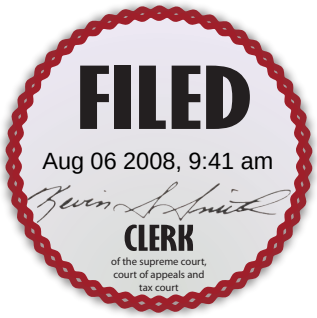

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IN THE COURT OF APPEALS OF INDIANA

RON BANET,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 31A04-0709-CR-519
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HARRISON SUPERIOR COURT
The Honorable Roger D. Davis, Judge
Cause No. 31D01-0406-FA-461

August 6, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Ron Banet appeals his convictions and sentence for Burglary,[1] a class B felony, Battery,[2] a class D felony, and Resisting Law Enforcement,[3] a class A misdemeanor. Specifically, Banet argues that (1) the State failed to present sufficient evidence to support the burglary conviction; (2) his conviction for burglary is inconsistent with his acquittal for the felony that the State alleged he intended to commit upon entering the dwelling; and (3) his sentence is inappropriate in light of the nature of the offenses and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

On May 28, 2004, Banet was excavating a basement on property near the Ohio River in Harrison County for his boss, Ronald Rosenberger. The property was located on a bluff overlooking the river and a camping area where people commonly congregated for parties. Because it was Memorial Day weekend, the camping area was "a pretty wild place." Tr. p. 56. Around 11:00 p.m., Banet appeared at Rosenberger's shop to refuel his truck. He appeared "wound up" and excitedly told Rosenberger that some attractive women had given him beer. Id. Rosenberger was concerned about Banet's behavior and was about to ask him to leave when Banet exposed his penis. Rosenberger "freaked out" and Banet "took off running." Id. at 58.

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[1] Ind. Code § 35-43-2-1.

[2] Ind. Code § 35-42-2-1.

[3] Ind. Code § 35-44-3-3.

After leaving Rosenberger's shop, Banet ran to a nearby trailer home. Eleven-year-old C.D. lived in the trailer with her mother and father. Her bedroom was located in the front of the trailer and a large letter "C" was on the window to indicate a child's presence in case of an emergency. The blinds on C.D.'s window were open and her television was turned on, allowing Banet to see into the bedroom. Banet knocked over a birdbath and damaged various plants while standing outside the window for an unidentified amount of time. Banet eventually entered the bedroom through C.D.'s window and stood near her bed with his pants down and his penis exposed for approximately thirty seconds. C.D. screamed and tried to kick Banet. C.D.'s father entered the room and struggled with Banet to force him from the residence. During the struggle, C.D.'s mother entered the room wearing a nightgown and Banet "turned around and grabbed her gown and tried to pull it off." Id. at 114. C.D.'s father eventually forced Banet from the home.

Rosenberger heard the commotion and witnessed Banet crawling through the woods with his pants around his ankles. Rosenberger kept Banet near his truck until the police arrived. Harrison County Police Department Officer Anthony Mills was the first to arrive. Banet began to walk toward Officer Mills, who ordered Banet to stop. When he did not stop, Officer Mills drew his weapon and Banet fled. Officer Mills pursued him and brought him to the ground multiple times, only to have Banet free himself and continue to flee. Eventually, two other officers arrived at the scene and were able to capture Banet, who had to be subdued with pepper spray. One of the officers, Tim Berkenmeyer, injured his leg during the encounter.

Banet was transported to the hospital and treated by an emergency room physician, who noted that he was combative, disoriented, and hallucinating. A few hours later, after Banet had calmed down, he became increasingly concerned that he had hurt someone. Officer Michael Kurz advised Banet of his Miranda[4] rights, which Banet waived. Banet stated that he remembered entering C.D.'s bedroom through the window and standing over C.D. but that "[h]e kept telling himself that he couldn't do this to a little girl." Id. at 177-78.

