COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	*	**CASE NO. 2019 CR 00572**
PLAINTIFF	*	**JUDGE JERRY R. MCBRIDE**
VS.	*	**DECISION/ENTRY**
DAMON PERRY HINKSTON	*	
DEFENDANT	*	

Katherine Terpstra, assistant prosecuting attorney for the state of Ohio, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Ronald A. Mason, assistant public defender and counsel for the defendant Damon Perry Hinkston, 302 East Main Street, Batavia, Ohio 45103.

This cause came before the court for a bench trial on September 3-4, 2019.

The defendant Damon Perry Hinkston was indicted in this case on June 13, 2019 on the following counts: (1) Burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree with a one-year firearm specification included pursuant to R.C. 2941.141(A) charging the defendant with having a firearm on or about his person or under his control while committing the offense; (2) Grand theft (of a firearm) in violation of R.C. 2913.02(A)(1), a felony of the third degree; and (3) Having weapons while under disability in violation of R.C. 2923.13(A)(2), a felony of the third degree.

On the 3rd day of September 2019, the defendant appeared before the court and indicated his desire to waive his right to a jury trial. The court engaged in a colloquy with

the defendant regarding the nature and effect of the defendant's waiver, and the court found that the defendant had knowingly, intelligently, and voluntarily waived his right to a jury trial in writing.

This cause came before the court for a bench trial on September 3rd and 4th, 2019. The defendant was represented throughout the trial by attorney Ronald A. Mason.

At the conclusion of the trial, the court took the issues raised in the case under advisement. Counsel for the state submitted her written closing argument on September 13, 2019. Defense counsel submitted his written closing argument on September 27, 2019. Counsel for the state submitted a written final summation on October 2, 2019.

Upon consideration of the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

STANDARD OF REVIEW

In a criminal case, it is the state's burden to prove the defendant's guilt beyond a reasonable doubt.[1] R.C. 2901.05(E) describes reasonable doubt as follows:

> "'Reasonable doubt' is present when the [triers of fact], after * * * carefully consider[ing] and compar[ing] all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs."

[1] R.C. 2901.05(A).

Further, "[i]t is axiomatic that the state must prove each and every element of an offense * * *."[2] "[T]he state solely carries the burden of proof and the defense has no duty to disprove the state's case."[3]

As the trier of fact, the court "* * * makes the determinations of credibility and the weight to be given to the evidence."[4] The trier of fact is in the best position to take into account any inconsistencies of evidence, "along with manner and demeanor to determine witness credibility," and is free to believe or disbelieve all or any of the testimony.[5]

FINDINGS OF FACT

The court makes the following findings of fact based upon the testimony of the witnesses and the exhibits it found to be admissible, credible, and reliable as presented at trial:

The offenses in this case are alleged to have occurred on May 23, 2019, and as a result much of the background information will be discussed in terms of that date.

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[2] *State v. Jones*, 91 Ohio St.3d 335, 347, 744 N.E.2d 1163 (2001). *See State v. Brown*, 12th Dist. Warren No. CA2006-10-120, 2007-Ohio-5787, ¶ 29 ("The state has a duty to present evidence, beyond a reasonable doubt, as to each and every element of the crime as set forth in the indictment.")

[3] *State v. Petit*, 12th Dist. Madison No. CA2016-01-005, 2017-Ohio-633, ¶ 27, quoting *State v. Richardson*, 8th Dist. Cuyahoga No. 100115, 2014–Ohio–2055, ¶ 24.

[4] *State v. Burrell*, 12th Dist. Fayette No. CA2016-04-005, 2016-Ohio-8454, ¶ 22, citing *State v. Clements*, 12th Dist. Butler No. CA2009-11-277, 2010-Ohio-4801, ¶ 20. *See State v. Shaver*, 12th Dist. Butler No. CA90-12-241, 1991 WL 170164, *3 (Sept. 3, 1991), citing *State v. Thomas*, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982) (stating that "it is the accepted rule in Ohio that the weight to be given evidence and the credibility of the witnesses in a criminal proceeding are primarily for the trier of fact.").

[5] *State v. Cope*, 12th Dist. Butler No. CA2009-11-284, 2010-Ohio-6430, ¶ 47, citing *State v. Johnson*, 10th Dist. Franklin No. 10AP-137, 2010-Ohio-5440, ¶ 18.

Brian Norton and his wife Rena have lived in a single family home located at 2907 Fair Oak Road in Amelia, Clermont County, Ohio, since 2001. They have four adult children, who are named Edwin Rust, Jesse Rust, William (Cody) Rust, and Logan Norton.

On and around May 23, 2019, Brian was self-employed in construction. His hours varied, and he did not leave the house or come home at the same time every day. On days when he did not have work scheduled, he might not leave the house at all. Even on days when he had work, he might return home for lunch or might return home to pick up tools since most of his work was conducted within a driving time of twenty to twenty-five minutes.

Brian's wife Rena worked for a food service company, with her work typically taking place at Northern Kentucky University. Her normal working hours were 1 p.m. until 10 p.m., but her hours varied depending on when she was needed. However, she typically had three weeks off work when the school year ended in the spring, which in 2019 was on May 10th. She was scheduled to be off work until June 5th.

