judging the credibility of witnesses is primarily the responsibility of the jury. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. Notwithstanding that general principle, Appellant's specific

contentions are not well taken. With respect to Scott, Appellant argues that her testimony that she saw Appellant entering the apartment was incredible in light of her additional testimony that police found no evidence of a burglary. It is axiomatic that a jury is free to believe all, part or none of the testimony of each witness. *State v. Green* (1996), 117 Ohio App.3d 644, 654, citing *State v. Antill* (1964), 176 Ohio St. 61. Therefore, the jury was free to believe only that part of Scott's testimony indicating that she saw Appellant enter the apartment. We note, too, that Appellant has all but ignored evidence that Scott herself did not enter the apartment and was in no position to verify what the police officers did or did not see in the apartment. (Tr. pp. 254, 256-257). Appellant has also failed to consider that Scott positively identified Appellant in a photo line-up and at trial as the person she saw enter the apartment. (Tr. pp. 243-244).

{¶38} With respect to Benson, Appellant argues that her testimony does not prove that Appellant entered the Apartment and committed the actual theft. Benson did not testify as a witness to the crime, nor was her testimony offered as such. Benson's testimony links Appellant to the commission of the crime through the stolen goods and thus, supports Appellant's guilt. Benson testified that Appellant came to her apartment

around 12:00 a.m. on January 1, 1999, and sold her the items which were later determined to be the stolen property of Bankston and Jackson. (Tr. p. 173). Benson also testified that she knew Appellant and that she had purchased stolen items from him in the past. (Tr. p. 180). The fact that Benson admitted that she had previously purchased stolen goods goes to her credibility as a witness, and as we have already discussed, her credibility is a matter for the jury. *State v. DeHass, supra,* 231.

{¶39} Having disposed of Appellant's specific arguments, we now address the more general issue as to whether the verdict was against the manifest weight of the evidence. Pursuant to, R.C. §2911.12(A)(2), Appellant can be found guilty if the state proves that he forcefully entered the apartment when it was likely for the occupants to be present for the purpose of committing a criminal offense. As was demonstrated earlier, there was sufficient evidence that the occupants were likely to be present. Moreover, the state presented sufficient evidence that Appellant entered the apartment, as Scott testified that she saw Appellant enter the apartment. (Tr. p. 245). The state also presented sufficient evidence that the entry was gained by force, as Bankston and Jackson both testified that a brick was thrown through a window. (Tr. pp. 144, 199). Moreover, the

evidence supports that Appellant committed a theft offense because Benson purchased items from Appellant which she later learned were the property of Bankston and Jackson. (Tr. pp. 173-177). Appellant offered nothing to contradict the state's evidence. Instead, he relied wholly on cross-examination as a defense. Appellant's defense therefore turned on the credibility of the witnesses which we have stated is not within our purview. *State v. DeHass, supra,* 231.

{¶40} Given that the state offered evidence of Appellant's guilt on which reasonable minds could convict and Appellant offered no evidence to the contrary, it cannot be said that Appellant's conviction constituted a manifest miscarriage of justice. Accordingly, we hold that this assignment of error lacks merit and affirm the judgment of the trial court.

Donofrio, J., concurs.

DeGenaro, J., concurs.