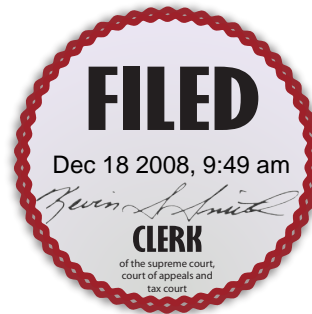


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DARYL M. PAYNE,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 71A03-0805-CR-236

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0707-FB-97

December 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a jury trial, Daryl Payne was found guilty of burglary, a Class B felony. Payne appeals his conviction, contending that the State did not present sufficient evidence to support his conviction. Concluding that there was sufficient evidence of Payne's intent to commit theft at the time he broke and entered a dwelling, we affirm.

Facts and Procedural History

Cornelious Williams lived in a second-floor apartment in a house owned by the Housing Development Corporation ("HDC"). The furnace and water pipes were located in the locked basement to which only HDC had access. On the morning of July 21, 2007, Williams woke when a neighbor's dogs started barking and he heard noises coming from the basement. Assuming at first it was a maintenance person from HDC, Williams looked outside for an HDC car; finding none, he called the police to report someone in the house. He told the 911 operator that it sounded "[l]ike the furnace is being torn out." Transcript at 152. When police arrived, they found a window into the basement broken. They entered the basement and found a bag of copper pipes, a bag containing tools and a flashlight, and a puddle of water on the floor. Eventually they discovered Payne hiding among the pipes along the ceiling. Payne was in possession of a pair of pliers, a screwdriver, and a pocket knife. His shirt was wet, dirty, and covered with bits of insulation.

Payne was charged with burglary as a Class B felony for breaking and entering a dwelling. See Ind. Code § 35-43-2-1(1)(B). A two-day jury trial was conducted, at the conclusion of which the jury found Payne guilty as charged. The trial court sentenced

Payne to twelve years at the Indiana Department of Correction. Payne now appeals his conviction.

Discussion and Decision¹

I. Standard of Review

When reviewing a claim of insufficient evidence, we will not reweigh evidence or judge witnesses' credibility. Grim v. State, 797 N.E.2d 825, 830 (Ind. Ct. App. 2003). We will consider only the evidence favorable to the judgment and the reasonable inferences drawn therefrom. Id. We will affirm a conviction if the lower court's finding is supported by substantial evidence of probative value. Id.

Our supreme court recently summarized our standard for reviewing a challenge to the sufficiency of the evidence:

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

¹ Payne has filed a two-volume appendix which does not comply with our rules in several respects. Volume I of the appendix consists of a table of contents for both volumes followed by six pages of record material: the chronological case summary, the information, the jury verdict form, the judgment of conviction and sentencing order, the notice of appeal, and counsel's verification. Volume II, described in the table of contents only as containing the "Clerks Record," is approximately 100 unnumbered pages of various documents. Appellate Rules 50 and 51 govern the content, form, and assembly of appendices. Because of the length of the appendix, all documents should have been bound as one volume. See App. R. 51(D) ("No more than two hundred fifty (250) pages shall be bound into any one Appendix volume."). The order of documents within that one volume should be as described in Appellate Rule 50(B)(1). The table of contents is to "specifically identify each item contained in the Appendix, including the item's date." App. R. 50(C) (emphasis added). Finally, "[a]ll pages of the Appendix shall be numbered at the bottom consecutively." App. R. 5(C). We urge counsel to consult the Appellate Rules when preparing appeals in the future.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, footnote, and citations omitted) (emphasis in original).

II. Sufficiency of the Evidence

Indiana Code section 35-43-2-1 provides, “A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary.” Payne was charged with breaking and entering the building in which Williams lived with the intent to commit a theft therein. See Appellant’s Appendix Volume I at 3. The intent to commit a felony may not be inferred solely from the evidence of breaking and entering, Freshwater v. State, 853 N.E.2d 941, 943 (Ind. 2006), nor may it be inferred from one’s mere presence at the scene, Brink v. State, 837 N.E.2d 192, 194 (Ind. Ct. App. 2005), trans. denied. A conviction of burglary requires proof beyond a reasonable doubt that the specific intent to commit the criminal offense alleged in the charging information coincides in time with the acts constituting the breaking and entering. Freshwater, 853 N.E.2d at 943-44. Payne contends that the State failed to present sufficient evidence that he intended to commit theft when he entered the basement.

Payne bases his argument on his own testimony regarding why he was in the basement. Payne testified that as he sat on his porch, he saw two men carrying bags approach Williams’ residence and then saw them leave without the bags several minutes later. Curious, he went to the residence and saw that a basement window had been broken. He peered into the basement through the window, saw a bag on the floor, and entered the basement through the broken window to see what was in the bag. Finding

copper pipe in the bag and knowing that “scrapping” is “pretty lucrative right now,” tr. at 323, “I figured, ‘Hey, they left it, I might as well grab it.’ At that point and time it was free, it was sitting there, they don’t need it. They obviously left it, they didn’t want it,” id. at 290. Before he could exit the basement with the bag, however, he saw a person’s leg outside the basement window and hid on top of a pipe. Based on his testimony that when he entered the basement his intent was only to look in the bag, Payne claims that the evidence “demonstrates at best a Trespass.” Appellant’s Brief at 5. Payne essentially asks that we judge his testimony for ourselves and find, contrary to the jury’s determination, that his testimony is credible. This we cannot do. See Drane, 867 N.E.2d at 146.

A burglary conviction may be sustained by circumstantial evidence alone. Klaff v. State, 884 N.E.2d 272, 275 (Ind. Ct. App. 2008). However, “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, 853 N.E.2d at 943. Here, the State presented evidence that that copper pipe had been removed from the basement and placed in a bag, that Payne was found hiding in the basement, and that he was in possession of pliers, a screwdriver, and a pocket knife. There was water on the floor that presumably drained from the pipe as it was removed, and Payne was wet and dirty when the police found him. This is sufficient evidence from which the jury could infer that Payne entered the basement with the intent to remove copper pipe. Cf. id. at 944-45 (holding there was not sufficient evidence to convict Freshwater of breaking and entering a car wash to commit a theft therein where police found him outside the car

wash rather than near or approaching anything valuable in the car wash and the owner of the car wash testified that nothing was missing from the building or cash register).

Conclusion

The State presented sufficient evidence of Payne's intent to commit theft when breaking and entering the building and Payne's conviction of burglary is therefore affirmed.

Affirmed.

NAJAM, J., and MAY, J., concur.