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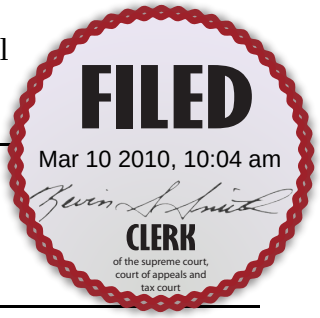

IN THE COURT OF APPEALS OF INDIANA

TERRANCE LAVALE JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0910-CR-461
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Judge
Cause No. 71D08-0808-FB-111

March 10, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Terrance Lavale Jones was convicted of burglarizing the Navarette family's home, and he was also found to be an habitual offender. On appeal, Jones argues the evidence is insufficient to support his burglary conviction, the trial court erred by declining to give a proffered jury instruction, and his sentence is inappropriate. We conclude the State failed to prove Jones intended to commit a felony inside the Navarette home; however, the evidence was sufficient to support a conviction of residential entry. In light of this resolution, we find any error in the instructions was harmless, and we need not address the sentencing argument. Therefore, we remand to the trial court with instructions to vacate the burglary conviction, enter a conviction of Class D felony residential entry, and resentence Jones accordingly.

FACTS AND PROCEDURAL HISTORY

On August 14, 2008, Antonio Ruiz Navarette left his home around 10:30 or 11:00 a.m. His wife had already left for work, and his children had gone to school. That afternoon, his next door neighbor, Catheryn Kluszczynski, saw Jones standing near the Navarette home pointing what she thought was a handgun. Kluszczynski told her son to call the police while she continued watching. Kluszczynski heard a window shatter and saw Jones attempt to crawl over an air conditioner and through the window. Jones could not fit through the window, so he jumped down. Kluszczynski saw Jones drop the gun near a tree and run away.

Officer Scott Ruszkowski apprehended Jones shortly thereafter. Jones' hands were bleeding. Officer Ruszkowski found a BB-type gun near the tree in the Navarettes' yard, and the grip had blood on it. The window and the interior blinds had holes in them that appeared consistent with shots from a BB gun. A BB pellet was found on top of the air conditioner.

There was blood on the blinds and the air conditioner. It was determined that the blood on the blinds matched Jones' DNA profile.[1] A cell phone charger was found underneath the broken window.

Jones was charged with Class B felony burglary[2] and being an habitual offender.[3] The burglary charge alleged Jones intended to commit theft within the Navarette residence.

At trial, Antonio Navarette testified that when he left home on August 14, his house was locked and he did not see a cell phone charger outside. When he returned home, there were holes in the window and the blinds. Navarette testified his wife, his son, and his daughter each have cell phones, but he was not shown the charger found outside the house. He stated his children could have left it outside. He testified nothing was missing from inside the house.

Officer Ruszkowski testified the charger was lying on top of glass shards from the window. However, he did not look closely enough to determine whether there was blood on the charger. He testified there was nothing inside the Navarette home that was within reach of the broken window. Daniel Lawecki, an evidence technician, testified there was no blood on the charger. He did not indicate whether the charger appeared to be on top of the broken glass.

[1] The blood found on the BB gun and the air conditioner was not collected or tested.
[2] Ind. Code § 35-43-2-1.
[3] Ind. Code § 35-50-2-8.

The jury was instructed on burglary and a lesser included offense thereof, Class D felony residential entry.[4] The jury found Jones guilty of burglary and also found him to be an habitual offender. The trial court sentenced Jones to an aggregate term of twenty-six years.

DISCUSSION AND DECISION

1. Sufficiency of Evidence

In reviewing the sufficiency of the evidence, we do not reweigh the evidence or assess the credibility of the witnesses. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). We consider the evidence most favorable to the verdict and the reasonable inferences drawn therefrom. *Id*. We will affirm if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id*.

To convict Jones of Class B felony burglary, the State had to prove he broke and entered the dwelling of another person with intent to commit a felony in it. Ind. Code § 35-43-2-1. Intent to commit a felony may be inferred from the circumstances, but some fact in evidence must point to intent to commit a specific felony. *Freshwater v. State*, 853 N.E.2d 941, 943 (Ind. 2006).

> Intent to commit a felony may not be inferred from proof of breaking and entering alone. Similarly, evidence of flight alone may not be used to infer intent, though other factors, such as the removal of property from the premises, may combine with flight to prove the requisite intent for burglary.

