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**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN SHEPARD,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0602-CR-141
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0510-FB-179944

October 24, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Steven Shepard appeals his convictions for burglary, a Class B felony;¹ theft, a Class D felony;² and resisting law enforcement, a Class A misdemeanor.³ Specifically, he contends that the evidence is insufficient to support his convictions for burglary, theft, and resisting law enforcement, respectively, because: (1) the State failed to prove that Shepard entered the apartment that had been burglarized; (2) the State failed to prove that Shepard exerted unauthorized control over property of another person; and (3) the State failed to present evidence that Shepard was ordered to stop by visible or audible means. Finding that the evidence is sufficient to support each of his convictions, we affirm.

Facts and Procedural History

The facts most favorable to the verdicts are as follows. On October 17, 2005, a report of a burglary in progress at an apartment on 1 West 28th Street was received by the Indianapolis Police Department. Officers Zotz, Branham, and at least two other officers arrived at the scene. Officer Zotz arrived at the south end of the building on Meridian Street approximately one minute after the call was made, with the emergency lights on his marked police vehicle activated. Another officer was chasing Shepard just north of Officer Zotz's location when Officer Zotz arrived. Officer Zotz remained in his car and turned westbound on 27th Street in an attempt to stop Shepard. He and Shepard made eye contact. Shepard paused and then continued to run toward Meridian Street. Shepard

¹ Ind. Code § 35-43-2-1(1)(B)(i).

² Ind. Code § 35-43-4-2(a).

³ Ind. Code § 35-44-3-3(a)(3).

ran into the street, directly into Officer Branham's patrol vehicle, rolled off of the hood, and continued running east across Meridian Street. Shepard was apprehended by Officer Branham's canine unit while attempting to climb a wall surrounding a parking lot on the east side of Meridian Street. Officer Zotz was the arresting officer.

A handset to a cordless phone unit fell out of Shepard's pocket while he was being apprehended. Also on his person were three pairs of glasses, a screwdriver, and some wire cutters. Upon apprehension, Officer Zotz asked Shepard what he was doing. Shepard replied that he was "stealing stuff to buy some crack." Tr. p. 17. During the investigation, a white trash bag containing a DVD player, a cordless phone base, and other miscellaneous items was found under some bushes nearby. The serial number on the cordless phone base found in the white bag matched that of the cordless handset found on Shepard.

Jonathan Perkins resided in the apartment that was burglarized. He left his apartment at approximately 8:00 p.m. on October 17, 2005, for work. He returned the next morning at approximately 7:30 a.m., at which time he discovered that the glass had been broken out of one of his windows and that the window had been subsequently boarded up. He later identified the glasses and cordless phone handset found on Shepard as his. Perkins testified that other items, including leather coats and jewelry, were stolen from his apartment as well. These items were not found during the investigation of the scene.

The State charged Shepard with Class B felony burglary, Class D felony theft, and Class A misdemeanor resisting law enforcement. The State also alleged that he was a

habitual offender. Following a bench trial, Shepard was convicted as charged. He then pled guilty to being a habitual offender. The trial court sentenced him to an aggregate term of twelve years. Shepard now appeals.

Discussion and Decision

Shepard raises three issues on appeal. First, he contends that the evidence is insufficient to sustain his conviction for burglary because there is no evidence that he entered the apartment. Second, he contends that the evidence is insufficient to sustain his conviction for theft because there is no evidence that he exerted unauthorized control over Perkins' property found by the police officers in an alley by Perkins' apartment. Third, he contends that the evidence is insufficient to sustain his conviction for resisting law enforcement because there is no evidence that he was ordered to stop by visible or audible means. We analyze each issue in turn.

