

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20090862-CA
v.)	
)	F I L E D
Victor Rios,)	(December 23, 2010)
)	
Defendant and Appellant.)	<u>2010 UT App 375</u>

Second District, Ogden Department, 091900572
The Honorable Pamela G. Heffernan

Attorneys: Samuel P. Newton, Ogden, for Appellant
Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake
City, for Appellee

Before Judges McHugh, Roth, and Christiansen.

CHRISTIENSEN, Judge:

Defendant Victor Rios appeals his jury conviction for aggravated burglary, see Utah Code Ann. § 76-6-203 (2008), arguing that the trial court plainly erred in sending the case to the jury because the State clearly presented insufficient evidence to support Defendant's aggravated burglary conviction.¹ We affirm.

Because Defendant did not object at trial to the sufficiency of the State's evidence,² he must demonstrate that the trial court plainly erred.

¹Defendant was also convicted of aggravated assault, see Utah Code Ann. § 76-5-103 (2008), but he does not appeal that conviction.

²Defendant suggests that his trial counsel performed ineffectively by not objecting or filing a motion to dismiss the aggravated burglary charge. However, because Defendant did not provide any legal argument to support his claim, we do not reach the merits of this argument. See Utah R. App. P. 24(a)(9); Allen v. Friel, 2008 UT 56, ¶ 9, 194 P.3d 903 ("[A] brief is inadequate if it merely contains bald citations to authority [without] development of that authority and reasoned analysis based on that authority." (second alteration in original) (internal quotation marks omitted)).

To demonstrate that plain error occurred in the context of a challenge to the sufficiency of the evidence, an appellant must show "first that the evidence was insufficient to support a conviction of the crimes charged^[3] and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury."

State v. Diaz, 2002 UT App 288, ¶ 32, 55 P.3d 1131 (quoting State v. Holgate, 2000 UT 74, ¶ 17, 10 P.3d 346), cert. denied, 63 P.3d 104 (Utah 2003). Only if Defendant establishes that the State presented insufficient evidence to support the conviction "will we undertake an examination of the record to determine" whether the trial court plainly erred in "submit[ting] the case to the jury." Id. ¶ 33 (internal quotation marks omitted).

Defendant concedes that there was sufficient evidence to prove some of the aggravated burglary elements,⁴ i.e., that he "remained unlawfully in the building^[5] and . . . caused bodily injury to [the victim]." Defendant's main argument centers on the timing of when he must have formed the intent to commit the assault. More specifically, Defendant argues that to convict him of aggravated burglary the State was required to prove he formed "the intent to commit the assault before he unlawfully remained on the premises." (Emphasis in original.) We disagree.

³"We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Johnson, 771 P.2d 1071, 1072 (Utah 1989) (internal quotation marks omitted). When reviewing a jury verdict, "[w]e review the evidence and all inferences from which may reasonably be drawn from it in the light most favorable to the verdict of the jury." Id. (internal quotation marks omitted).

⁴Burglary is elevated to aggravated burglary "if in attempting, committing, or fleeing from a burglary the actor . . . causes bodily injury to any person who is not a participant in the crime." Utah Code Ann. § 76-6-202(1)(a) (2008). "An actor is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit[] (a) a felony; (b) theft; [or] (c) an assault on any person" Id. § 76-6-202(1)(a)-(c).

⁵Although Defendant concedes that he was unlawfully in the victim's apartment, he asserts that his unlawfulness did not occur until he reached the door as he was leaving.

The Utah Supreme Court has determined that under the burglary statute, see Utah Code Ann. § 76-6-202(1), a defendant's intent to commit an assault can be formed "either at the time he [unlawfully] entered the victim's home or at any time thereafter while he remained there unlawfully." State v. Rudolph, 970 P.2d 1221, 1229 (Utah 1998); see also State v. Garcia, 2010 UT App 196, ¶ 13, 236 P.3d 853 ("[T]he plain language of the [burglary] statute requires that an actor's intent be formed at the time of entry or at any time while the actor remains unlawfully in the building or dwelling."). Furthermore, "[i]t is well established that intent can be proven by circumstantial evidence," Holgate, 2000 UT 74, ¶ 21 (internal quotation marks omitted), "and reasonable inferences drawn therefrom," id. ¶ 26.

The evidence produced at Defendant's trial included the victim's testimony that Defendant entered the victim's apartment without her consent after she had turned her back to get Defendant some cigarettes; that, after giving Defendant the cigarettes, the victim asked Defendant to leave; that Defendant "meandered" towards the door as the victim repeatedly told him to "Go. Get out."; that Defendant stopped at the door and turned around; that the victim pushed Defendant in hopes that she could close the door; and that Defendant struck the victim, knocked her to the ground, covered her mouth, choked her, straddled her, and tried to undo his pants.

Based on this evidence, viewed in the light most favorable to the jury's verdict, see State v. Johnson, 771 P.2d 1071, 1072 (Utah 1989), a reasonable jury could have determined that when Defendant entered the victim's apartment without her permission, he entered unlawfully, see generally State v. Bradley, 752 P.2d 874, 876 (Utah 1985) (explaining that a person who enters lawfully, i.e., with authorization, remains unlawfully when "that person's presence becomes unauthorized" (internal quotation marks omitted)). The jury could have also reasonably inferred that Defendant remained unlawfully in the victim's apartment when he "meandered" to the door despite the victim's repeated requests that he leave and that his reluctance to leave was indicative of intentions other than simply obtaining cigarettes, such as assaulting the victim.

Even though the jury could have reasonably determined otherwise, Defendant suggests that he was lawfully in the victim's apartment up to the time when he reached the door and that the earliest the jury could have found that he formed the intent to assault the victim was when she pushed him while he was standing at the door. Even if we were to accept these arguments as true, Defendant unlawfully remained in the victim's apartment when he stopped at the door, which occurred before he formed the intent when the victim pushed him. Therefore, based on the evidence the State presented, a reasonable jury could have determined that Defendant had sufficient time while he remained unlawfully in the victim's apartment to form the requisite intent

to commit assault, thereby supporting his aggravated burglary conviction. See Rudolph, 970 P.2d at 1229. Because there was sufficient evidence to establish Defendant's aggravated burglary conviction, he has failed to establish that the trial court plainly erred by submitting the case to the jury. See State v. Diaz, 2002 UT App 288, ¶ 32, 55 P.3d 1131.

We also reject Defendant's argument that a surreptitious element should be a required element in the burglary statute. Defendant argues that to be convicted of burglary, in addition to the statutory requirements, there exists an implied requirement that the defendant "must conceal himself or do something to hide his presence so that he may commit the crime." "The general rule is that 'when faced with a question of statutory construction, we look first to the plain language of the statute.'" Rudolph, 970 P.2d at 1229 (citation omitted). "Moreover, 'courts are not to infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and the court has no power to rewrite the statute to conform to an intention not expressed.'" Id. (citation omitted). Because the plain language of the burglary statute does not contain such an element, see Utah Code Ann. § 76-6-202(1) (2008), we refuse to require proof of surreptitiousness.⁶

Affirmed.

Michele M. Christiansen, Judge

WE CONCUR:

Carolyn B. McHugh,
Associate Presiding Judge

Stephen L. Roth, Judge

⁶We also refuse to address the issues raised for the first time in Defendant's reply brief. See Utah R. App. P. 24(c); State v. Weaver, 2005 UT 49, ¶ 19, 122 P.3d 566 (determining that matters raised for the first time in the reply brief will not be considered).