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**IN THE  
COURT OF APPEALS OF INDIANA**

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PHILLIP A. FERGUSON,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 38A02-0911-CR-1127

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APPEAL FROM THE JAY SUPERIOR COURT  
The Honorable Max C. Ludy, Jr., Judge  
Cause No. 38D01-0801-FD-8

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**April 8, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Phillip A. Ferguson appeals his conviction for Class D felony residential entry. Specifically, he contends that the State did not disprove his defense of consent beyond a reasonable doubt. Concluding that Ferguson's belief that he had permission to enter the victim's apartment for the purpose of starting a fight was not reasonable, we affirm his conviction for residential entry.

### Facts and Procedural History<sup>1</sup>

The facts most favorable to the verdict reveal that in the late evening hours of January 16 and the early morning hours of January 17, 2008, Ferguson was drinking at Greazy Pickle and then Pits, both taverns in Portland, Indiana. Ferguson was with Brian Barnett. After Pits closed around 3:30 A.M., Ferguson, who was "really intoxicated," "was in no condition to drive" his car home. Tr. p. 226, 224. Therefore, Barnett offered to drive Ferguson's car home for him. Barnett parked Ferguson's car across from his house on Arch Street and then helped Ferguson out of the car. Ferguson, however, was not ready to call it a night. He was loud and obnoxious in the street. A male voice two or three houses down on Arch Street yelled from an upstairs window to quiet down because it was 4:00 in the morning. Ferguson responded, "[W]hoever had the balls to say that, would you please step out?" *Id.* at 226.

Ferguson then followed the sound of the voice to an apartment house in which, among others, Gavin Doss and his girlfriend Brittney Norton lived. Barnett tried to prevent Ferguson from going to the apartment house, but Ferguson was "a lot bigger"

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<sup>1</sup> We note that Ferguson's Statement of Facts is sequentially numbered sentence by sentence. This is in violation of our appellate rules, which requires the statement to be in narrative form. Ind. Appellate Rule 46(A)(6)(c).

than Barnett. *Id.* at 228. As Ferguson was walking toward the apartment house, the arguments between the male, who turned out to be Doss, and Ferguson escalated. Although Doss had initially asked Ferguson to quiet down in a polite manner, Doss was now telling Ferguson to “shut the f\*\*\* up.” *Id.* at 106. When Ferguson reached the apartment house, he mistakenly knocked on the apartment door of Melinda Cooper and asked for the male who had been yelling. After Melinda told Ferguson that the only other person inside was her one-year-old daughter, Ferguson said “sorry” and left. *Id.* at 194. Doss heard this exchange from his window above and went downstairs.

In the meantime, Ferguson proceeded around the house to Doss’s apartment door. Barnett stayed at a safe distance behind Ferguson. The door to Doss’s apartment was open, but the storm door was closed. Doss was standing behind the storm door holding two “tonfas,” which are martial arts equipment. *Id.* at 136. According to Doss, he told both Ferguson and Barnett to leave and that he was going to call the police. *Id.* at 115, 116. Ferguson then asked Doss, “[W]hat are you going to do, beat me with your pussy sticks?” *Id.* at 119. After more heated exchanges between Ferguson and Doss, Ferguson opened the storm door, entered Doss’s apartment, and immediately began swinging. *Id.* at 197, 120.

The State charged Ferguson with Class D felony residential entry, Class A misdemeanor criminal trespass, and Class A misdemeanor battery resulting in bodily injury. The State also alleged that Ferguson was a habitual offender. Following a jury trial, he was found guilty as charged. Ferguson then admitted to the habitual offender allegation. The trial court sentenced Ferguson to two years for residential entry, one year

for battery resulting in bodily injury, and four years for being a habitual offender. The court ordered all sentences to run consecutively, for an aggregate term of seven years. The trial court did not enter a sentence on criminal trespass “because the Court believe[d] the offense . . . merge[d] with . . . Residential Entry.” Appellant’s App. p. 17. Ferguson now appeals.