On most days between May 10th and June 5th, Rena would help her husband in his construction work and would travel to his worksites with him. However, she had no set hours, and there were times when she was not helping her husband, and she might be running errands during those times, or she might have doctor's or other appointments, or she could be at home during any of those times.

On May 23, 2019, none of the Nortons' four adult children was living with Brian and Rena. Cody and Logan kept property at the house, and Cody kept an automobile parked in the driveway, and each had a key to the house and was free to come and go at

any time. Cody last lived at the house in August or September 2018. He was serving a prison sentence on or about May 23rd. Logan, meanwhile, had lived at Brian and Rena's home until he started living with his girlfriend in February 2019. The house where Logan and his girlfriend were residing is located on S.R. 132 in Clermont County. On May 23rd, which is the day on which the offenses in this case are alleged to have occurred, Logan was working for a friend, Chase Creech, in his landscaping business. He started working that day around 9 a.m.

Although he no longer lived there, Logan had an automobile, tools, weapons, ammunition, and other belongings at the house. He had a key to the house and had permission to stop by the house even when his parents were not present. The times when he would stop by the house varied. On most occasions when he came to the house, he let his parents know in advance that he would be coming, but there were occasions when he would drop by without giving them any notice.

On May 23rd, the Nortons had a gun cabinet made of wood which was in a bedroom. The gun cabinet was not visible from someone standing in the doorway to the bedroom because of a bathroom door which was almost always kept open and which when open concealed the presence of the gun cabinet.

There were four firearms that were stored in the gun cabinet that were described during the trial as follows: an AR-15 rifle, a .22 rifle, a Hi-Point 9 mm rifle, and a 410 Mossberg Gold Trigger .410 shotgun. They also had a significant amount of ammunition, some stored loosely and some in boxes, which included shotgun shells.

The firearms, while they were maintained at Brian and Rena's house, were not all owned by one person. Logan testified that all of the firearms were in proper working order

and capable of being fired. According to Brian, the .22 rifle had been given to him by his father, was used by him occasionally, with the last use being about a year before, and was in proper working order. Logan owned the AR-15 rifle and testified that a friend in the military had fully cleaned the weapon for him and that the weapon had last been fired in the late part of 2018 or in the early part of 2019. According to Logan, a friend in the military, presumably the same friend, owned the pistol, and there was no testimony as to which weapon he was referring to. In any event, it was last discharged at the end of last year or beginning of this year. However, Logan also stated that both the Hi-Point 9 mm rifle and the 410 Mossberg Gold Trigger .410 shotgun had last been fired a couple of years ago.

The court finds all of the testimony of Brian and Logan with relation to these weapons to be credible. Significantly, there was no testimony provided to indicate that the firearms had not been, at the times stated, in good working order, and there was no reason offered as to why the firearms would not be in good working order on May 23rd.

On May 23rd, Brian and Rena left to go to a worksite about 8:00 or 8:30 in the morning, and they did not return from the worksite, which was located near the intersection of S.R. 222 and S.R. 232, and which was only about 10 minutes away in terms of driving time, until about 8:00 or 8:30 in the evening. On that particular day, Brian was constructing a screened-in porch at the location, and Rena was installing siding.

After they returned home from work that day, Brian and Rena noticed that the kitchen window was not in the window casement but was on the sink. A screen had also been removed and was located in the yard. They went through the house to see if

anything was missing, and they noticed right away that the firearms were missing from the gun safe and that there was also missing ammunition.

Brian and Rena immediately called 9-1-1, and Deputy Sheriff Timothy Goins responded to their home to take a report. After calling 9-1-1, Brian then spoke to Logan, who had left work and was spending time with his daughter, to let him know that some of his firearms had been taken. Logan immediately left from where he was and went to his parents' home.

When Deputy Goins arrived at the residence, Brian informed him that he had a home surveillance system with cameras on each corner of the house and on the front of garage. Deputy Goins took a report from Brian and Rena, and Logan provided Deputy Goins the serial number for the AR-15 rifle.

Brian turned over the video recordings from the surveillance system that were relevant to that day. The date and time shown in the surveillance system was inaccurate. However, Detective Chris Allen, who was assigned to investigate the reported burglary, calculated that the time was off by 3 hours 48 minutes by comparing the time that he was there to the time that was shown in the surveillance system at that time. He calculated the date of the burglary using the same methodology. He was able to determine that the burglary occurred about 3:15 p.m. on May 23rd.

The video was admitted into evidence and depicts a purple Scion automobile pulling into the driveway of the Norton residence. It then shows the driver exiting the automobile, entering the residence empty handed, and then leaving the residence with firearms in his possession.

Detective Allen had prior contact with the defendant Damon Hinkston, and he identified Damon as the individual who was the driver of the vehicle and who, after exiting the vehicle and entering the house, returned carrying firearms. When asked what he relied on in making the identification, Detective Allen cited Damon's unique physical characteristics, skin tone, muscular build, and height. He stated from all of these factors, he immediately was able to identify the individual as Damon Hinkston.

Brian and Rena likewise each viewed the surveillance videos and identified Damon Hinkston as the individual who was depicted getting out of the driver's side of the car and then carrying firearms out of the house. They both recognized Damon because he had been a friend of their son Cody, and because he had been at the house within the past couple years at least several times as Cody's guest.

