

FILED

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

2019 MAY -8 AM 10: 51

DANIEL E. WHITELEY
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

STATE OF OHIO :
Plaintiff : **CASE NO. 2018 CR 01173**
vs. : **Judge McBride**
DAVID ALLEN KUHLMAN : **DECISION/ENTRY**
Defendant :

Dorothy K. Smith, assistant prosecuting attorney for the state of Ohio, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Daniel E. Whiteley, Jr. counsel for the defendant David Allen Kuhlman, 602 Main Street, Suite 1309, Cincinnati, Ohio 45202.

This case came before the court for a bench trial on March 4, 2019. At the conclusion of the trial, the court took the issues raised in the case under advisement.

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

PROCEDURAL BACKGROUND

The defendant David Allen Kuhlman was indicted on December 18, 2018 on two counts: (1) burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree, and (2) theft of a firearm in violation of R.C. 2913.02(A)(1), a felony of the third degree.

On February 11, 2019, the defendant submitted a waiver of 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. The court journalized this finding on February 21st.

The court held a bench trial on March 4th. At the outset of the trial, the parties submitted stipulations that there are sufficient facts to prove that the defendant is guilty of committing the offense of burglary in violation of R.C. 2911.12(A)(3), a felony of the third degree, and the offense of theft of a firearm in violation of R.C. 2913.02(A)(1), a felony of the third degree. The parties then agreed that the only remaining issue to be determined at trial was, as to Count 1, whether the defendant's burglary of the victim's home was committed when any person other than an accomplice of the defendant was present or likely to be present. At the conclusion of the trial, the court took this remaining issue under advisement.

FINDINGS OF FACT

I. STIPULATIONS BY THE PARTIES

The following are the agreed stipulations:

The defendant David Allen Kulhman stipulates and agrees that there are sufficient facts to prove that he is guilty of committing a violation of R.C. 2911.12(A)(3), burglary felony in the third degree, and a violation of R.C. 2913.02(A)(1), theft of a firearm felony in the third degree, as a result of his trespass into the home of John Repman on November 27, 2018 with purpose to commit a theft from that home and his theft of a firearm from that home.

The defendant, on November 27, 2018, did, by force, stealth, and deception, trespass into the home of Repman, with purpose to commit a theft offense inside of his home. On that same date, he trespassed into Repman's home as it is defined in R.C. 2911.21. Repman's home is located at 2592 State Route 52, in Clermont County, Ohio. Repman's home is an occupied structure as defined in R.C. 2909.01(C). The criminal offense the defendant intended on committing inside Repman's home was the offense of theft as defined in R.C. 2913.02.

Also on November 27th, the defendant did knowingly obtain and exert control over property belonging to Repman. The defendant did so with the purpose of depriving Repman of that property. The defendant obtained and exerted control over such property without Repman's consent. The property the defendant obtained was an operable firearm as defined in R.C. 2923.11. The defendant did obtain and exert control over the firearm belonging to Repman on November 27th while in Clermont County, Ohio.

II. ADDITIONAL FINDINGS OF FACT

The victim, John Repman, is a plumber for Gardner Plumbing. His normal work schedule is 7:30 am to 4:00 p.m. Gardner Plumbing is located about an hour from Repman's home, on Winton Ridge Lane in Cincinnati, Ohio. Each morning he drives to that location, where he gets into a work vehicle with a work partner. He then receives a plumbing assignment, which usually lasts one to two days, and could be anywhere in the greater Cincinnati area.

On November 27, 2018, Repman went to work and then drove an additional hour for a plumbing job in Fairfield, Ohio. Repman does not come home from work during the day. He occasionally calls in sick or takes vacation days, during which he stays at his home.

Repman lives alone. However, Repman's stepson, Jeff Pritchard, has a key to his home. He is allowed to come over whenever he likes to fish and hunt, which he does on occasion. On such occasions, he will come into Repman's home, have some food, and occasionally watch TV. Pritchard always calls Repman before he comes over to fish or hunt.

It is unclear at what time the burglary occurred on November 27, 2018, but Repman was at work, and Pritchard was not present at the home. When police contacted Repman regarding the burglary, he informed them it would take him approximately two hours to get back to his house.

At the time of the burglary, the defendant knocked on the victim's door. No one answered. Using a pry bar and a screw driver, he entered Repman's back door. He stole three firearms, a record player, watches, jewelry, and other miscellaneous items.

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."

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

¹ R.C. 2901.05(A).

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*,

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

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:

* * *

(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 * * *.”

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.

As discussed, given the agreed stipulations, the only element at issue in this case is whether any other person was present or likely to be present. It is undisputed that all other elements for second degree burglary are satisfied.

“Although the term ‘likely’ connotes something more than a mere possibility, it also connotes something less than a probability or reasonable certainty.”⁶ “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.”⁷ Furthermore, “[t]he fact that a permanent or temporary habitation has been burglarized does not give rise to the presumption that a person was present or likely to be present.”⁸ 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.”⁹

To satisfy this element, “[t]he state must adduce specific evidence that people were present or likely to be present.”¹⁰ “In determining whether persons are likely to be present under R.C. 2911.12(A)(2), a defendant’s knowledge is not material.”¹¹ “The issue is not whether the burglar subjectively believed that persons were likely to be

⁶ *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).

⁷ *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).

⁸ *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).

⁹ *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).

¹⁰ *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).

¹¹ *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.

there, but whether it was objectively likely.”¹² “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.”¹³

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.”¹⁴ The Twelfth District Court of Appeals 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.”¹⁵

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.¹⁶ 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.”¹⁷ 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

¹² *Petit*, 2017-Ohio-633 at ¶ 21, citing *Pennington*, 2007–Ohio–6572 at ¶ 28.

