Cite as 2009 Ark. App. 782

# ARKANSAS COURT OF APPEALS

DIVISIONS I and II

**No.** CACR09-220

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| KEITH F. WHITE,<br>APPELLANT<br><br>V.<br><br>STATE OF ARKANSAS,<br>APPELLEE | **Opinion Delivered** 18 NOVEMBER 2009<br><br>APPEAL FROM THE UNION COUNTY CIRCUIT COURT, [NO. CR-08-406-4]<br><br>THE HONORABLE GAYLE K. FORD, SPECIAL JUDGE<br><br>REVERSED AND DISMISSED |

**D.P. MARSHALL JR., Judge**

Keith White appeals his conviction for breaking or entering. Does substantial evidence exist that White entered Marshall Shackleford's garage and the adjoining bathroom/storage room for the purpose of stealing fishing reels and a combination air compressor/battery charger?

The basic and undisputed facts were these. Shackleford hired White to do yard work at Shackleford's home. Shackleford gave White permission to enter the garage (where Shackleford stored his yard tools and equipment) and to use the bathroom in a storage room at the back of the garage. White did this work for about a year. At some point, Shackleford noticed that some fishing reels and a combination air compressor/battery charger were missing. He suspected White. The police found the stolen items at a pawn shop. White

admitted stealing the items, and pleaded guilty to misdemeanor theft.*

At his bench trial on the breaking-or-entering charge, White twice moved for dismissal. He argued that the State failed to prove that he entered the garage with the purpose of committing a theft. The circuit court denied the motions and found White guilty.

To have committed the offense of breaking or entering, White must have entered Shackleford's garage and the adjoining storage room/bathroom with the purpose of committing a theft or felony. Ark. Code Ann. § 5-39-202 (Supp. 2009). "A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime." *Smith v. State*, 346 Ark. 48, 53, 55 S.W.3d 251, 254 (2001). Although circumstantial evidence can be sufficient to support a conviction, if the fact-finder is left to speculation or conjecture in deciding the case, then the proof is insufficient as a matter of law. *Sales v. State*, 374 Ark. 222, 227–28, 289 S.W.3d 423, 427–28 (2008). "Two equally reasonable conclusions about what happened raise only a suspicion of guilt." *King v. State*, 100 Ark. App. 208, 215, 266 S.W.3d 205, 207–08 (2007) (supplemental opinion on denial of rehearing). "On appeal, we may consider whether the record—viewed in the light most favorable to the State—presents this situation, and thus required the fact-finder to speculate to convict the defendant." *King*, 100 Ark. App. at 215, 266 S.W.3d at 208.

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*White has not appealed his theft conviction and, having pleaded guilty to that crime, in general could not do so. *Seibs v. State*, 357 Ark. 331, 334, 166 S.W.3d 16, 17 (2004).

Here is the proof in the light most favorable to the State. *Bienemy v. State*, 374 Ark. 232, 235–36, 287 S.W.3d 551, 554 (2008). Shackleford gave White permission to enter both his garage and the adjoining bathroom/storage room while White did yard-work at Shackleford's home. White admitted stealing some personal items from the premises and pawning them. Shackleford, his son, and an investigator for the sheriff's office testified and confirmed all the undisputed particulars. That was the State's case. White then testified in his defense. On direct, he said:

> Q. Okay. Did you enter the room for the purpose of committing a theft?
>
> A. No. No.
>
> Q. Why, why did you do that?
>
> A. I just, honestly just, I meant, needed money that day and it wasn't time for me to get paid and I took them. I was not going to his house to steal. I went to his house to work. And it just happened. You know. And I apologize for that. But nevertheless it happened.

On cross, White said:

> A. When I was using the bathroom the battery charger was right there beside the hot water tank.
>
> Q. And you decided to take it?
>
> A. Well, yes, I took it. Still not fixin' to say I didn't.

Of course the circuit court, as the fact-finder, was not required to believe any or all of White's testimony. *Coggin v. State*, 356 Ark. 424, 436, 156 S.W.3d 712, 720 (2004). But the State is entitled to the benefit of White's admission that he needed money on the day of the

theft.