Brian and Rena each identified Damon from the fact that they were acquainted with him, and they testified that they could recognize him from his build and other features, and also from the fact that he was wearing bright red shoes that appeared identical to a pair of red shoes that their son Cody had previously given Damon.

Logan also identified Damon Hinkston as the person who appears in the video. He testified that he could recognize Damon based on the fact that he "hung out" with his brother Cody and had been to the Fair Oaks address about five or six times. He also testified that he had occasion to be introduced to Damon while he was there.

At the request of Detective Allen, Detective Mike Robinson of the Sheriff's Office reviewed the surveillance videos and made several still shots from the videos. He had prior contact with Damon, and he also identified Damon as the person in the still shots

and in the video. He testified that he recognized Damon from having tattoos up and down his arms, from the way he walked, and from the way he handled himself.

What stood out to Detective Robinson in the still photographs, however, was the fact that the individual in the photographs was carrying a firearm and was wearing bright red shoes. Robinson accessed Damon's Facebook page and on that page observed that there was a photograph of Damon wearing bright red shoes similar to what Robinson had observed in the videos.

From the surveillance video, Detective Robinson also prepared still photographs depicting the rear license plate on the purple Scion automobile. He was able to identify most of the numerals on the license plate on his computer screen. From these stills, he was able to discern the last letter S and the numbers 248 as being on the license plate. He was not sure if the last digit was a 5 or a 6.

Detective Robinson was also able to develop a still photograph which depicted the passenger in the vehicle. However, he was not able to identify this individual.

Later, the AR-15 rifle, with the identical serial number that had been provided to the Sheriff's Office by Logan Norton, was located at the Comfort Inn in Union Township, Clermont County, by members of the Clermont County Narcotics Unit. It was test fired and was found to be operational and in good working order at the time.

Another of the firearms that was missing, the 410 Mossberg Gold Trigger .410 shotgun, was also recovered by the narcotics unit from a confidential informant who surrendered it to law enforcement. This weapon was then test fired and determined to be operational. The other two firearms have not been recovered.

On June 3, 2019, Detective Dominic Donovan of the Sheriff's Office began investigating a report made by an individual named William Tolan that his purple Scion automobile had been stolen on May 21st. The report included the license plate number for that vehicle.

On June 4th, Investigator Mike Robinson of the Sheriff's office issued a BOLO to other law enforcement agencies with the still photographs of the purple Scion automobile captured in the surveillance videos as having been in the Nortons' driveway on May 23rd and of the two suspects who had been in that vehicle. At that point, after doing a comparison, Investigator Robinson discerned that the license plate number on the purple Scion automobile in the videos was substantially the same as the license plate number provided by William Tolan for his stolen automobile.

When Detective Donovan questioned William Tolan, he learned that the last person that Tolan had loaned his vehicle to was a male individual named Earl Dean. Donavan also learned that a traffic citation had been issued on a stop of a maroon Scion automobile approximately four days prior to that, and that the license plate number was the same as the one provided by William Tolan. The license plate number also included the same letter and three numerals that Detective Robinson had identified from the still shots as having been part of the license plate number on the purple Scion automobile that had been at the Norton's residence. The individual who was issued the citation was listed as Damon Hinkston, and the birthdate listed on the citation is in fact Damon's birthdate. The other person in the vehicle at the time was Earl Dean. Although the vehicle was listed as being maroon in color, Detective Allen opined that, depending on the sunlight, a maroon vehicle may appear to be purple, and vice versa.

Robinson then spoke to Tolan, who provided him the names of Damon Hinkston, whom he identified as someone he had loaned his car to previously, and an individual named Earl Dean, whom he said he had loaned the automobile to most recently.

Because Damon Hinkston was then confined in the Clermont County Jail, Investigator Robinson began to monitor the calls at the Jail. Just several weeks prior to May 23rd, Robinson had talked to Damon Hinkston in person, and he was able to recognize Damon's voice from a recording at Jail. In one of the telephone calls that he listened to, he heard Damon saying that "nobody was at home." In another clip, he heard Damon saying that he made sure that "they" were not going to be home.

In addition to Investigator Robinson recognizing the voice of Damon Hinkston on the telephone, calls from the Clermont County Jail to non-attorneys are recorded. Notice is given to inmates at the time of calling that their calls are being recorded. PIN (personal identification) numbers are unique to each inmate, and an inmate must enter his PIN number, as well as the number of a telephone card if he is using one, in order to make a call. Phone numbers called are also recorded. The calls made by Damon Hinkston between June 14th and June 17th were recorded in this manner. In one call, he states that "they have him dead to rights." In another call, he says he "made sure they were not going to be home." Three of the calls were made to the same number, which from the discussion during the phone calls appears to have been made to the defendant's mother.

Earl Dean testified as a witness for the state and confirmed in his testimony that he knows William Tolan and sometimes borrows his purple Scion automobile from him, and that he knows the defendant Damon Hinkston. He testified that Damon drove them on the day in question to the Norton residence in Amelia. According to Dean, Damon

exited the car and came back with a couple of firearms on his person that he did not have in his possession previously, and that he then placed the firearms in the hatch portion of the vehicle. He states that both of them had used heroin previously and were "high" at the time. He recounted that this occurred in the late afternoon, and that there were three other cars in the driveway, which is consistent with what was described by the Nortons.