When reviewing a challenge to the sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). We must consider only the probative evidence and reasonable inferences supporting the verdict. *Id.* We 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.* When a conviction is based on circumstantial evidence, we will not disturb the verdict if the fact-finder could reasonably infer from the evidence presented that the defendant is guilty beyond a reasonable doubt. *Brown v. State*, 827 N.E.2d 149, 152 (Ind. Ct. App. 2005). Additionally, the circumstantial evidence need not overcome every reasonable hypothesis

of innocence; the evidence is sufficient if an inference may reasonably be drawn to support the verdict. *Id.*

I. Burglary

To convict Shepard of burglary, the State must have proved that he broke and entered the building or structure of another person with intent to commit a felony in it. *Freshwater v. State*, 853 N.E.2d 941, 942 (Ind. 2006); *see also* Ind. Code § 35-43-2-1. The offense is a Class B felony if the building is a dwelling. I.C. § 35-43-2-1(1)(B)(i). A burglary conviction may rest upon circumstantial evidence, and such evidence need not exclude every reasonable hypothesis of innocence so long as an inference may reasonably be drawn therefrom which supports the findings of the trier of fact. *Voss v. State*, 469 N.E.2d 788, 790 (Ind. Ct. App. 1984). Shepard argues that there is no evidence--direct or circumstantial--that he entered Perkins' apartment.

We acknowledge that there is no direct evidence that Shepard entered Perkins' apartment. However, as noted above, a burglary conviction may rest upon circumstantial evidence. Here, the evidence shows that Shepard was close to the scene of the burglary only moments after the police call was radioed in. While this alone is not sufficient to sustain a conviction, there is other circumstantial evidence that, when combined with his proximity, is sufficient to support a conviction. *See Brink v. State*, 837 N.E.2d 192, 194 (Ind. Ct. App. 2005), *trans. denied*. That is, when the police officers arrived at the scene, Shepard was running away from the building in which the burglary occurred. Flight may be considered by the fact-finder in determining a defendant's guilt. *See Dill v. State*, 741 N.E.2d 1230, 1232 (Ind. 2001). In addition, once Shepard was apprehended, the officers

discovered that he had on his person a handset and three pairs of glasses that Perkins later identified as items stolen from his apartment. Shepard said he was stealing to buy crack.

The circumstantial evidence of Shepard's proximity to the scene of the burglary one minute after the call, his flight from the scene upon seeing the police officers, and the fact that he possessed items from Perkins' apartment, which he said he was stealing to buy crack, is sufficient to prove that Shepard entered Perkins' apartment. Shepard's arguments that he mistook the items as abandoned, that he fled because he had an outstanding warrant, and that more expensive items were not recovered from the scene, are merely an invitation for us to reweigh the evidence, which we will not do. Therefore, we affirm his burglary conviction.

II. Theft

To convict Shepard of theft, the State must have proved that he knowingly or intentionally exerted unauthorized control over property of another person with intent to deprive the other person of any part of its value or use. *Beeks v. State*, 839 N.E.2d 1271, 1275 (Ind. Ct. App. 2005), *trans. denied*; *see also* Ind. Code § 35-43-4-2(a). Shepard contends that there is no evidence that he knowingly or intentionally exerted unauthorized control over Perkins' property. Specifically, he argues that there is no evidence that he possessed the white bag found by the police officers. However, Shepard was found to be in possession of items, specifically a handset to a cordless telephone and three pairs of glasses, that he testified he had removed from the white bag and that Perkins later identified as stolen from his apartment. Moreover, Shepard told Officer Zotz that he was "stealing stuff to buy some crack," indicating his awareness that he was

indeed exerting unauthorized control over property that was not his. Tr. p. 17. Shepard's possession of recently stolen items, his flight from the police officers on the scene, and his statement that he was stealing stuff to buy crack are sufficient to prove that he knowingly or intentionally exerted unauthorized control over Perkins' property. Therefore, we affirm his theft conviction.