The State charged Banet with class B felony burglary, class A felony attempted child molesting, class D felony battery, class A misdemeanor resisting law enforcement, and class A misdemeanor criminal mischief. Following a bench trial, the trial court acquitted Banet of the attempted child molesting charge and found him guilty of the remaining charges. The trial court held a sentencing hearing on August 9, 2007, and merged the criminal mischief conviction into the burglary conviction before pronouncing the sentence. For the remaining charges, the trial court sentenced Banet to eleven and one-half years incarceration, with five years suspended to probation. Banet now appeals.

DISCUSSION AND DECISION

I. Sufficiency

Banet argues that the State presented insufficient evidence to sustain his conviction for burglary. While he admits that he broke into the residence in which C.D. lived, Banet argues that "the State presented no evidence from which it can reasonably

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

[be] inferred that [he] intended to molest C.D. when he broke through her bedroom window." Appellant's Br. p. 10.

To convict Banet of class B felony burglary, the State had to prove beyond a reasonable doubt that he broke into and entered another person's dwelling with intent to commit a felony therein. I.C. § 35-43-2-1. The State alleged in the charging information that Banet intended to commit felony child molesting upon entering the dwelling. Appellant's App. p. 15.

When addressing sufficiency of the evidence challenges, we neither reweigh the evidence nor judge the credibility of the witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences therefrom that support the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). If there is conflicting evidence, we consider that evidence only in the light most favorable to the judgment. Id. The evidence is sufficient if an inference may reasonably be drawn from it to support the judgment. Id. at 147.

Our Supreme Court has provided that "the criminal transgression of burglary is committed by a person intending to commit an underlying felony at the moment the building or structure is broken into and entered." Swaynie v. State, 762 N.E.2d 112, 114 (Ind. 2002). A defendant's culpability is established at the point of entry regardless of whether the underlying intended felony is ever completed. Id. The State must prove a specific fact that provides a solid basis to support a reasonable inference that the defendant had the specific intent to commit a felony. Freshwater v. State, 853 N.E.2d 941, 844 (Ind. 2006). The time, force, and manner of entry alone are not enough. Id.

However, intent may be inferred from circumstantial evidence of the nature of the felony. Webster v. State, 708 N.E.2d 610, 615 (Ind. Ct. App. 1999). The evidence need not be insurmountable, but it must provide a solid basis to support a reasonable inference that the defendant intended to commit the underlying felony. Id.

The evidence presented at trial established that Banet exposed his penis to his boss before running toward the trailer where C.D. lived. Tr. p. 54, 102-103. The window to C.D.'s bedroom had a large sticker with the letter "C" on it, indicating that, in case of an emergency, a child lived in the room. Id. at 148. Banet approached C.D.'s window and stood there long enough to knock over a birdbath and damage various plants. Id. at 111-13, 218. He eventually "came through the window" and stood "right at the end of [C.D.'s] bed" for approximately thirty seconds with his pants down and his penis exposed while C.D. screamed and kicked her feet toward him. Id. at 110, 162, 164, 166. After C.D.'s parents entered the room, a struggle ensued between Banet and C.D.'s father and Banet tried to remove the nightgown that C.D.'s mother was wearing. Id. at 114. Banet was removed from the house and later told officers that he remembered entering C.D.'s bedroom through the window and standing over her but that "[h]e kept telling himself that he couldn't do this to a little girl." Id. at 177-78.

Banet argues that any inferences that can be drawn from this evidence that suggest that he specifically intended to molest C.D. are "patently unreasonable and ignore[] the facts and circumstances surrounding the break-in." Appellant's Br. p. 12. We disagree. Banet entered C.D.'s bedroom after standing outside the window for a period of time. The window contained a sticker indicating the presence of a child. The evidence

surrounding Banet's decision to enter C.D.'s bedroom through the window and immediately approach her bed and expose his penis supports a reasonable inference that he broke into the residence with the intent to commit child molesting. It is of no moment that Banet did not succeed in committing the crime because C.D.'s father quickly entered the room; instead, a defendant's culpability is established at the time he enters the residence. Banet's arguments that he was "unhinged and irrational" when he committed the crimes are an invitation for us to reweigh the evidence—a request we must decline when reviewing the sufficiency of the evidence. Id. at 8. Thus, we conclude that the State presented sufficient evidence to sustain Banet's conviction for burglary.[5]

II. Allegedly Inconsistent Verdicts

Banet argues that the verdicts for the burglary and attempted child molesting charges are "fatally inconsistent" because he was found guilty of the former charge and acquitted of the latter. Appellant's Br. p. 16. Banet asks us to review the verdicts for consistency and conclude that they cannot be explained by the factfinder's decision to accept or reject certain pieces of evidence.