EVIDENCE OF PRIOR OFFENSE OF VIOLENCE

Damon Hinkston was charged in Juvenile Court with delinquency in committing an assault as a felony of the fifth degree. The alleged victim of the offense was a teacher, and the charge would be a felony pursuant to R.C. 2903.13(C)(4)(d) if the victim at the time of the offense was engaged in her duties or official responsibilities associated with her employment. However, the paperwork from Juvenile Court never indicates that the victim was engaged in her official responsibilities as a teacher at the time, or that the charge was brought pursuant to R.C. 2903.13(C)(4)(d).

Damon Hinkston, who was approximately nine years old at the time, may have waived his right to counsel. However, that cannot be determined because there is no signature on the waiver of counsel form.

Damon signed a written plea of admission, but the written plea of admission does not state that he was admitting to the charge of assault as a felony of the fifth degree, or whether he was admitting to the facts which are not alleged in the paperwork which would make the offense a felony of the fifth degree if committed as an adult, or whether he was simply admitting to "simple assault" which would be a misdemeanor of the first degree if

committed by an adult. Likewise the disposition/adjudication paperwork does not provide any information beyond what was in the plea of admission form.

The state is indicating that there is nothing in the paperwork to state that the charge of assault was pled down to a misdemeanor of the first degree. However, the point is that there is nothing in the paperwork to indicate what the defendant was admitting to in Juvenile Court or as to the nature of the court's judgment. The Juvenile Court, as is the case with any court, speaks as to its decisions through its entries. If the entries are silent in terms of what the defendant is admitting to, the facts regarding his admission may be testified to by someone with first hand knowledge, but nobody can testify as to what the court's judgment was except the court itself through its journal. By the same token, the LEADS report that includes a reference to the defendant having been adjudicated to be a delinquent child for the commission of a felony offense of violence may be based on information provided by the court, but it cannot stand in place of a court entry. Furthermore, there is no way of knowing whether the information that may have been transmitted by some unidentified court personnel was related correctly, or whether the information that was given was accurately reported in the LEADS report.

As a result, the court finds that the state has failed to prove beyond a reasonable doubt that the defendant was previously adjudicated to be a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

LEGAL ANALYSIS

I. COUNT 1: BURGLARY

Count 1 charges the defendant with burglary, in violation of R.C. 2911.12(A)(2), a felony of the second degree. Burglary of the second degree is criminalized in R.C. 2911.12(A)(2), which provides:

> "(A) No person, by force, stealth, or deception, shall do any of the following:
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> * * *
>
> (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 * * *."

Pursuant to R.C. 2901.22(A), a "person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature."[6]

Per R.C. 2911.10, "the element of trespass refers to a violation of section 2911.21 of the Revised Code."[7] In turn, R.C. 2911.21 defines criminal trespass as follows: "(A) No person, without privilege to do so, shall do any of the following: (1) Knowingly enter or remain on the land or premises of another * * *."[8]

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[6] R.C. 2901.22(A).
[7] R.C. 2911.10.
[8] R.C. 2911.21(A)(1).

A person acts "knowingly" when:

> "* * * regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact."[9]

Lastly, R.C. 2911.12 states that "occupied structure" is defined in R.C. 2909.01. In turn, R.C. 2909.01(C) provides that an "occupied structure" is "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: * * * (2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present."[10]

Finally, as for the requirement that another person is likely to be present, "[a]lthough the term 'likely' connotes something more than a mere possibility, it also connotes something less than a probability or reasonable certainty."[11] "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."[12] Furthermore, "[t]he fact that a permanent or temporary habitation has been burglarized does not give rise to the presumption that

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[9] R.C. 2901.22(B).
[10] R.C. 2909.01(C)(2).
[11] *State v. K.L.P.W.*, 2017-Ohio-5671, 94 N.E.3d 1, ¶ 16 (12th Dist.), citing *State v. Pennington*, 12th Dist. Warren. No. CA2006-11-136, 2007-Ohio-6572, ¶ 29. *See State v. Gerde*, 12th Dist. Clermont No. CA2016-11-077, 2017-Ohio-7464, ¶ 24, citing *Pennington*, 2007-Ohio-6572 at ¶ 29 (holding same).
[12] *K.L.P.W.*, 2017-Ohio-5671 at ¶ 16, citing *Pennington*, 2007-Ohio-6572 at ¶ 29. *See Gerde*, 2017-Ohio-7464 at ¶ 24, citing *Pennington*, 2007-Ohio-6572 at ¶ 29 (holding same).

a person was present or likely to be present."[13] So too, "[t]he fact that a dwelling is used as a residence is not, standing alone, sufficient to show that someone is 'likely to be present' at the time of a burglary."[14]

To satisfy this element, "[t]he state must adduce specific evidence that people were present or likely to be present."[15] "In determining whether persons are likely to be present under R.C. 2911.12(A)(2), a defendant's knowledge is not material."[16] "The issue is not whether the burglar subjectively believed that persons were likely to be there, but whether it was objectively likely."[17] "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."[18]

The Ohio Supreme Court has found the "likely to be present" element is satisfied "where the structure is a permanent dwelling house that 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."[19] The Twelfth District Court of Appeals

