NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR08-724

THEODIS ANDERSON, APPELLANT	**Opinion Delivered** April 1, 2009
V.	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CR 2004-2260, CR2008-484]
STATE OF ARKANSAS, APPELLEE	HONORABLE JOHN LANGSTON, JUDGE,
	AFFIRMED AS MODIFIED

DAVID M. GLOVER, Judge

On June 3, 2005, appellant, Theodis Anderson, pled guilty to the offense of failure to register as a sex offender and was placed on five years' probation. On February 13, 2006, he pled guilty to violating the terms and conditions of his probation, and was again sentenced to five years' probation. On February 13, 2008, the State filed a felony information and a petition for revocation, alleging that Anderson had committed the offenses of residential burglary and theft of services at a house located at 125 Emily in North Little Rock, Arkansas, on September 14, 2007, and thereby also violated the terms of his probation. On May 1, 2008, the State filed its amended petition to revoke, adding an allegation that Anderson also tested positive for the use of a controlled substance in violation of the terms of his probation.

On May 2, 2008, Anderson was tried by the court and found guilty of the offense of

residential burglary.[1] Following Anderson's conviction, the trial court heard the State's petition to revoke and granted it. Appellant was sentenced to nine years in the Arkansas Department of Correction on his conviction for residential burglary and two years on the revocation of his probation.

Anderson raises two points of appeal: 1) the trial court should be reversed because the State never proved he had the intent to commit an offense punishable by imprisonment when he was found inside an occupiable residence; and 2) because his probation was specifically revoked pursuant to the residential-burglary conviction, the trial court should be reversed and his probation should be reinstated.

Anderson contends that his conviction for residential burglary should be reversed because the State failed to prove that he had the necessary intent to commit any offense punishable by imprisonment when he entered the residence at 125 Emily Street on September 14, 2007. We agree.

Arkansas Code Annotated section 5-39-201 (Repl. 2006) provides in pertinent part:

> (a)(1) A person commits residential burglary if he or she enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment.

In *Forgy v. State*, 302 Ark. 435, 437, 790 S.W.2d 173, 174-75 (1990), our supreme court explained:

---

[1]The trial court granted Anderson's motion for directed verdict on the charge of theft of services.

> The crime of burglary involves two elements: (1) that the defendant entered or remained unlawfully in an occupiable structure of another person and (2) that he did so with the purpose of committing therein an offense punishable by imprisonment. Ark. Code Ann. § 5-39-201(a) (1987). The jury must find that the defendant had the purpose to commit a particular offense. *Oliver v. State*, 286 Ark. 198, 200, 691 S.W.2d 842, 843 (1985). Criminal intent cannot be presumed from the mere showing of illegal entry. *Norton v. State*, 271 Ark. 451, 453-54, 609 S.W.2d 1, 3 (1980).

Forgy cited *Norton v. State*, 271 Ark. 451, 453-54, 609 S.W.2d 1, 3 (1980), in which our supreme court explained in even more detail:

> Accordingly, we hold a specific criminal intent, which is an essential element of the crime of burglary, cannot be presumed from a mere showing of illegal entry of an occupiable structure. The prosecution must prove each and every element of the offense of burglary beyond a reasonable doubt and cannot shift to the defendant the burden of explaining his illegal entry by merely establishing it. Not only is illegal entry an independent element of burglary, but it also constitutes a separate crime punishable as criminal trespass. Ark. Stat. Ann. 41-2004 (Repl. 1977). By implying a specific criminal intent from mere evidence of illegal entry, the State not only evades its constitutional evidentiary burden in criminal prosecutions but imposes upon a defendant the responsibility to prove he only committed a criminal trespass or stand in jeopardy of a conviction of burglary.
>
> . . . .
>
> We are not unmindful that our decision in *Grays v. State*, 264 Ark. 564, 572 S.W.2d 847 (1978), may suggest that the specific intent requirement of burglary may be presumed from the unexplained illegal entry of an occupiable structure. In *Grays*, however, the defendant fled, eluding the police officers, when his presence was discovered in the occupiable structure. We have consistently suggested that the flight of an accused to avoid arrest is evidence of his felonious intent. *See, e.g., France v. State*, 68 Ark. 529, 60 S.W. 236 (1900), *Smith v. State*, 218 Ark. 725, 238 S.W.2d 649 (1951), *Russell & Davis v. State*, 262 Ark. 447, 559 S.W.2d 7 (1977). Notwithstanding our holding in *Grays*, however, we find no evidence here other than appellant's illegal entry to sustain a conclusion that appellant's entry was for the purpose of committing an imprisonable offense. Certainly, the evidence of the other neighborhood crimes is immaterial since appellant was acquitted of those charges. At most, the evidence revealed that appellant was standing inside the doorway of an office building which he had illegally entered and from which nothing was taken,

> speaking to his friends passing by. Although criminal intent is by nature subjective and usually provable only by circumstantial evidence, it remains an independent and indispensable element of the crime of burglary and cannot be presumed from another fact, the establishment of which is also essential to a conviction of burglary.

Here, the State relied upon the offense of criminal mischief to satisfy the intent portion of burglary. A person commits criminal mischief in the second degree if the person:

> (1) Recklessly destroys or damages any property of another person; or
>
> (2) Purposely tampers with any property of another person and by the tampering causes substantial inconvenience to the owner or another person.
>
> (b) Criminal mischief in the second degree is a:
>
> (1) Class D felony if the amount of actual damage is two thousand five hundred dollars ($2,500) or more[.]

Ark. Code Ann. § 5-38-204 (Repl. 2006).