III. Resisting Law Enforcement

To convict Shepard of resisting law enforcement, the State must have proved that he knowingly or intentionally fled from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered him to stop. Ind. Code § 35-44-3-3(a)(3).⁴ The charging information in this case alleged that Shepard "did knowingly flee from Bryan Zotz, a law enforcement officer empowered by the Indianapolis Police Department, after Bryan Zotz had identified himself by visible or audible means and ordered Steven Shepard to stop." Appellant's App. p. 15. Shepard argues that the evidence is insufficient to prove that Officer Zotz ordered him to stop by visible or audible means.

Here, the evidence shows that Officer Zotz arrived at the scene of the burglary within one minute after the call was radioed in. He had the emergency lights on his marked police vehicle activated, and at least one other officer in another patrol vehicle had emergency lights activated also. Another officer was chasing Shepard just north of Officer Zotz's location when Officer Zotz arrived. Officer Zotz then attempted to cut off Shepard by turning from Meridian Street onto 27th Street. When he and Shepard made

⁴ In 2006, this statute was amended to provide that visible or audible means includes the operation of a law enforcement officer's siren or emergency lights. P.L. 143-2006, Sec. 2. This amendment went into effect on July 1, 2006. *Id.*

eye contact, Shepard paused and then continued to run toward Meridian Street. Shepard ran into the street, directly into Officer Branham's patrol vehicle, rolled off of the hood, and continued running east across Meridian Street. Shepard was apprehended by Officer Branham's canine unit while attempting to climb a wall surrounding a parking lot on the east side of Meridian Street. At trial, Officer Zotz testified that Shepard was told to stop, but he did not specify who told Shepard to stop.⁵ Although there is no evidence that Officer Zotz himself verbally ordered Shepard to stop, the circumstantial evidence viewed most favorable to the verdict does allow a reasonable fact-finder to conclude that Officer Zotz visibly ordered Shepard to stop.

This court addressed a similar issue in *Czobakowsky v. State*, 566 N.E.2d 87 (Ind. Ct. App. 1991). In that case, a police officer responded to a call of a disturbance involving five men and a gun. The officer was uniformed and arrived at the scene in a marked police vehicle. The emergency lights on his police vehicle were not activated. When he arrived close to the scene of the alleged disturbance, the officer observed five men walking in the street. The men fled once they observed him. The officer apprehended two of the subjects by cutting them off with his vehicle and ordered them on the ground. The officer did not verbally order Czobakowsky to stop, and on appeal this court found that there was not a visible order to stop, reversing Czobakowsky's conviction for resisting law enforcement. *Id.* at 89. Specifically, we held that the

⁵ Specifically, the deputy prosecutor asked Officer Zotz:

Q: Was Mr. Shepard told to stop as he was fleeing from police?

A: Yes.

circumstances surrounding the arrest of Czobakowsky did not constitute a visible order to stop, but rather a mere approach of a uniformed police officer. We articulated, “It is unreasonable to conclude that a mere approach of a uniformed police officer constitutes an order to stop whether the officer, in his patrol car, approaches a group of people in the street or, while on foot, approaches a group of people on the sidewalk, in the street, in a store or in a restaurant.” *Id.* However, we cautioned, “This is not to say that the approach of a police officer, coupled with other circumstances such as operating the police vehicle’s signal lamps, would not support the conclusion a visual order to stop had been given.” *Id.*

Here, we cannot say that Officer Zotz audibly ordered Shepard to stop. However, the evidence supports an inference that Officer Zotz visibly ordered Shepard to stop because the circumstances surrounding Shepard’s apprehension for resisting law enforcement constitute more than a “mere approach of a[] uniformed officer.” *See id.* Specifically, Shepard’s arrest was preceded with the arrival of at least two marked police vehicles with their emergency lights activated, he was being chased by an officer when Officer Zotz arrived on the scene, and he paused and made eye contact with Officer Zotz and then continued to run. The evidence supports the inference that Officer Zotz visibly ordered Shepard to stop, and therefore, we affirm his conviction for resisting law enforcement.

Affirmed.

BAKER, J., and CRONE, J., concur.