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[13] *K.L.P.W.*, 2017-Ohio-5671 at ¶ 17, citing *Pennington*, 2007-Ohio-6572 at ¶ 30. *See Gerde*, 2017-Ohio-7464 at ¶ 24, citing *State v. Fowler*, 4 Ohio St.3d 16, 18-19, 445 N.E.2d 1119 (1983) (holding same).
[14] *K.L.P.W.*, 2017-Ohio-5671 at ¶ 17, quoting *State v. Jackson*, 188 Ohio App.3d 803, 2010-Ohio-1846, 937 N.E.2d 120, ¶ 9 (4th Dist.). *See Gerde*, 2017-Ohio-7464 at ¶ 24, citing *Jackson*, 2010-Ohio-1846 at ¶ 9 (holding same).
[15] *K.L.P.W.*, 2017-Ohio-5671 at ¶ 17, citing *Pennington*, 2007-Ohio-6572 at ¶ 28. *See Gerde*, 2017-Ohio-7464 at ¶ 24, citing *Pennington*, 2007-Ohio-6572 at ¶ 28 (holding same).
[16] *State v. Petit*, 12th Dist. Madison No. CA2016-01-005, 2017-Ohio-633, ¶ 21, citing *State v. Pennington*, 12th Dist. Warren No. CA2006–11–136, 2007–Ohio–6572, ¶ 28.
[17] *Petit*, 2017-Ohio-633 at ¶ 21, citing *Pennington*, 2007–Ohio–6572 at ¶ 28.
[18] (Internal quotations omitted.) *Pennington*, 2007–Ohio–6572 at ¶ 28.
[19] *K.L.P.W.*, 2017-Ohio-5671 at ¶ 18, citing *State v. Kilby*, 50 Ohio St.2d 21, 23, 361 N.E.2d 1336 (1977). *See Gerde*, 2017-Ohio-7464 at ¶ 25, citing *Kilby*, 50 Ohio St.2d at 23 (holding same).

has similarly explained, "the state must show that the victim was home at varying times to prove that the victim was likely to be home at the time of the burglary."[20]

Ohio courts have found insufficient evidence that the occupants of a residence were likely to be present when they were absent for an extended period of time, such as a vacation, and no one else was regularly checking on the house.[21] So too, "where the occupants of a house are almost always absent as part of their fixed work schedule, they are not likely to be present during their regular working hours."[22] And "[w]here a person individually occupies [a home] and his usual and ordinary work habits take him away from that [home] regularly, during certain hours of the day, at a time there is minimum likelihood that a person will be present therein."[23] Indeed, Ohio case law provides numerous examples where a second degree burglary conviction could not be affirmed on appeal because the occupant was at work at the time of the burglary and regularly worked at that time.[24]

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[20] *Pennington*, 2007–Ohio–6572 at ¶ 31, citing *State v. Hibbard*, 12th Dist. Butler No. CA2001-12-276, 2003-Ohio-707.
[21] *K.L.P.W.*, 2017-Ohio-5671 at ¶ 18. *See Gerde*, 2017-Ohio-7464 at ¶ 25 (holding same).
[22] *State v. Braden*, 1st Dist. No. C-170097, 2018-Ohio-563, 106 N.E.3d 827, ¶ 12. *See State v. Jones*, 8th Dist. Cuyahoga No. 104233, 2017-Ohio-288, ¶ 21, quoting *State v. Miller*, 2d Dist. Clark No. 2006 CA 98, 2007–Ohio–2361, ¶ 16 ("Conversely, Ohio courts have found that 'if the occupants of a house are gone for the entire workday, they are not likely to be present during the day.'"); *State v. Cole*, 8th Dist. Cuyahoga Nos. 103187 through 103190, 2016–Ohio–2936, ¶ 39, quoting *State v. McCoy*, 10th Dist. Franklin No. 07AP–769, 2008–Ohio–3293, ¶ 23 ("Conversely, Ohio courts have also found that "where the occupants of a house are absent as part of their regular workday, they are not likely to be present during the day.").
[23] *Cole*, 2016–Ohio–2936 at ¶ 43, quoting *State v. Meisenhelder*, 8th Dist. Cuyahoga No. 76764, 2000 WL 1513695, *14 (Oct. 12, 2000).
[24] *See Braden*, 2018-Ohio-563 (finding the "likely to be present" element not satisfied where the burglary occurred during the occupant's normal working hours, there was no evidence the occupant regularly missed work or that he had a commitment to be home on day of burglary, and although the occupant had an occasional housekeeper, there was no evidence the occupant had arranged for the housekeeper to come on any day near the burglary); *Jones*, 2017-Ohio-288 at ¶¶ 23-25 (finding the "likely to be present" element not satisfied where the victim lived alone and was at work during the burglary, and even though he testified that he sometimes worked from home, such testimony presented only a "mere possibility" insufficient to establish likelihood); *State*

In turning to the present case, the court finds that the state proved all elements of R.C. 2911.12(A)(2) beyond a reasonable doubt. The defendant did use force to trespass into the Nortons' home by pushing the kitchen window out of its casement and removing a screen. Further, the defendant's acts constitute trespassing because he knowingly entered the land and premises' of Brian and Rita Norton without their permission. Moreover, the Nortons testified that they have lived in their single family home located at 2907 Fair Oak Road in Amelia, Ohio, since 2001, and as such it qualifies as an occupied structure. The defendant also entered the occupied structure with the purpose to commit a theft therein.[25]