When reviewing a challenge to the sufficiency of the evidence, the evidence is viewed in the light most favorable to the State, and only the evidence supporting the verdict will be considered. *Cooper v. State*, 84 Ark. App. 342, 141 S.W.3d 7 (2004). A conviction is affirmed if substantial evidence exists to support it. *Id*. Substantial evidence is evidence forceful enough to compel a conclusion beyond suspicion or conjecture. *Id*.

At trial, Michael Landers, the owner of the house located at 125 Emily, testified that an earlier act of vandalism at the house had resulted in a broken door and windows, but that he had replaced them prior to the September 14, 2007 incident; that no one was living in the house and no one had permission to do so, even though the electricity and water were turned on; and that following the earlier vandalism of the house, he had asked the North Little Rock

police to increase their patrols of the area.

Officer Matthew Pfleger testified that he had inspected the house with Mr. Landers before September 14; that on the night Anderson was arrested, he saw damage to the house that had not been present on his earlier visit; that those damages included cigarette burns on the carpet, broken furniture, graffiti, and trash/garbage strewn on the living room floor, including half-eaten food; that upon entering the house, he observed the front door had been kicked off its hinges and several windows that were broken. He also observed drug paraphernalia "all over the place,"as well as various items of clothing, the majority of which was men's clothing. He explained that the reason he investigated the house further that night was the presence of a vehicle in the driveway and a light on inside the house; that he had not seen the vehicle in the driveway earlier in his shift; and that the vehicle belonged to Anderson. He stated that upon entering the house, he and the officer accompanying him first encountered Anthony Coyle. He stated that Anderson and a female named Mary Ives were found in a locked bathroom located at the rear of the house, after he had already identified himself as a police officer; that they would not come out; and that the officers had to force open the bathroom door.

Anderson presented a version of events essentially stating that he was invited to the house by Mary Ives; that when he honked for her, she told him to give her a few minutes; that he stepped into the house while she was finishing up; that he followed her to the bathroom; that she was the one who locked the bathroom door; and that the police arrived soon

thereafter and knocked in the door. He denied doing any damage to the house.

Anderson moved for a directed verdict at the close of the State's case and again at the close of all of the evidence. It was denied by the trial court.

There is no question that Anderson was inside the house located at 125 Emily without permission from the owner, Michael Landers. His argument, however, focuses on the State's proof regarding his intent to commit an offense punishable by imprisonment, *i.e.*, criminal mischief, while inside the house. He contends that the proof was not sufficient to satisfy both elements of residential burglary. The trial court, of course, did not have to believe Anderson's version of events, but even viewing the evidence in the light most favorable to the State, as we are required to do, we find Anderson's argument convincing and conclude that there is not substantial evidence to support his conviction for residential burglary.

Even though we have concluded that the burglary conviction is not supported by substantial evidence, we nevertheless hold that there was substantial evidence to convict Anderson of the offense of criminal trespass, which is a lesser-included offense of residential burglary. *See Bongfeldt v. State*, 6 Ark. App. 102, 639 S.W.2d 70 (1982). In *Tigue v. State*, 319 Ark. 147, 152-53, 889 S.W.2d 760, 762 (1994), our supreme court explained:

> Where the evidence presented is insufficient to sustain a conviction for a certain crime, but where there is sufficient evidence to sustain a conviction for a lesser-included offense of that crime, this court may "reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense, fix it ... at some intermediate point, remand the case to the trial court for the assessment of the penalty, or grant a new trial either absolutely or conditionally."

(Citations omitted.)

Arkansas Code Annotated section 5-39-203 (Repl. 2006), provides in pertinent part:

> (a) A person commits criminal trespass if he or she purposely enters or remains unlawfully in or upon:
>
> (1) A vehicle; or
>
> (2) The premises of another person.
>
> (b) Criminal trespass is a:
>
> (1) Class B misdemeanor if the vehicle or premises involved is an occupiable structure[.]

Anderson himself testified that he told Mary Ives that he did not like being on abandoned property; that he did not open the bathroom door when the police came in; and that when he heard "the boom" outside, he suspected it was the police "because it was an abandoned house." His testimony alone constitutes substantial evidence to support the conclusion that he purposely entered or remained unlawfully in or upon the premises of another person, and thereby committed the offense of criminal trespass. In addition, the house was occupiable, making his offense a Class B misdemeanor punishable by a sentence not to exceed ninety days and a fine not to exceed $500. *See* Ark. Code Ann. §§ 5-4-401(b)(2) (Repl. 2006), 5-4-201(b)(2) (Supp. 2007).

Accordingly, we modify Anderson's judgment of conviction to reflect that his conviction is for criminal trespass under Arkansas Code Annotated section 5-39-203 (Repl. 2006), rather than for residential burglary, and we reduce his sentence to the maximum allowed for the lesser-included offense of criminal trespass, *i.e.*, ninety days, and the

maximum allowable fine of $500.

For his second point of appeal, Anderson contends that his probation was specifically revoked based on his conviction for residential burglary, and that because the residential-burglary conviction was not supported by substantial evidence, the revocation of his probation should be reversed and his probation reinstated. We disagree.

It is true that the trial court based the revocation solely upon the residential-burglary conviction, despite evidence that Anderson had also tested positive for cocaine; but from our review, we conclude that the revocation of his probation is supported by our conclusion that there was substantial evidence to support a conviction for the lesser-included offense of criminal trespass. We therefore affirm the revocation of his probation.

Affirmed as modified.

HART and HENRY, JJ., agree.