

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 18, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2586-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD C. BLACKER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. Richard C. Blacker appeals from a judgment convicting him of burglary. He contends there is no evidence of one element of the crime, namely whether he intentionally entered the building. We conclude that there was sufficient circumstantial evidence of Blacker's intentional entry to convict him of burglary. Therefore, we affirm.

A jury found Blacker and his co-defendant, Willard F. Espinoza, guilty of burglarizing the Meyers' unoccupied residence, contrary to

§ 943.10(1)(a), STATS.¹ One of the elements of burglary requires proof that the defendant intentionally entered a building. *See* § 943.10(1)(a).² The State concedes there was no direct evidence of intentional entry.

[T]he standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. Under that standard, an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Poellinger, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990) (emphasis added).

It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

In viewing evidence which could support contrary inferences, the trier of fact is free to choose among conflicting inferences of the evidence and may, *within the bounds of reason*, reject that inference which is consistent with the innocence of the accused. Thus, when faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law.

¹ Blacker also was convicted as a repeater, contrary to § 939.62, STATS.

² Blacker concedes there was sufficient evidence on the other elements of burglary. *See* § 943.10(1)(a), STATS.

Id. at 506-07, 451 N.W.2d at 757 (citations omitted). We summarize the circumstantial evidence on Blacker's intentional entry which is most favorable to the conviction.

Blacker and Espinoza operated a construction and demolition business. Espinoza was familiar with the Meyer farm and residence. Blacker and Espinoza were seen at the Meyer residence a month before the burglary. When questioned by a neighbor, they claimed they were interested in the barn. However, wet footprints led to the back door of the residence rather than to the barn. The back door of the residence was warped and would not lock. A neighbor went through the house and noticed that someone had rummaged through the drawers.

On the day of the burglary, a neighbor testified that he saw Blacker sitting in a truck with a state-owned license plate at the Meyer residence.³ Blacker told him that he worked for the state and was foreclosing on Meyer's furnishings to haul to Madison for an auction.

Later that day, Blacker was taken into custody for a traffic offense. When searched, police found a screwdriver, keys, two antique letter openers and three hinge pins in Blacker's pockets. The arresting officer testified that the hinge pins appeared to have fresh scratch marks on them. Although these items were returned to Blacker, when asked for them later that day, Blacker claimed to have lost them.

Searching the residence, Meyer and the police found that three hinge pins had been removed from the locked front door and the wood near the top of the hinges had marks which appeared to be fresh. The deputy sheriff testified that the hinge pins found in Blacker's pockets appeared to match the color of the hinges from that door. Disassembled furniture from the upstairs bedrooms was stacked downstairs. Meyer testified that it would require two people to disassemble and move that size furniture downstairs. A neighbor

³ The state license plate was traced to a professor who found that his plate was missing.

also testified that he saw Espinoza leave the residence, although Blacker denied having been there that day.⁴

There is ample circumstantial evidence to support the jury's reasonable inferences that Blacker intentionally entered the Meyer residence. Blacker's surveying that residence on a prior occasion, his incredible excuse that he was foreclosing on furnishings for the state, concomitant to his denial that he was there on the date of the burglary despite a neighbor's contrary testimony, his being found with "tools" allegedly from the Meyer residence, and Meyer's opinion that the furnishings could not have been moved and disassembled by one person, provide ample circumstantial evidence from which the jury could reasonably infer that Blacker intentionally entered the Meyer residence. Although Blacker offers hypotheses consistent with innocence, such as carrying these "tools" for his business, the jury found the facts, assessed the witnesses' credibility, weighed the evidence and drew reasonable inferences from that evidence. See *Poellinger*, 153 Wis.2d at 506, 451 N.W.2d at 757. "[We] must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." *Id.* at 507, 451 N.W.2d at 757. This evidence is not incredible.

Because we do not distinguish between direct and circumstantial evidence, the State need not present direct evidence of Blacker's intentional entry. There is an abundance of circumstantial evidence from which the jury drew reasonable inferences of Blacker's intentional entry.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

⁴ Blacker said this to police, he did not testify.