And lastly, it was likely that someone other than the defendant or an accomplice was likely to be present at the time of the trespass. There was more than a mere possibility that Brian or Rita Norton may have been present at their home during the burglary. Brian testified that his work hours varied, and on some days, when he did not

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v. Richardson, 8th Dist. Cuyahoga No. 100115, 2014–Ohio–2055, ¶ 23 (finding the victim was not likely to be present where the burglary occurred shortly before noon on a workday, and there was no evidence that the victim sometimes returned home during the workday); *McCoy*, 2008–Ohio–3293 at ¶ 24 (finding the "likely to be present" element not satisfied where an adult occupant testified she was at work during the burglary and did not testify as to whether she ever came home during the workday, nor did she testify to her husband and children's schedules in the home); *State v. Frock*, 2d Dist. Clark No. 2004 CA 76, 2006-Ohio-1254 (finding the "likely to be present" element not satisfied where the occupant regularly came home from work to walk her dog around 2 p.m., and burglary occurred between 1:00 p.m. and 1:30 p.m.); *State v. Brown*, 1st Dist. Hamilton No. C–980907, 2000 WL 492054 (Apr. 28, 2000) (finding the "likely to be present" element not satisfied where burglary occurred during the occupant's workday, and no evidence was offered that the occupant ever came home during his workday); *Meisenhelder*, 2000 WL 1513695 (where a person individually occupies an apartment and his usual and ordinary work habits take him away from that apartment regularly during certain hours of the day, there is minimal likelihood that a person will be present in the structure); *State v. Lockhart*, 115 Ohio App.3d 370, 685 N.E.2d 564 (8th Dist.1996) ("likely to be present" element not satisfied where home's occupant testified that burglary occurred while she was at work, and that she did not return to her house at varying times).

[25] The criminal offense element is examined more thoroughly in Section II, wherein the court finds the defendant guilty of grand theft of a firearm.

have any construction projects scheduled, he might stay at home all day. More strikingly, Rena was on a break from her work at Northern Kentucky University between May 10th and June 5th. Although she happened to be helping Brian at his construction project on the day of the burglary, she also testified that she also stayed home on some of her days off. Given the varying times that the Nortons returned to their home from work, if they left it at all, the court finds that it was likely that someone other than the defendant or an accomplice was likely to be present at the Norton's home at the time of the trespass.

Count 1 also includes a one-year firearm specification pursuant to R.C. 2941.141(A) charging the defendant with having a firearm on or about his person or under his control while committing the offense. Pursuant to R.C. 2941.141(A):

> "Imposition of a one-year mandatory prison term upon an offender under division (B)(1)(a)(iii) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense."[26]

R.C. 2941.141(F) indicates that "firearm" bears the same meaning as in R.C. 2923.11. In turn, R.C. 2923.11(B)(1) provides: "'Firearm' 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."[27] And R.C. 2923.11(B)(2) explains the operability component to firearm: "When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible

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[26] R.C. 2941.141(A).
[27] R.C. 2923.11(B)(1).

propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm."[28]

The Ohio Supreme Court found in *State v. Powell*, 59 Ohio St.3d 62, 63, 571 N.E.2d 125 (1991), at paragraph one of the syllabus, that a defendant may be charged with a gun specification if the defendant "has a firearm in his or her possession at any time during the commission of a felony, even if the firearm is acquired by theft during the course of the felony."[29] This is so because burglary "continues so long as the defendant remains in the structure being burglarized because the trespass of the defendant has not been completed."[30]

In examining the present case, the state has proven the firearm specification. Based on the court's factual findings, the defendant had four firearms on his person while he was still in the Nortons' home committing the burglary. Thus, when the defendant acquired the firearms by theft, he was still engaged in the commission of the burglary. Moreover, the four guns that the defendant stole are all firearms, and the testimony provided indicates that they were operable. As such, the court finds the state has proven the defendant guilty beyond a reasonable doubt on Count 1, burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree, with a one-year firearm specification included pursuant to R.C. 2941.141(A) charging the defendant with having a firearm on or about his person or under his control while committing the offense.

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[28] R.C. 2923.11(B)(2).
[29] *State v. Powell*, 59 Ohio St.3d 62, 63, 571 N.E.2d 125 (1991), paragraph one of the syllabus.
[30] Id. at 127.

II. COUNT 2: GRAND THEFT OF A FIREARM

In Count 2 the defendant is charged with grand theft of a firearm, in violation of R.C. 2913.02(A)(1), a felony of the third degree. R.C. 2913.02(A)(1) provides: "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) Without the consent of the owner or person authorized to give consent * * *."[31] R.C. 2913.02(B)(4) goes on to provide that "[i]f the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft" and a felony of the third degree.[32]

Multiple terms in R.C. 2913.02, the theft statute, are statutorily defined, including the terms purposely, deprive, and knowingly. Pursuant to R.C. 2901.22(A), a "person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature."[33]

The term "deprive" in the statute means to do any of the following:

> "(1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration;
>
> (2) Dispose of property so as to make it unlikely that the owner will recover it * * *."[34]

Additionally, a person acts "knowingly" when:

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[31] R.C. 2913.02(A)(1).
[32] R.C. 2913.02(B)(4).
[33] R.C. 2901.22(A).
[34] R.C. 2913.01(C).

