

STATE OF LOUISIANA

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NO. 2001-KA-0217

VERSUS

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COURT OF APPEAL

ALFRED J. SIMMONS

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 415-949, SECTION "G"
HONORABLE JULIAN A. PARKER, JUDGE

JAMES F. MC KAY, III
JUDGE

(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr.)

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AFFIRMED

Alfred J. Simmons was charged by bill of information on August 1, 2000, with burglary of an inhabited dwelling in violation of La. R.S. 14:62.2. At his arraignment on August 11th he pleaded not guilty. Probable cause was found, and the motions to suppress the identification and evidence were denied on August 24th. A twelve-member jury found him guilty as charged after trial on September 26th. The state filed a multiple bill, and after being advised of his Boykin rights and pleading guilty to the bill, Simmons was sentenced on October 17th to serve six years at hard labor as a second offender under La. R.S. 15:529.1. The defendant's motion for an appeal was granted.

At trial Detectives Dawn Lolley and Gary LeRouge testified that on May 30, 2000, they investigated a burglary at 2816 Fourth Street. Tanya Joshua, the victim, told them that a VCR, antenna, a play station, and several play station game cartridges were taken. When Detective Lolley arrested Simmons, the defendant admitted he took a VCR but claimed that a man who owed him seventy dollars let him into the house, and Simmons then took the VCR.

Ms. Tanya Joshua testified that on May 30th she left her house about 8:30 a.m. and returned between 12:30 and 1 p.m. She found her front door open and wires hanging where a VCR and television had been plugged into a home entertainment center. In her bedroom she found her jewelry box open and empty and a VCR gone; in her children's bedroom she found the air conditioner out of the window and upside down on the floor. The VCR stand was missing from her children's room as well. Ms. Joshua stated that Raymond Frazier, a friend of her husband, had stayed at their house for two weeks prior to the burglary. Frazier never had a key. After the burglary, Simmons approached Ms. Joshua, and she told him he had no business going into her house and that she had called the police. Simmons said, "Well, you [sic] right. Do what you got to." Later Ms. Joshua identified Simmons in a photo lineup. Ms. Joshua's husband went to Simmons' home and retrieved one VCR.

The defense indicated that it would call Raymond Frazier, and out of the jury's presence, Frazier took the stand and stated that if he were questioned about the events of May 30th, he would invoke his Fifth Amendment right to remain silent.

Before discussing the defendant's assignment of error, we must address an error patent in the sentence. Under La. R.S. 14:62.2 and La. R.S.

15:529.1, the defendant could receive a sentence of six to twenty-four years at hard labor; the first year must be served without benefit of parole, probation, or suspension of sentence. In this case, the trial court neglected to impose the first-year without benefits. However, this court will not correct a sentence when the error is in the defendant's favor and the state has not raised the issue. State v. Fraser, 484 So. 2d 122 (La. 1986).

In a single assignment of error, the defendant argues that the evidence is insufficient to support the conviction.

In evaluating the sufficiency of the evidence, a reviewing court must determine whether viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all essential elements of the crime to have been proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); State v. Duncan, 94-1045 (La. App. 4 Cir. 12/28/94), 648 So.2d 1090.

Either direct or circumstantial evidence may prove the essential elements of the crime. When circumstantial evidence forms the basis of the conviction, the elements must be proven so that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This rule is not a separate test from the review standard established by Jackson v. Virginia, but rather it is an evidentiary guideline which facilitates appellate review of the sufficiency

of the evidence. State v. Jacobs, 504 So.2d 817, 820 (La. 1987).

Ultimately, to support a conviction, the evidence, whether direct or circumstantial or both, must be sufficient under Jackson to satisfy any rational trier of fact that the defendant is guilty beyond a reasonable doubt. Id.; State v. Hawkins, 90-1235 (La. App. 4 Cir. 9/15/95), 667 So.2d 1070, 1086.

The defendant was convicted of simple burglary of an inhabited dwelling, which is defined as “the unauthorized entering of any inhabited dwelling . . . with the intent to commit a felony or any theft therein.” La. R.S. 14:62.2. Specific intent to commit a felony may be inferred from the circumstances and actions of the accused. State of Louisiana In Interest of A.G. and R.N., 630 So.2d 909 (La. App. 4th Cir. 1993).

In the case at bar, the defendant now argues that the state did not prove unauthorized entry or specific intent. However, as to unauthorized entry, Ms. Joshua testified that she did not give the defendant permission to enter her house on May 30, 2000. Furthermore, about an hour after she found her house had been burglarized and confronted Simmons, she told him he had no business in her house and that she was reporting the crime to the police; he agreed with her and told her to do what she had to do. Moreover, when he was arrested, Simmons said, “I gave the V.C.R. back to the dude

with the braids when **he found out I broke in there**. All I took was the V.C.R. because he owed me \$70.00 and **the dude with the braids let me in the house.**” [Emphasis added]. (The person referred to in the first sentence is Ms. Joshua’s husband, who according to her testimony, retrieved the VCR from Simmons; the person referred to in the last clause is Raymond Frazier). The jury heard this seemingly contradictory statement and apparently deduced that although Frazier allowed Simmons to enter the house, Simmons realized that Frazier had no authority and that Simmons was making an unauthorized entry into the house.

The defendant also argues that he had no specific intent to commit a felony in that he was owed money by someone who suggested he take a VCR to pay off the debt, and when he realized the VCR owner had not given him the item, he returned it. However, Simmons overlooks the testimony that two VCR’s, a television, jewelry, and a play station were taken, and only one VCR was returned. Furthermore, Ms. Joshua found her house in great disarray with wires hanging from the home entertainment center and an air conditioner pulled out of the window and set on the floor. In State v. Richardson, 547 So.2d 749, 752, (La. App. 4 Cir. 1989), this court considered the element of specific intent in a burglary conviction and found that the disarray and movement of the owner’s personal possessions

indicated the defendant's intent to commit a theft.

Where, as in this case, a defendant admits breaking into the house and taking an item of property, there is simply no basis for a reasonable hypothesis of innocence that he did not take the other missing items. Obviously, the jury could not believe his explanation that he thought the owner of the property was handing it over to him, particularly in light of the other testimony in the case.

Viewing the evidence in the light most favorable to support the jury verdict, this court must determine whether a rational juror could have found the defendant's position untenable and could have concluded that the evidence proved his guilt beyond a reasonable doubt. The fact that he did not literally break into the house does not negate his unauthorized entry and his returning one item does not absolve him of guilt for taking the rest of the missing property.

Accordingly, the circumstantial evidence is sufficient to support a finding that the defendant's entry into the Joshua home was unauthorized and that he had specific intent to commit burglary. Reviewing all of the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found all of the elements of simple burglary of an inhabited dwelling present beyond a reasonable doubt.

For the foregoing reasons, we affirm the defendant's conviction and sentence.

AFFIRMED