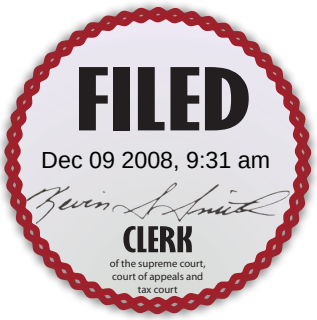

ATTORNEY FOR APPELLANT:

SUSAN D. RAYL
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHARLES R. RAY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0712-CR-679
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 22
The Honorable Amy J. Barbar, Magistrate
The Honorable Carol J. Orbison, Judge
Cause No. 49G22-0702-FC-22295

December 9, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Charles R. Ray (Ray), appeals his conviction for two Counts of burglary, Class C felonies, Ind. Code § 35-43-2-1; two Counts of theft, Class D felonies, I.C. § 35-43-4-2; one Count of auto theft, a Class D felony, I.C. § 35-43-4-2.5; and his adjudication as an habitual offender, I.C. § 35-50-2-8.

We affirm.

ISSUES

Ray raises two issues on appeal, which we restate as follows:

(1) Whether the trial court abused its discretion by admitting certain evidence pursuant to Indiana Rule of Evidence 404(b); and

(2) Whether the State presented sufficient evidence to prove beyond a reasonable doubt that Ray committed burglary and theft.

FACTS AND PROCEDURAL HISTORY

During the weekend of November 3-6, 2006, a white Ford Ranger pickup truck with license plate 5Z0661 was stolen from the premises of Quality Environmental Professionals, Inc., located in the 1600 block of South Franklin Road, in Indianapolis, Indiana. On January 11, 2007, Brian Seniour (Seniour) was operating a backhoe at a residence at Lot 101 on Cougar Court, located in the Westbrook housing addition developed by K.D. Homes. He noticed that a man, later identified as Ray, was sitting in a white Ford Ranger pickup truck on the side of the road in front of the residence on the next lot, Lot 102. The house on Lot 102 had a white barricade in its driveway.

Approximately two hours and fifteen minutes later, Seniour observed Ray pulling out of the driveway of Lot 102 with a range appliance in the truck's bed. Seniour jotted down part of the license plate number, 69206. A K.D. Homes employee later discovered that the sliding door at the rear of the home and the home's garage door had been opened. Seniour subsequently identified Ray from a photo array as the man he saw drive away from Lot 102 with the range.

At 8:00 a.m. on February 6, 2007, Peggy Hockman (Hockman), a Beazer Homes' employee, entered a spec home located at 8315 Garden Ridge Road to check on the pipes and furnace. At that time, she noted nothing out of the ordinary. At approximately 9:30 a.m., another employee, Robert Hahn (Hahn) entered the house for a short time while a hard snow was coming down. Everything seemed to be in order, and he did not note any foot or tire tracks on the residence's driveway. While in the home, Hahn noticed a white Ford Ranger pickup truck with a broken cab window driving slowly around the area. After Hahn returned to his office, he observed, through the window of his office, the white Ford Ranger driving out of the housing addition with an unboxed washer/dryer set in its bed. This washer/dryer set was the same type as what was installed in the property at 8315 Garden Ridge Road. Hahn later identified Ray as the driver of the truck.

Hockman returned to 8315 Garden Ridge Road at approximately 11:00 a.m. When she arrived, she noticed that a white barricade, that had formerly been in the residence's driveway, had been moved to the side and that there were tire tracks leading from the garage. The front door had been pried open, and upon entering the house, Hockman saw that the

stove and refrigerator were missing from the kitchen. In addition, the washer/dryer set had been removed from the laundry area. She alerted Hahn, and they later located the home's stove stashed in the garage.

Hahn and Hockman returned to the office approximately forty-five minutes later. As they were preparing to phone the police department, they saw Ray drive the white Ford Ranger pickup truck back into the addition. While there was no longer a washer/dryer set in the truck's bed, Ray now had a passenger with him. While Hockman telephoned the authorities, Hahn started following the truck in his car. Hahn observed Ray drive slowly by 8315 Garden Ridge, turn around, drive past the home again, and then speed away.

Hahn called 911. He followed Ray for about twenty minutes until Officer Noel Gudat (Officer Gudat) of the Indianapolis Metropolitan Police Department began to pursue the truck on South Emerson Avenue. Officer Gudat activated his cruiser's siren and lights, Ray stopped the truck, and he and his passenger fled on foot. After a short foot chase in traffic, Officer Gudat apprehended Ray and his passenger. Examination of the Ford Ranger revealed that the steering console had been broken away. Three license plates were found under the front seat of the pickup truck, bearing the numbers 69206S, 507075L, and 30225S. A tool bag containing screwdrivers, hammers, and pliers were also located in the truck.

On February 8, 2007, the State filed an Information charging Ray for the events at 8315 Garden Ridge Road with one Count I, burglary, a Class C felony, I.C. § 35-43-2-1, Count II, theft, a Class D felony, I.C § 35-43-4-2; and Count III, auto theft, Class D felony, I.C. § 35-43-4-20.5. On February 27, 2007, the State amended its Information, charging Ray

for the events that occurred at Cougar Court with Count IV, burglary, a Class C felony, I.C. § 35-43-2-1, and Count V, theft, a Class D felony, I.C. § 35-43-2-1. Thereafter, on March 30, 2007, the State filed a notice seeking to have Ray adjudicated as an habitual offender pursuant to I.C. § 35-50-28.