Taken as a whole, this record supports two equally reasonable conclusions. First, White could have entered the garage and bathroom/storage room intending to steal from Shackleford. Or second, White could have entered the garage and bathroom/storage room intending to get or return yard tools or to use the bathroom, and once inside decided to steal from Shackleford. Faced with these two possibilities, the fact-finder had to speculate about White's entry purpose. A judgment, however, cannot rest on speculation. *King*, 100 Ark. App. at 215, 266 S.W.3d at 207–08.

The State argues from *Smith*, another entering case, that the circumstantial evidence of White's entry purpose was substantial. Kenneth Smith entered K-Mart during regular store hours. 346 Ark. at 53–54, 55 S.W.3d at 254–55. Security cameras recorded him approaching K-Mart's gun cabinet six times, walking around and behind the counter three times, and looking back and forth several times before opening the cabinet's glass door and taking a rifle. *Ibid.* The jury convicted him of breaking or entering. *Ibid.* The supreme court held that this circumstantial evidence was sufficient to allow the inference that Smith entered K-Mart with the purpose of committing a theft. The court thus affirmed Smith's breaking-or-entering conviction. *Ibid.*

But there is no evidence here comparable to the evidence about Smith casing the K-Mart gun cabinet. There was, for example, no evidence that White entered the garage at night when there was no yard work to be done; no evidence that he entered the premises

carrying a bag to hold his loot; no evidence that he had called the pawn shop before the theft to see if he could sell some fishing reels; and no evidence White had told someone that, though he was broke and it was not pay day, he would have some money after going to Shackleford's house. Evidence of any of these circumstances, or the like, could support the reasonable inference that White entered these premises intending to steal notwithstanding his permission to enter. Unlike in *Smith*, there was no substantial evidence, direct or circumstantial, showing that White entered Shackleford's garage and the adjoining storage room/bathroom with the purpose of committing a theft or felony. White's breaking-or-entering conviction therefore cannot stand.

Reversed and dismissed.

PITTMAN, HART, and ROBBINS, JJ., agree.

BAKER and BROWN, JJ., dissent.

BAKER, J., dissenting. The question presented in this case is whether there was substantial evidence that appellant entered Mr. Shackleford's garage and adjoining bathroom/storage room with the intent to commit theft. A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Smith v. State*, 346 Ark. 48, 55 S.W.3d 251 (2001); *Price v. State*, 2009 Ark. App. 664, ___ S.W.3d ___; *DeShazer v. State*, 94 Ark. App. 363, 230 S.W.3d 285 (2006). Because intent cannot be proven by direct evidence, the fact-finder is allowed

to draw upon common knowledge and experience to infer it from the circumstances. *DeShazer*, 94 Ark. App. at 366, 230 S.W.3d at 289. Due to the difficulty in ascertaining a defendant's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his or her acts. *Id.*

In reversing and dismissing White's breaking-or-entering conviction, the majority attempts to distinguish the *Smith* case. Unlike the majority, I am unable to distinguish *Smith* from the facts of the case at hand, and I believe this court is constrained to follow the holding announced in that case. Here, it was undisputed that appellant was hired to perform lawn work for Mr. Shackleford and that he had access to the garage and the bathroom/storage room. It was also undisputed that appellant stole items from the garage and bathroom/storage room. Appellant admitted that on the day of the theft "it wasn't time for [him] to get paid," so he took the items because he "needed money." He denied that he went to Mr. Shackleford's house to "steal"; however, the finder of fact was not obligated to believe this testimony, as appellant was the person most interested in the outcome of the case. *See Geer v. State*, 75 Ark. App. 147, 55 S.W.3d 312 (2001) (citing *Rankin v. State*, 338 Ark. 723, 1 S.W.3d 14 (1999)). On this proof, thin as it was, the jury could have reasonably found that appellant had the requisite intent to enter the garage with the intent to commit theft. Because we are compelled to follow the court's holding in *Smith*, I would affirm.

BROWN, J., joins.