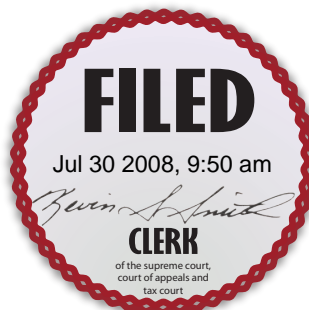


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

JOHN PINNOW

STEVE CARTER

Special Assistant to the
State Public Defender
Greenwood, Indiana

Attorney General of Indiana

GEORGE P. SHERMAN

Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT F. LYONS, JR.,)

Appellant-Defendant,)

vs.)

No. 90A02-0712-CR-1098

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable Bruce C. Bade, Judge *Pro Tem*
Cause No. 90C01-0508-FC-28

July 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a bench trial, Robert Lyons was convicted of Attempted Burglary¹ as a class C felony and Resisting Law Enforcement² as a class A misdemeanor. Lyons was also found to be a Habitual Offender.³ On appeal, Lyons presents two issues for review:

1. Is the evidence sufficient to support his conviction for attempted burglary?
2. Is the evidence sufficient to support the habitual offender determination?

We affirm in part, reverse in part, and remand.

The facts favorable to the convictions follow. At approximately 3:30 a.m. on August 28, 2005, Bluffton police officers Andrew Ellis and Brent Garrett were dispatched in response to an entry alarm at a Scott's grocery store. When Officer Ellis checked the doors on the east side of the building, he observed a loading dock door was partially open. The door had been pried open. Office Ellis then saw two individuals run behind a semi trailer that was parked in the loading dock area near the open door. The subjects ran around the corner of the building and one of them stopped behind a transformer unit near the back corner of the store. Officer Ellis radioed Officer Garrett that two individuals were running. Officer Ellis, with his service weapon pointed in the direction of the suspect, ordered the individual to come out from behind the transformer unit and to show his hands. The suspect, later identified as Lyons, showed his hands and said, "What are you going to do?"

Transcript at 21.

¹ Ind. Code Ann. § 35-41-5-1 (West, PREMISE through 2007 1st Regular Sess.); Ind. Code Ann. § 35-43-2-1 (West, PREMISE through 2007 1st Regular Sess.).

² Ind. Code Ann. § 35-44-3-3 (West, PREMISE through 2007 1st Regular Sess.).

³ Ind. Code Ann. § 35-50-2-8 (West, PREMISE through 2007 1st Regular Sess.).

Officer Garrett soon arrived in his patrol car and parked at an angle so that his headlights and spotlight were shining on Officer Ellis and Lyons. Officer Garrett exited his vehicle and also pulled out his service weapon. As Officer Garrett approached, Lyons ran off. Officers Ellis and Garrett gave chase. Officer Garrett continued to pursue Lyons across a field and Highway 1 while yelling “Stop, police.” *Id.* at 38. Lyons ran to an older model, white, four-door sedan that was parked in a parking lot of a State Farm Insurance building. A second individual was sitting in the driver’s seat. Officer Garrett observed Lyons open the rear, driver’s side door of the vehicle and appear to throw or drop something in before jumping into the car. Officer Garrett pointed his weapon at the car and ordered the occupants to stop. The suspects fled in the vehicle. Officer Garrett radioed the description of the car and then returned to the grocery store to assist Officer Ellis.

In the meantime, upon returning to the grocery store, Officer Ellis saw an individual run from the loading-dock area to a field across the street from the store. Officer Ellis ordered the individual to stop, and after deploying his taser, apprehended him. The individual was identified as Fate Stewart.

Decatur police officer Jamie Tharp heard a broadcast of the burglary and Officer Garrett’s report of two black males fleeing in a white, four-door vehicle. At approximately 4:00 a.m., Officer Tharp observed a vehicle meeting the description traveling northbound on U.S. 27 near the Scott’s grocery store in Decatur. Officer Tharp and Officer Kris Affolder followed the vehicle for eight or nine blocks. After the car rolled through a stop sign, they activated their lights and attempted to initiate a traffic stop. The driver of the vehicle did not stop, and a chase ensued. Eventually, the driver drove the vehicle off of the roadway and

behind a house, where the car ran into a pile of trash. Two black males jumped out of the car and ran into a nearby cornfield. The driver of the vehicle was eventually apprehended and identified as Anthony Allen. Officer Garrett recognized Allen as the driver of the car that fled from the State Farm parking lot.

At approximately 8:00 a.m., Officer Kevin McIntosh found Lyons walking down a road a few miles from where the suspect vehicle had been abandoned. Officer McIntosh observed that Lyons's clothes were wet and grass stained. He approached Lyons and informed him that he fit the description of a burglary suspect. Officer McIntosh detained Lyons. Officer Affolder recognized Lyons as the passenger in the white, four-door car he had pursued. Officer Garrett positively identified Lyons as the person he had chased from the back of the Scott's store in Bluffton and observed jump into the white, four-door vehicle in the State Farm parking lot before fleeing.

A three-pound sledgehammer, a chisel, and two pry bars were found at the loading dock of the Scott's grocery store in Bluffton. A second sledgehammer was found inside the back room of the store. A black, Uniden two-way radio was found in the parking lot of the State Farm Insurance building. Inside the white, four-door car from which Lyons fled, officers found two pry bars, tin snips, a flashlight, bolt cutters, and a black, Uniden two-way radio.