On September 4, 2007 and October 9, 2007 a bench trial took place. At the close of the evidence, the trial court found Ray guilty as charged. Ray subsequently pled guilty to being an habitual offender in exchange for receiving a four year sentence on the charge. On October 31, 2007, during a sentencing hearing, the trial court sentenced Ray as follows: eight years on Count I, enhanced by four years with the habitual offender adjudication; three years on Count II, to be served concurrently with Count I; three years on Count III, to be served concurrently with Count I; eight years on Count IV, to be served consecutively to Count I, three years on Count V, to be served concurrent to all other Counts. As a result, Ray's aggregate sentence amounts to twenty years.

Ray now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Indiana Rule of Evidence 404(b)*

First, Ray contends that the trial court abused its discretion by admitting evidence of uncharged burglaries to prove Ray's identity through a common plan to steal appliances from unoccupied homes in new housing additions. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *reh'g denied, trans. denied*. An abuse of discretion occurs if a trial court's

decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. However, if a trial court abused its discretion by admitting the challenged evidence, we will only reverse for that error, if the error is inconsistent with substantial justice or if a substantial right of the party is affected. *Id*. Any error caused by the admission of evidence is harmless error for which we will not reverse a conviction if the probable impact of the evidence upon the fact finder is sufficiently minor so as not to affect a party's substantial rights. *King v. State*, 799 N.E.2d 42, 49 (Ind. Ct. App. 2003), *trans. denied.*

In essence, Ray now asserts that the trial court should not have admitted evidence surrounding two uncharged burglaries and thefts that occurred at two other new housing divisions as Ray's identity was not an issue. Additionally, he claims that the evidence was inadmissible under the common scheme or plan exception of Evid. R. 404(b) because the offenses are not related in character, time, and plan of commission.

However, the record reflects that the trial court at the close of the evidence and prior to rendering its decision stated the following:

> Okay. Let's just get to the nuts and bolts of it right now. I'm not going to let him get away with accomplice liability, I think the evidence in this case is absolutely overwhelming even without 404(b). I can – just looking at my notes from [Hahn] and [Seniour], they didn't even need 404(b), both of these people identified [Ray], we have license plate numbers written down, I had no idea that the people who run these subdivisions keep such a close watch on their properties, evidently they do because these folks were absolutely unhesitating in their identification and what they believe happened and what happened in these homes. Sometimes direct evidence isn't as good as circumstantial evidence, this case is very strong circumstantially, strong enough that the [c]ourt finds there is no reasonable theory of innocence in this matter. That accomplice liability argument is not persuasive because I don't believe he is on the accomplice liability, I believe he's directly involved in

> these burglaries, even without considering any 404(b) [e]vidence. So the [c]ourt finds [Ray] guilty of Counts one, two, three, four and five.

(Transcript pp. 161-62). Based on the trial court's statement, we conclude that, even if the admission of the evidence amounted to an abuse of discretion, this error was harmless as the trial court clearly did not rely on the evidence to reach its decision.

II. *Sufficiency of the Evidence*

Next, Ray contends that the State failed to present sufficient evidence to support his conviction of burglary and theft at the residence located at 8315 Garden Ridge Road. Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. at 213. A conviction may be based upon circumstantial evidence alone. *Id*. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

Specifically, Ray asserts that there was no evidence of probative value from which the factfinder could have found that he was at the spec house at 8315 Garden Ridge Road or that he was ever in possession of the appliances stolen in that residence. A person commits burglary when he breaks and enters the building or structure of another person, with intent to commit a felony in it. I.C. § 35-43-2-1. A person commits theft when he knowingly or

intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use. I.C. § 35-43-4-2. Thus, in order to establish that Ray committed the 8315 Garden Ridge Road burglary and theft, the State was required to prove that he broke and entered the home and removed a washer/dryer set without the consent of Beazer Homes.

Here, we agree with the trial court that the circumstantial evidence is overwhelming. Hahn testified that when he was at the residence at 9:30 a.m., he saw nothing amiss but took note of the white Ford Ranger pickup truck driving slowly past the house. Later that morning, Hahn saw the white truck again with a brand new washer/dryer in the pickup's bed. Hahn specified that it was a "General Electric washer and dryer, which was what was in all of [the] specs and models." (Tr. p. 34). Later that morning, around 11:30 a.m., Hockman alerted Hahn that the front door of 8315 Garden Ridge Road had been broken through and that the washer/dryer set, as well as the refrigerator and stove, had been removed.

When Hockman and Hahn returned to the office to alert the police after checking the damage at the residence, they again noticed the same white Ford Ranger entering the housing addition. Pursuing the car, Hahn noticed the truck drive slowly past 8315 Garden Ridge Road twice before it sped away. Later, Hahn identified Ray as the driver of the Ford Ranger from a photo array. In light of this evidence, we find that the trial court was presented with

sufficient evidence of probative value that Ray committed burglary and theft at 8315 Garden Ridge Road.

CONCLUSION

Based on the foregoing, we conclude that regardless of whether the trial court abused its discretion by admitting certain evidence pursuant to Indiana Rule of Evidence 404(b), any possible error was harmless; and the State presented sufficient evidence to prove beyond a reasonable doubt that Ray committed burglary and theft.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.