¹³ (Internal quotations omitted.) *Pennington*, 2007–Ohio–6572 at ¶ 28.

¹⁴ *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).

¹⁵ *Pennington*, 2007–Ohio–6572 at ¶ 31, citing *State v. Hibbard*, 12th Dist. Butler No. CA2001-12-276, 2003-Ohio-707.

¹⁶ *K.L.P.W.*, 2017-Ohio-5671 at ¶ 18. See *Gerde*, 2017-Ohio-7464 at ¶ 25 (holding same).

¹⁷ *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.’”).

minimum likelihood that a person will be present therein.”¹⁸ 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.¹⁹

In turning to the present case there was only a mere possibility that Repman may have been present at his home during the burglary. Repman regularly works from 7:30 a.m. to 4:00 p.m., and his employment is approximately an hour away from his home. The state presented no evidence that Repman was home, would be home, or planned to be home at the time of the burglary. The state presented no evidence that Repman

¹⁸ *Cole*, 2016–Ohio–2936 at ¶ 43, quoting *State v. Meisenhelder*, 8th Dist. Cuyahoga No. 76764, 2000 WL 1513695, *14 (Oct. 12, 2000).

¹⁹ 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 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).

went home or considered going home after the time he left for work on the morning of November 27th.

Although Repman occasionally takes sick days or vacation time, which he spends at home, there was no evidence that he was planning on doing so on the day of the burglary. In sum, Repman was almost always absent as part of his fixed work schedule, and was not likely to be present at his home during his regular working hours when the burglary occurred.

Next, the court must consider whether it was likely that Pritchard, Repman's stepson, would be present at the time of the burglary, since he had a key to the home. It is not clear how frequently Pritchard hunted and fished at Repman's home, but he had no set schedule for his visits. However, Pritchard *always* calls Repman before he comes over to hunt or fish. And there was no testimony from Repman that Pritchard had called him about coming over to hunt or fish on November 27, 2018. Given the foregoing evidence, there is no logical expectation that Pritchard could be present during the burglary. Stated differently, the court does not believe beyond a reasonable doubt that it was likely Pritchard would be present at Repman's home during the burglary. Accordingly, the court finds that the defendant is not guilty of burglary in the second degree under R.C. 2911.12(A)(2).

Although the state failed to present sufficient evidence to sustain a burglary conviction under R.C. 2911.12(A)(2), the defendant may be convicted of the lesser included offense of burglary under R.C. 2911.12(A)(3), as the latter contains all the elements of R.C. 2911.12(A)(2) except the presence or likely presence of another.²⁰ It

²⁰ See *Petit*, 2017-Ohio-633 at ¶ 28, citing *Cole*, 2016-Ohio-2936 at ¶ 45 and *Miller*, 2007-Ohio-2361 at ¶ 19.

is undisputed that the agreed stipulations satisfy all elements for third degree burglary under R.C. 2911.12(A)(3), since the defendant stipulated, *inter alia*: "The defendant David Allen Kuhlman stipulates and agrees that there are sufficient facts to prove that he is guilty of committing a violation of R.C. 2911.12(A)(3), burglary felony in the third degree * * *." As such, the court finds the defendant guilty beyond a reasonable doubt of committing burglary, in violation of R.C. 2911.12(A)(3), a felony in the third degree.

II. COUNT 2: THEFT OF A FIREARM

Count 2 charges the defendant with theft of a firearm, in violation of R.C. 2913.02(A)(1), a felony of the third degree. Theft is defined in R.C. 2913.02(A)(1) as follows:

"(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:

* * *

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent * * *."

Under R.C. 2913.02(B)(4): "If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft. Except as otherwise provided in this division, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the third degree * * *."

It is undisputed that the agreed stipulations satisfy all elements for third degree theft of a firearm under R.C. 2913.02(A)(1), since the defendant stipulated, *inter alia*:

"The defendant David Allen Kuhlman stipulates and agrees that there are sufficient facts to prove that he is guilty of committing * * * a violation of R.C. 2913.02(A)(1), theft of a firearm felony in the third degree, as a result of his trespass into the home of John Repman on November 27, 2018 with purpose to commit a theft from that home and his theft of a firearm from that home." For this reason, the court finds the defendant guilty beyond a reasonable doubt of committing theft of a firearm, in violation of R.C. 2913.02(A)(1), a felony in the third degree.

CONCLUSION

For the foregoing reasons, the court finds that the state has not proven beyond a reasonable doubt the defendant's guilt of Count 1, burglary, in violation of R.C. 2911.12(A)(2), a felony of the second degree.

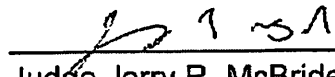
However, the state has proven the defendant's guilt as to the lesser included offense of burglary, in violation of R.C. 2911.12(A)(3), a felony of the third degree, and the court finds him guilty of such. The state has also proven the defendant's guilt beyond a reasonable doubt of Count 2, theft of a firearm, in violation of R.C. 2913.02(A)(1), a felony of the third degree.

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 four weeks of the date of the Decision/Entry.

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

IT IS SO ORDERED.

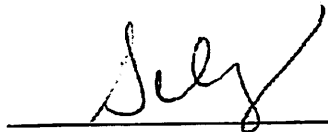
DATED: 5-8-19



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent on this 8th day of May 2019 by e-mail to Dorothy Branson-Smith, Assistant Prosecuting Attorney, at dksmith@clermontcountyohio.gov, and by regular U.S. Mail to Daniel E. Whitely, Jr., Attorney for the Defendant, 602 Main Street, Suite 1309, Cincinnati, Ohio 45202.



Judicial Assistant to Judge Jerry McBride