Although this court reviews verdicts for consistency, perfect logical consistency is not required. Parks v. State, 734 N.E.2d 694, 700 (Ind. Ct. App. 2000). It is not within our province to attempt to interpret the factfinder's thought process in arriving at its

[5] The dissent disagrees with this conclusion, opining that "[i]t is likely that Banet's pants had fallen down prior to breaking in and remained down . . ." and that, with regard to Banet's statement that he "couldn't do this to a little girl[,]" "there was no evidence presented as to what 'this' meant." Slip op. p. 2. It is evident that these arguments reweigh the evidence and are contrary to our well-established standard of review.

verdict. Id. A factfinder may attach whatever weight and credibility to the evidence it believes is warranted and is free to believe portions of a witness's testimony but disregard other portions of the same testimony. Id. Therefore, when we review a claim of inconsistent jury verdicts, we will take corrective action only when the verdicts are "extremely contradictory and irreconcilable." Jones v. State, 689 N.E.2d 722, 724 (Ind. 1997). This is an extremely rare occurrence; in fact, only once has an Indiana court found verdicts in a criminal case to be irreconcilably inconsistent. See Owsley v. State, 769 N.E.2d 181, 183-85 (Ind. Ct. App. 2002) (holding a defendant's conviction for conspiracy to commit dealing in cocaine to be impermissibly inconsistent with his acquittals for possession of cocaine and dealing in cocaine arising out of the same alleged criminal transaction).

Typically, when a defendant is acquitted of one charge but convicted of another, the results will survive a claim of inconsistency if the conviction is supported by sufficient evidence. Edwards v. State, 730 N.E.2d 1286, 1290 (Ind. Ct. App. 2000). We have already concluded that the State presented sufficient evidence to support Banet's burglary conviction.

Furthermore, our Supreme Court has previously rejected a challenge almost identical to the one Banet presents. In James v. State, the defendant claimed that it was inconsistent for a jury to acquit him of attempted rape and find him guilty of burglary because the burglary charge was predicated on his intent to commit rape upon entering the dwelling. 472 N.E.2d 195, 197-98 (Ind. 1985). Our Supreme Court succinctly rejected James's argument, emphasizing that "[w]e do not, however, require entirely

consistent verdicts in situations in which one criminal transaction gives rise to criminal liability for separate and distinct offenses." Id. at 198. The James court further concluded that "[w]hile the jury might have found [James] guilty of attempted rape from the evidence presented at trial, it was not required to do so." Id. Applying this rationale, we reject Banet's argument that the factfinder's verdicts were fatally inconsistent.

III. Sentencing

Banet argues that his sentence for eleven and one-half years imprisonment with five years suspended to probation is inappropriate in light of the nature of the offenses and his character. When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). In conducting an appropriateness review, we must examine both the nature of the offense and the defendant's character. Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004). We may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied.

At the time of Benet's offenses, the presumptive[6] sentence for a class D felony was eighteen months imprisonment and the presumptive sentence for a class B felony was ten years imprisonment. Ind. Code §§ 35-50-2-5, -7. The trial court sentenced Banet to the presumptive sentence for each of his offenses, ordered those sentences to run

[6] Because Banet committed his offenses before the legislature's amendments to Indiana's sentencing scheme went into effect in April 2005, we will refer to the presumptive sentence.

consecutively, and suspended five years of the sentence to probation. We recognize that the presumptive sentence for an offense "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). Therefore, when the trial court imposes the presumptive sentence, the defendant bears a heavy burden in persuading us that his or her sentence is inappropriate. McKinney v. State, 873 N.E.2d 630, 647 (Ind. Ct. App. 2007), trans. denied.

