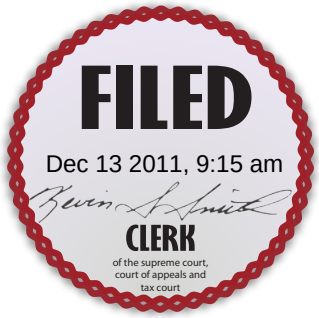

ATTORNEYS FOR APPELLANT:

ANDREW J. BORLAND
Borland & Gaerte
Indianapolis, Indiana

RUTH JOHNSON
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KATHERINE MODESITT COOPER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CLIFTON J. SAVAGE,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A05-1104-CR-196
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-1009-FB-073875

December 13, 20111

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Clifton J. Savage ("Savage") was convicted in Marion Superior Court of Class B felony burglary, Class C felony battery, Class D felony theft, and Class A misdemeanor battery. Savage appeals and raises one issue, which we restate as whether sufficient evidence exists to support his burglary conviction. We *sua sponte* raise the issue of whether Savage's simultaneous convictions for burglary and theft violate double jeopardy protections. We affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

At around midnight on September 23, 2010, William Moss ("Moss") and his roommate Norman Retell ("Retell") were inside their Indianapolis residence when Savage knocked on the door. When Moss answered the door, Savage asked for a cup of coffee. As Moss was telling Savage that he did not have any coffee, two other men walked up to the porch. When one of the men on the porch mentioned something about Moss's 1998 conviction for child molesting, Moss tried to close the door. As Moss turned away, Savage and one of the other men entered the house and attacked Moss from behind, hitting him repeatedly with their fists. When Retell attempted to intervene, Savage punched him in the face. Retell then ran upstairs and called the police. When Retell returned a few minutes later, the room was in disarray and Moss was lying on floor.

Officer Charles King ("Officer King") of the Indianapolis Metropolitan Police Department responded to a dispatch to Moss's residence on a report of a burglary and battery in progress. While en route, Officer King received a second dispatch indicating

that two suspects were leaving the scene in black Chevrolet pickup truck. Officer King then saw a black or blue Chevrolet pickup truck in the area and turned on his emergency lights. Savage and another man then jumped out of the truck and began to run. When Officer King shouted for the suspects to stop, Savage complied while the other man kept running. While other officers pursued the second suspect, Officer King took Savage into custody. Immediately after being handcuffed, Savage spontaneously stated that "the dude's a f****ing child molester and I beat his a**." Tr. p. 90. After being read his Miranda rights, Savage continued to state that he had beaten Moss because Moss was a child molester, stating that he "was doing the world a favor" and that he should only be charged with misdemeanor battery. Tr. pp. 91, 108. Officers later discovered a pair of binoculars on the front seat of the truck from which Savage had fled.

Upon returning from the hospital a few hours after the attack, Moss and Retell discovered that multiple items had been stolen from their residence, including a pair of binoculars, a cell phone, a camera, and two watches. Retell later identified the binoculars found in the truck from which Savage had fled as the ones that were stolen from the residence.

As a result of these events, the State charged Savage as follows: Count I, Class B felony burglary; Count II, Class C felony battery; Count III, Class D felony theft; Count IV, Class A misdemeanor battery; Count V, Class A misdemeanor interference with the reporting of a crime; and Count VI, Class A misdemeanor resisting law enforcement. A

bench trial was held on February 11, 2011, and Savage was convicted of Counts I-IV and acquitted of Counts V and VI. Savage now appeals.

I. Sufficiency of the Evidence

Savage claims that the State presented insufficient evidence to sustain his burglary conviction. In reviewing a challenge to the sufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Atteberry v. State, 911 N.E.2d 601, 609 (Ind. Ct. App. 2009). Instead, we consider only the evidence supporting the conviction and the reasonable inferences to be drawn therefrom. Id. If there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt, then the judgment will not be disturbed. Baumgartner v. State, 891 N.E.2d 1131, 1137 (Ind. Ct. App. 2008).

To convict Savage of Class B felony burglary, the State was required to prove that, when Savage broke and entered into Moss's home, he acted with the intent to commit the specific felony of theft. Ind. Code § 35-43-2-1 (2004); Appellant's App. pp. 22-23. On appeal, Savage does not deny that he broke and entered Moss's home. Rather, he argues that the State failed to present sufficient evidence to prove that he did so with the intent to commit theft therein. We disagree.

To establish the intent element of a burglary charge, the State must prove beyond a reasonable doubt the defendant's intent to commit the felony specified in the charging information. Freshwater v. State, 853 N.E.2d 941, 942 (Ind. 2006). Here, the State

alleged, and was therefore required to prove, that Savage had the intent to commit theft when he entered Moss's residence. On appeal, Savage argues that at the time he entered Moss's home, his intent was not to commit the offense of theft, but rather to commit a battery upon Moss. Based on the evidence presented at trial, it seems clear that Savage entered Moss's home with the intent to commit a battery upon Moss. However, Savage's intent to commit a battery in no way forecloses the possibility that he also had a separate intent to commit the specific felony of theft. See Johnson v. State, 605 N.E.2d 762, 765 (Ind. Ct. App. 1992) (acknowledging that burglar may possess more than one specific intent at the time he breaks and enters a dwelling), trans. denied.