At trial, Fate Stewart testified that he and two other men had gone to the Scott's grocery store to burglarize it. Stewart denied that Lyons and Allen were the two men with him during the burglary. Allen testified that he pleaded guilty to the burglary of the Scott's store, but denied that he committed the burglary.

On August 29, 2005, the State charged Lyons with Count I, burglary as a class C felony, and Count II, resisting law enforcement as a class A misdemeanor. On October 26, 2005, the State filed an information alleging Lyons to be a habitual offender. On August 1, 2007, the State amended Count I to charge attempted burglary, a class C felony.⁴ Lyons waived his right to a jury trial, and a bench trial was held on November 1-2, 2007. At the conclusion of the evidence, the trial court found Lyons guilty as charged and adjudicated him a habitual offender. On November 28, 2007, the trial court sentenced Lyons to concurrent terms of eight years on Count I and one year on Count II. The trial court enhanced the sentence on Count I by four years because of the habitual offender finding, resulting in an aggregate sentence of twelve years.

1.

Lyons argues that the evidence is insufficient to support his conviction for attempted burglary. Our standard of review is well settled. When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the judgment, and “must affirm ‘if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.’” *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

⁴ On March 8, 2006, the State amended Count II to allege that Lyons fled from the officer rather than forcibly resisted.

In support of his claim, Lyons directs us to Stewart’s testimony that Lyons was not one of the men participating in the burglary with him and Allen’s testimony that, although he pleaded guilty to the burglary, he did not commit the crime. Lyons also asserts that his mere presence at the scene of the attempted burglary, while “suspicious”, did not prove that he was guilty of attempted burglary. *Appellant’s Brief* at 11. Lyons’s arguments are blatant requests for this court to reweigh the evidence and judge the credibility of the witnesses. We will not engage in such an analysis on appeal. Given the evidence as set forth above, we conclude that there was sufficient evidence from which the trial court could have concluded beyond a reasonable doubt that Lyons was guilty of attempted burglary.

2.

Lyons argues that the evidence is insufficient to support the trial court’s habitual offender finding because the State failed to establish the date of the second, prior unrelated offense. In addressing Lyons’s argument, we apply the same sufficiency standard set forth above, i.e., we will not reweigh the evidence, but instead look at the evidence in the light most favorable to the judgment. *Toney v. State*, 715 N.E.2d 367 (Ind. 1999).

In order to establish that a defendant is a habitual offender, the State must prove beyond a reasonable doubt that the defendant has accumulated two prior, unrelated felonies. I.C. § 35-50-2-8. One of the essential elements of a habitual offender finding is proof that the second predicate offense was committed subsequent to the date of sentencing for the first predicate offense. *Id.* (subsection (c) provides that prior felonies are unrelated if “(1) the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction; and (2) the offense for which the state seeks to have the person sentenced

as a habitual offender was committed after sentencing for the second prior unrelated felony conviction”). “Failure to prove the proper sequencing requires that the habitual offender determination be vacated.” *Flint v. State*, 750 N.E.2d 340, 341 (Ind. 2001).

The State does not contest Lyons’s challenge to the habitual offender determination. The State acknowledges that to prove the proper sequence of events, the charging information for the second unrelated felony is often introduced to establish the date that it was committed. Here, the State did not introduce the charging information for the second unrelated felony or any other evidence establishing the date the second offense was committed. In support of the habitual offender allegation, the State introduced State’s Exhibit 16 to establish that Lyons was convicted of two counts of burglary as class B felonies in 1985 and sentenced in November of 1985. The State also introduced State’s Exhibit 15, which demonstrates that Lyons pleaded guilty to aggravated battery as a class B felony on June 3, 1993 and was sentenced on that offense on July 12, 1993. As acknowledged by the State, the evidence fails to establish the date the second unrelated offense was committed.

While a rational inference could be drawn from the time span between the offenses that the aggravated battery was committed after sentencing for the first felony (i.e., burglary), our Supreme Court has held that such inferences cannot support a habitual offender determination. *See Flint v. State*, 750 N.E.2d 340 (holding evidence was insufficient to find the two prior felonies were committed in the proper sequence where the evidence showed that on December 20, 1972 the defendant was convicted and sentenced for an August 31, 1972 forgery, and that in June, 1974, the defendant was arrested for murder and convicted of that offense in February 1977); *McCovens v. State*, 539 N.E.2d 26 (Ind. 1989) (holding that

twenty-year span between prior convictions could not be relied upon to establish that the offenses were committed in the sequence mandated by statute); *Henderson v. State*, 534 N.E.2d 1105 (Ind. 1989) (ordering the habitual offender finding vacated because “The State’s evidence of two prior felony convictions established only that the defendant was sentenced for the first on August 25, 1975, and that the second offense was committed sometime in 1981 or before, for which the defendant was sentenced on June 10, 1981”); *see also* *McManomy v. State*, 751 N.E.2d 291 (Ind. Ct. App. 2001). Because the State failed to establish the proper sequence of the prior felonies, we must remand to the trial court to vacate the habitual offender determination.

Judgment affirmed in part, reversed in part, and remanded.

KIRSCH, J., and BAILEY, J., concur