Regarding the nature of the offenses, Banet broke into a residence through a window to enter an eleven-year-old girl's bedroom. He lowered his pants and exposed his penis while the girl screamed and kicked her feet toward him. After the girl's father removed him from the residence, Banet fled from an officer. Although the officer apprehended him, Banet continued to struggle and freed himself numerous times. Banet was eventually captured when two additional officers arrived at the scene. However, one of the officers injured his leg during the encounter. Based on the nature of the offenses, we conclude that Banet's decisions to break into a residence, expose his genitalia to a child, and flee from officers do not convince us that his sentence is inappropriate.

Turning to his character, we acknowledge that Banet had lived a law-abiding life until he committed the underlying offenses. However, while on bond for these offenses, Banet was charged with and convicted of operating while intoxicated. Appellant's App. p. 275. The fact that Banet committed an additional crime while on bond instead of reverting to his previous law-abiding ways certainly does not reflect favorably on his character. Thus, we agree with the State that while "this record may not warrant an enhanced sentence," appellee's br. p. 12, it does not compel us to find the trial court's

decision to impose consecutive, presumptive sentences and suspend five years to probation to be inappropriate.

The judgment of the trial court is affirmed.

ROBB, J., concurs.

RILEY, J., dissents with opinion.

IN THE
COURT OF APPEALS OF INDIANA

RON BANET,	)	
	)	
Appellant-Defendant,	)	
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vs.	)	No. 31A04-0709-CR-519
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

Judge, Riley, dissenting with separate opinion.

I respectfully dissent. I would conclude that the State did not present sufficient evidence to prove beyond a reasonable doubt that Banet intended to commit child molesting when he entered C.D.'s room, and therefore his conviction for burglary is in error. The facts identified by the majority as supporting the element that Banet intended to commit child molesting when he broke into C.D.'s room are that the room had a large letter "C" sticker on the window, he stood outside long enough to break a birdbath and damage plants, he stood in the room with his pants down after breaking in, and as he was standing there he said he was thinking "he couldn't do this to a little girl." However, I find this evidence insufficient to support the conclusion that Banet intended to molest a

child when he broke into C.D.'s room. There is no evidence that Banet saw, or would have seen the large letter "C" sticker, or that would have understood what the sticker represented that the room was a child's. As the State's witness conceded, the damaged plants and birdbath do not prove that Banet stood outside the window for any period of time longer than a "moment." (Tr. p. 257). The evidence was that Banet had unfastened his pants at the gas station prior to going to the trailer where he broke in. There was no evidence that he pulled his pants down when entered C.D.'s room, just that he stood there with them down. It is likely that Banet's pants had fallen down prior to breaking in and remained down, just as they remained down after he left the trailer and crawled through the woods. (Tr. p. 79). Further, C.D. testified that the light was turned off in her room when Banet broke in, making it more unlikely that he saw C.D. and could form the intent to molest her as he was breaking in. As for Banet's statement that "he couldn't do this to a little girl" there was no evidence presented as to what "this" meant. (Tr. p. 177-78). Furthermore, there was no evidence that C.D. developed this thought prior to breaking in to the child's room.

The majority contends in footnote number five that I am reweighing the evidence, which we cannot do. However, I am pointing out the lack of any evidence that Banet intended to commit child molesting when he broke into her room. It should be unnecessary for me to remind the majority that the State must prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The only thing proved by the evidence relied upon by the majority is that in his inebriated state, Banet

broke into the trailer and found himself standing before C.D. with his pants down. This would be a crime, but it is not proof beyond a reasonable doubt that he intended to commit child molest.

Because I would find that Banet's conviction for burglary was not supported by sufficient evidence, I would not address whether the jury's acquittal of him on the charge of attempted child molest and its finding that he was guilty of burglary based upon his intent to commit the felony of child molest are fatally inconsistent. Furthermore, I would have remanded so that the trial court could enter a judgment of conviction on the criminal mischief charge and sentence Banet accordingly.