### **Discussion and Decision**

Ferguson contends that the evidence is insufficient to support his conviction for residential entry. Initially, we note that the State has failed to file an appellee’s brief. “The obligation of controverting arguments presented by the appellant properly remains with the State.” *Mateyko v. State*, 901 N.E.2d 554, 557 (Ind. Ct. App. 2009), *trans. denied*. Where, as here, the appellee fails to submit a brief, the appellant may prevail by making a prima facie case of error, *i.e.*, an error at first sight or appearance. *Id.* Still, we must correctly apply the law to the facts of the record to determine if reversal is required. *Id.*

When reviewing the sufficiency of the evidence, appellate courts must only consider the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it “most favorably to the trial court’s ruling.” *Id.* Appellate courts affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Id.* at 146-47 (quotation

omitted). It is therefore not necessary that the evidence “overcome every reasonable hypothesis of innocence.” *Id.* at 147 (quotation omitted). “[T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” *Id.* (quotation omitted).

In order to convict Ferguson of residential entry as charged in this case, the State had to prove that he knowingly or intentionally broke and entered the dwelling of Doss. *See* Ind. Code § 35-43-2-1.5; Appellant’s App. p. 124. Ferguson does not contest that he intentionally broke and entered Doss’s dwelling; rather, he claims “he was provoked and invited to fight [and] thus he had consent to enter.” Appellant’s Br. p. 5. Lack of consent is not an element of residential entry. *Holman v. State*, 816 N.E.2d 78, 81 (Ind. Ct. App. 2004), *trans. denied*. Rather, the defendant has the burden of raising consent as a defense. *Id.* Once the defense is raised, the State has the burden of disproving the defense beyond a reasonable doubt. *Id.* A defendant’s belief that he has permission to enter must be reasonable in order for him to avail himself of the defense of consent. *Id.*

Ferguson’s argument on appeal relies heavily on the “uncontested” fact that after Ferguson mistakenly knocked on Melinda’s apartment door, someone from Doss’s apartment directed Ferguson to Doss’s apartment door, which amounted to an invitation inside to fight.<sup>2</sup> Appellant’s Br. p. 6. However, the evidence most favorable to the verdict does not support this reading of the record. Specifically, Doss testified at trial that he did not direct Ferguson to his door, *see* Tr. p. 151, 168, and although Brittney

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<sup>2</sup> Ferguson also argues that Doss threatened to shoot him before he entered Doss’s apartment. However, the evidence most favorable to the verdict does not support this reading of the record either, as Doss denied making such a threat. *See* Tr. p. 116 (“Q: Did you say anything about a gun, having a gun? A: No.”); 147 (“Q: At that point in time you yelled, ‘[S]hut the f\*\*\* up because I’ve got a gun,’ didn’t you? A: No.”).

testified that she yelled at Ferguson and Barnett from the upstairs window that they were at the wrong door, she did not testify that she then directed them to her door, *id.* at 168. After Ferguson left Melinda's door, Barnett, sensing danger, tried to prevent Ferguson from proceeding to Doss's apartment, but Ferguson would not listen to the more rational Barnett. Once Ferguson arrived at the door, Doss, who was standing behind a storm door holding tonfas for protection from an unknown, intoxicated man, urged Ferguson to leave and threatened to call the police. After heated words were once again exchanged, it is undisputed that Ferguson opened the door, entered, and started swinging.

Even if Doss had directed Ferguson around the side of the apartment house to his door, this would not mean that Ferguson had consent to enter Doss's residence. Ferguson had just knocked on the wrong person's door. Doss or Brittney asked Ferguson several times to quiet down and go home, and Barnett expended considerable energy trying to persuade the much larger and intoxicated Ferguson to go home. Given that Doss never exited his apartment and instead remained behind the storm door, Ferguson should have simply walked away. Ferguson's belief that he had permission to enter Doss's apartment for the purpose of engaging in a fight was not reasonable. We therefore affirm his conviction for residential entry.

Affirmed.

NAJAM, J., and BROWN, J., concur.