> "* * * regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact."[35]

"The mens rea of an intent to deprive of property, 'like most mental elements of crime, can rarely be proved by direct evidence * * *.'"[36] As such, the fact finder looks to the surrounding facts and circumstances to determine the defendant's criminal intent.[37] Furthermore, people are "presumed to have intended the natural, reasonable and probable consequences of their voluntary acts."[38]

In examining the present case, the court finds that the state has proven beyond a reasonable doubt that the defendant committed grand theft of a firearm, in violation of R.C. 2913.02(A)(1). The evidence shows that the defendant's specific intention in removing the firearms from the Norton's home was to withhold them from the Nortons permanently. Indeed, two firearms have not been recovered. And the two that have, the AR-15 rifle and the 410 Mossberg Gold Trigger .410 shotgun, were not recovered because the defendant returned them. The former was recovered from the Clermont County Narcotics Unit in a Comfort Inn while the latter was recovered by the Narcotics

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[35] R.C. 2901.22(B).
[36] *State v. Vertucci*, 9th Dist. Summit No. 29205, 2017-Ohio-2838, ¶ 13, quoting *Piesciuk v. Kelly*, S.D.Ohio No. 1:14-cv-185, 2015 WL 1637425, *9 (Apr. 13, 2015).
[37] *State v. Smith*, 12th Dist. Butler No. CA2004-11-275, 2005-Ohio-6551, ¶ 18, citing *State v. Garner*, 74 Ohio St.3d 49, 60, 656 N.E.2d 623 (1995).
[38] *State v. Piesciuk*, 12th Dist. Butler No. CA2004-03-055, 2005-Ohio-5767, citing *Garner*, 74 Ohio St.3d 49.

Unit from a confidential informant who surrendered it to law enforcement. As such, it was the defendant's purpose to deprive the Nortons of the firearms.

Furthermore, the defendant knowingly exerted control over the four firearms when he physically removed them from the Nortons' home and drove away with them. And the evidence is clear that none of the Nortons gave consent to the defendant to remove the firearms. As previously discussed in Section I, the guns involved are firearms. Accordingly, the court finds the defendant guilty beyond a reasonable doubt of grand theft of a firearm under R.C. 2913.02(A)(1).

III. COUNT 3: HAVING WEAPONS WHILE UNDER DISABILITY

In Count 3 the defendant is charged with having weapons while under disability in violation of R.C. 2923.13(A)(2), a felony of the third degree. R.C. 2923.13(A)(2) provides, in relevant part: "

> "(A) Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply: (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence."[39]

At issue is whether the state has sufficiently proven that the defendant was adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence. The Ohio Supreme Court has held that using a prior juvenile delinquency adjudication as an element of the offense of having

[39] (Emphasis added.) R.C. 2923.13(A)(2).

weapons under a disability does not offend the Due Process Clause.[40] In that case, the Court recognized that "[i]nherent in R.C. 2923.13(A)(2) is a policy decision made by the legislature that allowing weapons in the hands of individuals with certain prior juvenile adjudications poses an increased risk to public safety, as does allowing weapons in the hands of those with other disabling conditions such as chronic alcoholism or drug dependence."[41] The Court noted that "the lack of a right to a jury trial, as well as other protections, does not make prior juvenile adjudications unreliable for risk-assessment purposes."[42] Indeed, "juvenile law and criminal law are not synonymous."[43]

And "in a prosecution for having weapons while under disability * * * the validity of a predicate juvenile adjudication is not at issue. The question presented in such circumstances is simply whether the defendant chose to use or possess weapons in disregard of a legal disability. Consequently, the question of whether the defendant actually committed an offense as a juvenile is rendered immaterial."[44] Thus, it is not the role of this court to determine whether the defendant in this case committed a felony offense as juvenile that if committed by an adult would be an offense of violence. The role of the court is simply to determine whether the defendant was *adjudicated a delinquent child* for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

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[40] *State v. Carnes*, 154 Ohio St.3d 527, 2018-Ohio-3256, 116 N.E.3d 138, ¶ 1.
[41] Id. at ¶ 16.
[42] Id. at ¶ 17.
[43] *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, ¶ 13.
[44] *State v. Boyer*, 2017-Ohio-4199, 92 N.E.3d 213, ¶ 13 (2d Dist.), citing *State v. Hudson*, 2017-Ohio-645, 85 N.E.3d 371, ¶¶ 46, 50–52 (7th Dist.).

As with other elements of any criminal offense, proving a prior offense must be proven beyond a reasonable doubt.[45] The most illuminating case in this regard is *State v. Hottenstein*, 2015-Ohio-4787, 43 N.E.3d (2d Dist.). In *Hottenstein* the defendant was charged under a different subsection of R.C. 2921.13, that being (A)(14), but it dealt with whether the state offered sufficient evidence of the defendant's prior adjudication that he was a delinquent child for committing an offense that would violate R.C. Chapter 2925.[46]

That case involved much of the same documentation as provided in the instant case one, including a juvenile complaint and an adjudication entry.[47] The *Hottenstein* case also included a certified judgment entry.[48] The defense proffered testimony from a magistrate who would have testified about juvenile court and its procedures, but the trial court sustained an objection to it.[49]