Id. (quoting *Justice v. State*, 530 N.E.2d 295, 297 (Ind. 1988)) (citations omitted).

[4] Ind. Code § 35-43-2-1.5.

That Jones broke and entered the Navarette residence is supported by ample evidence, including the blood found on the blinds and Kluszczynski's testimony. However, there is insufficient evidence he intended to commit theft within the home. Beyond breaking, entering, and flight, the only evidence potentially relevant to Jones' intent was the cell phone charger found beneath the broken window. The State emphasizes Officer Ruszkowski's testimony that the cell phone charger was on top of the glass and argues this supports an inference that the charger was removed from the house after Jones broke the window. However, the testimony does not support that inference. Navarette testified nothing was missing from his house. He stated he was not shown the charger that was found outside the window, and he was not asked to identify it at trial. Officer Ruszkowski testified nothing inside the house was within reach of the window. As there is no evidence the tying the charger to the Navarettes' residence, its presence outside the window does not establish Jones intended to commit a felony inside the residence. Therefore, his conviction of burglary must be vacated. *See Patterson v. State*, 729 N.E.2d 1035, 1043 (Ind. Ct. App. 2000) (finding insufficient evidence of intent to commit a felony where Patterson attempted to climb through window, but did not touch or disturb any property within).

Jones was also tried on residential entry as a lesser included offense of burglary. The only element distinguishing Class B felony burglary from residential entry is intent to commit a felony. *Compare* Ind. Code § 35-43-2-1 *with* Ind. Code 35-43-2-1.5. As the blood on the blinds and Kluszczynski's testimony demonstrates Jones broke and entered the dwelling of

another,[5] we conclude judgment should be entered on the lesser included offense of Class D felony residential entry. *See Patterson*, 729 N.E.2d at 1043 (modifying burglary conviction to residential entry where there was sufficient evidence of breaking and entering, but not of intent to commit a felony).

2. Jury Instructions

Jones tendered the following instruction regarding reasonable doubt: "A reasonable doubt may arise from the evidence or from a lack of evidence or from a conflict in the evidence on or concerning a given fact or issue." (Appellant's App. at 104.) The court declined to give that instruction and gave a different instruction on reasonable doubt.

Instructing the jury lies within the discretion of the trial court. *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002), *reh'g denied*. We will not reverse for an abuse of discretion unless the instructions as a whole mislead the jury as to the law in the case. *Id.*

> In determining whether a trial court abused its discretion by declining to give a tendered instruction, we consider the following: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the instruction; and (3) whether the substance of the instruction was covered by other instructions that were given.

Lampkins v. State, 778 N.E.2d 1248, 1253 (Ind. 2002). Before a defendant is entitled to a reversal based on the erroneous rejection of a tendered instruction, he must show the error prejudiced his substantial rights. *Hancock v. State*, 737 N.E.2d 791, 794 (Ind. Ct. App.

[5] Jones notes Kluszczynski testified she told the police Jones was wearing black shorts, while Officer Ruszkowski testified Jones was wearing white shorts. He also notes Kluszczynski testified she thought Jones used a screwdriver to "pop" the lock of the window (Tr. at 181); however, there was no evidence to corroborate this. To the extent Jones is arguing Kluszczynski is not credible, we note we may not weigh witness credibility. *See Love*, 761 N.E.2d at 810.

2000).

Jones' argument regarding prejudice appears to pertain primarily to the speculative evidence regarding his intent to commit a felony; however, we have determined his conviction should be modified to residential entry. Jones stipulated the blood found on the blinds matched his DNA profile; thus, there appears to be no serious dispute that he is the person who broke and entered the Navarettes' house. Therefore, even if the trial court erred by declining to give Jones' proffered instruction, we could not say he was prejudiced, as there was overwhelming evidence to support a conviction of residential entry. *See Hancock v. State*, 585 N.E.2d 1371, 1372 (Ind. Ct. App. 1992) (disapproving of instruction given to jury, but affirming conviction because evidence of guilt was overwhelming).

CONCLUSION

There was insufficient evidence Jones intended to commit a felony inside the Navarette house; however, there was ample evidence he broke and entered the house. Finding no other error, we remand for the trial court to vacate the burglary conviction, enter a conviction of residential entry, and resentence Jones accordingly.

Affirmed in part, reversed in part, and remanded.

KIRSCH, J., and DARDEN, J., concur.