Intent is a mental state and, absent an admission by the defendant, the trier of fact must resort to the reasonable inferences drawn from both the direct and circumstantial evidence to determine whether the defendant had the requisite intent to commit the offense in question. Stokes v. State, 922 N.E.2d 758, 764 (Ind. Ct. App. 2010), trans. denied. Although intent to commit a given felony may be inferred from the circumstances, some fact in evidence must point to an intent to commit the specified felony. Freshwater, 853 N.E.2d at 943. "Typically, the intent to commit a felony can be inferred from the subsequent conduct of the individual inside the premises, or by the manner in which the crime was committed." Johnson, 605 N.E.2d at 765 (citations omitted). Thus, "one may infer the intent at the time of entry from the fact of subsequent commission of a felony." Mull v. State, 770 N.E.2d 308, 313 (Ind. 2002).

Here, Savage was found guilty not only of Class B felony burglary based on breaking and entering the dwelling of Moss and Retell with the intent to commit theft, but also of Class D felony theft for stealing items from the residence. Savage does not challenge his theft conviction on appeal. Because Savage stole items from the residence, his intent to commit theft at the time he entered Moss's residence may be inferred. See Mull, 770 N.E.2d at 313 (defendant's intent to commit the felony of rape at time of entry could be inferred where defendant attempted to commit rape while inside residence); Eveler v. State, 524 N.E.2d 9, 11 (Ind. 1988) (defendant's intent to commit either rape or sexual deviate conduct at time of entry could be inferred where defendant committed rape and deviate sexual conduct after breaking and entering victim's apartment). We therefore conclude that the State presented sufficient evidence to support Savage's Class B felony burglary conviction.

II. Double Jeopardy

We next address, *sua sponte*, whether Savage's simultaneous convictions for Class B felony burglary and Class D felony theft subjected him to double jeopardy. We raise this issue *sua sponte* because a double jeopardy violation, if shown, implicates fundamental rights. Scott v. State, 855 N.E.2d 1068, 1074 (Ind. Ct. App. 2006). The double jeopardy clause found in Article 1, Section 14 of the Indiana Constitution "was intended to prevent the State from being able to proceed against a person twice for the same criminal transgression." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). Two or more offenses are the "same criminal transgression" for the purposes of the Indiana

double jeopardy clause if, "with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." Id.

The actual evidence test set forth by our supreme court in Richardson "prohibits multiple convictions if there is 'a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.'" Davis v. State, 770 N.E.2d 319, 323 (Ind. 2002) (quoting Richardson, 717 N.E.2d at 53). To establish that two offenses constitute the "same offense" under the actual evidence test, there must be a "reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Richardson, 717 N.E.2d at 53. The defendant must show that the evidentiary facts establishing the elements of one offense also establish all of the elements of a second offense. Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002).

Here, to convict Savage of Class B felony burglary, the State had to establish that Savage: (1) broke and entered Moss's dwelling, (2) with intent to commit the felony of theft therein. I.C. § 35-43-2-1; Appellant's App. p. 22. To convict Savage of Class D felony theft, the State had to establish that Savage (1) knowingly or intentionally exerted unauthorized control over Moss's property, (2) with intent to deprive Moss of any part of its value or use. Appellant's App. p. 23.

Here, the fact that a pair of binoculars belonging to Moss was found in a truck occupied by Savage immediately after Savage and another man forcibly entered Moss's residence was used to establish that Savage committed theft. The theft was then used to establish the intent element of the Class B felony burglary conviction. Specifically, the same evidence was used to show: (1) that Savage broke and entered Moss's home with the intent to commit a felony, i.e. theft, for the purposes of establishing the Class B felony burglary conviction; and (2) that Savage knowingly or intentionally exerted unauthorized control over Moss's property for the purposes of the Class D felony theft conviction. Thus, there is a reasonable possibility that the trial court used the same evidentiary facts to convict Savage of both Class B felony burglary and Class D felony theft, in violation of Indiana's double jeopardy clause.

The trial court ordered Savage to serve his sentences for the burglary and theft convictions concurrently. Thus, the length of Savage's sentence will not change. However, the imposition of concurrent sentences does not cure a double jeopardy violation. Carroll v. State, 740 N.E.2d 1225, 1233 (Ind. Ct. App. 2000), trans. denied. We therefore vacate the Class D felony theft conviction and remand to the trial court to enter judgment accordingly.

Affirmed in part, reversed in part, and remanded with instructions.

BAILEY, J., and CRONE, J., concur.