On appeal, the Second District Court of Appeals first dealt with whether the trial court properly excluded the magistrate's testimony, with the defense arguing that the defendant was entitled to present evidence that he had not been adjudicated a delinquent child.[50] However, the appellate court rejected this proposition, explaining that "[i]t is well established that a court speaks through its journal entries."[51] As such, the court resolved that whether the defendant "was, in fact, adjudicated a delinquent child for committing an

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[45] *See State v. Gwen*, 134 Ohio St.3d 284, 2012-Ohio-5046, 982 N.E.2d 626, ¶ 11, citing *State v. Henderson*, 58 Ohio St.2d 171, 173, 389 N.E.2d 494 (1979).
[46] *State v. Hottenstein*, 2015-Ohio-4787, 43 N.E.3d (2d Dist.)
[47] Id. at ¶ 7.
[48] Id.
[49] Id. at ¶ 9.
[50] Id. at ¶ 14.
[51] Id. at ¶ 15.

offense that would violate R.C. Chapter 2925 was a matter to be determined by reference to the record in the juvenile court case."[52]

The defendant also appealed on the basis that the state failed to prove that he had been adjudicated a delinquent child and thus his verdict was unsupported by the evidence. The complaint in the defendant's juvenile case stated that the defendant appeared to be a delinquent child and charged him with trafficking drugs in violation of R.C. 2925.03(A)(1)/R.C. 2152.021. Further, the court's judgment entry specifically found that the defendant was adjudicated a delinquent child.[53] However, the adjudication hearing entry did not indicate whether the defendant was adjudicated a delinquent child or simply an unruly child.[54] Thus the defendant posited that there was insufficient evidence that he had been adjudicated a delinquent child.[55]

The appellate court rejected this argument, opining: "The judgment entry in the juvenile case should not be read 'as a whole' with the complaint and adjudication entry to determine whether Hottenstein had a disqualifying adjudication. Rather, the juvenile court's judgment entry (Exhibit 2) is the only relevant entry to determine whether Hottenstein was adjudicated a 'delinquent child' for committing an act that would, if committed by an adult, be an offense under ORC 2925, 3719, or 4529 * * *."[56]

The court therefore concentrated upon the sufficiency of the judgment entry. And the defendant raised another issue with it – the judgment entry did not state the statutory section that formed the basis for the adjudication, the controlled substance involved, or

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[52] Id.
[53] Id. at ¶ 30.
[54] Id. at ¶ 26.
[55] Id.
[56] Id. at ¶ 29.

the degree of the offense.[57] The body of the judgment entry stated that the "defendant was "adjudicated a delinquent child 'as alleged in the complaint filed in this action.'"[58] The appellate court resolved that: "In our view, the judgment entry was insufficient to establish that, in December 2007, Hottenstein was adjudicated for "an offense under ORC 2925, 3719, or 4529, that involves illegal possession, use, sale, administration, distribution of or trafficking in a drug of abuse."[59] Accordingly, the appellate court reversed the defendant's conviction under R.C. 2921.13(A)(14).

In turning to the present case, the court finds that the defendant is not guilty of having weapons under disability for two reasons. First, as previously stated, the court must find that the state has proven beyond a reasonable doubt that the defendant has a prior adjudication for the commission of an offense that, if committed by an adult, would have been a felony offense of violence. And, even when considering all the state's evidence presented, the court, as the fact finder, is not convinced beyond a reasonable doubt that the defendant has a prior adjudication for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

Secondly, the *Hottenstein* case illustrates that the method of proving a prior adjudication as a delinquent for committing an offense is proven through the juvenile court's judgment entry. In the case at bar there is no such judgment entry submitted as an exhibit. But even if the court treated the adjudication entry as such, the adjudication entry does not state anywhere what statutes the defendant is being adjudicated under, the names of those offenses, or the degrees. Per *Hottenstein*, the court is not permitted

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[57] Id. at ¶ 33.
[58] Id.
[59] Id.

to rely on the juvenile complaint to conclude that the defendant was adjudicated as stated in the complaint. For this additional reason, the court finds that the state has failed to prove that the defendant committed having weapons while under a disability beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the court finds that the state has not proven beyond a reasonable doubt that the defendant is guilty of Count 3, having weapons while under disability in violation of R.C. 2923.13(A)(2), a felony of the third degree.

However, the state has proven the defendant's guilt as to Count 1, burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree with a one-year firearm specification included pursuant to R.C. 2941.141(A) charging the defendant with having a firearm on or about his person or under his control while committing the offense; and Count 2, grand theft of a firearm in violation of R.C. 2913.02(A)(1), a felony of the third degree, and the court finds him guilty of such.

Counsel shall conference and call the Assignment Commissioner within five days of the date of this Decision/Entry in order to schedule the sentencing hearing in the case. The sentencing hearing shall be scheduled within three weeks of the date of the Decision/Entry.

This matter is referred to the Probation Department for a presentence investigation.

IT IS SO ORDERED.

DATED: 1-31-20

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Entry have been sent on this 31st day of January 2020 by e-mail to Katherine Terpstra, Assistant Prosecuting Attorney, at kterpsrta@clermontcountyohio.gov, and to Ronald A. Mason, Attorney for the Defendant, at rmason@clermontcountohio.gov. Printed copies were provided to the Prosecuting Attorney's Office and the Public Defender's Office.

Judicial Assistant to Judge McBride