

Bonnie Warren (“Warren”) was convicted in Marion Superior Court of Class C felony burglary and Class A misdemeanor resisting law enforcement. Warren appeals and argues (1) that the evidence is insufficient to support his conviction for burglary, and (2) that the trial court erred in refusing Warren’s proposed jury instruction. We affirm.

Facts and Procedural History

At the time relevant to this appeal, Bruce McCord (“McCord”) owned a rental home on Dearborn Street in Indianapolis. McCord hired Charles Hood (“Charles”) and his brother Daniel Hood (“Daniel”) to assist him with his rental properties. In January 2010, the home on Dearborn Street was vacant after the prior tenant had been evicted. Charles then boarded up the home to prevent anyone from entering it. Before boarding up the home, he inspected and observed that the furnace worked and that no wires had been cut. Charles then used several screws to install plywood over the doors and windows. No one other than McCord and his employees had permission to enter the home, and no one had permission to remove anything from the home.

On January 15, 2010, Charles checked on the home and all the windows and doors were boarded up. But when he and Daniel returned two days later, they noticed that the plywood had been broken off the back door and the door opened. Charles and Daniel went into the house. When Charles entered, he heard banging sounds coming from the basement. He went down into the basement and saw Daniel talking to a man, later identified as Warren, who had a flat pry bar and a hammer. Warren claimed to be there to fix the furnace at the request of “Patty,” a woman who lived with the prior tenant. Tr. pp. 132-33. The door of the furnace had been removed and Warren was pulling things

out of and “messaging” with the furnace. Tr. p. 40. Charles saw Warren put some wire, which appeared to be copper, into his pants. As Charles telephoned the police, Warren walked past him holding the hammer and pry bar, left the basement, and exited the house. Charles attempted to follow Warren, but eventually lost track of him and returned to the house. He did provide the police with a description of Warren.

The police responded to the scene, and began to look for someone matching the description given by Charles. Officer Dewayne Gaddis, driving a marked patrol car, spotted Warren and asked to speak to him. Warren instead fled, and Officer Gaddis gave chase on foot. As he chased Warren, Officer Gaddis saw him take two pairs of pliers from his back pocket and drop them on the ground. Officer Gaddis soon caught Warren, who was identified by Charles as the man he found in the basement. Warren’s clothes were also dirty and rusty.

The furnace had been extensively damaged. Copper wiring had been removed, and the heating unit had been removed and placed in the yard. As a result of the damage done, the furnace had to be completely replaced.

As a result of this incident, Warren was charged on January 21, 2010 with Class C felony burglary, Class D felony theft, Class A misdemeanor resisting law enforcement, and Class A misdemeanor criminal mischief. On March 16, 2010, the State added an additional charge alleging Warren to be a habitual offender.

A jury trial was held on May 20, 2010. At the end of trial, Warren tendered a jury instruction regarding the State’s burden to prove the intent to commit a felony in order to establish burglary. The trial court declined the instruction. The jury found Warren guilty

of burglary and resisting law enforcement, but not guilty of theft and criminal mischief. Warren then admitted to being an habitual offender. On June 4, 2010, the trial court sentenced Warren to three years on the burglary conviction, enhanced by four years for the habitual offender adjudication. The trial court also imposed a concurrent one-year sentence on the resisting law enforcement conviction. Warren now appeals.

I. Sufficiency

Warren first claims that the State presented insufficient evidence to support his conviction for burglary. Upon a challenge to the sufficiency of evidence, we neither reweigh the evidence or judge the credibility of the witnesses; instead, we respect the exclusive province of the trier of fact to weigh any conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and we will 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.

To convict Warren of Class C felony burglary, the State was required to prove that Warren: (1) broke and entered (2) the building or structure of another person (3) with the intent to commit theft in it. See Appellant's App. p. 20; Ind. Code § 35-43-2-1 (2004). Warren claims that the State failed to prove that he was the one who broke and entered into the house and that he intended to commit a felony in the house. We disagree.

With regard to the element of breaking and entering, Charles testified that he boarded up all the windows and doors with plywood. On the day of the burglary, the plywood had been broken off the door and the door opened. Charles and Daniel found

Warren in the basement of the house with a flat pry bar and a hammer. From this, the jury could reasonably conclude that Warren broke and entered the house.

With regard to the element of intent to commit a felony, Warren claims that the State failed to prove that he intended to commit the felony of theft. In so arguing, Warren refers to evidence and inferences that do not favor the jury's verdict, including that Warren was not found carrying a bag, was not wearing gloves to avoid leaving fingerprints, and was not wearing a disguise. He therefore claims that there are "plausible and reasonable possibilities" that he was in the basement for purposes other than to commit a felony. While these may have been good arguments to present to the jury, Warren is simply requesting us to consider evidence not favorable to the verdict, reweigh this evidence, and come to a different conclusion than did the jury. This is not proper on appeal.

The facts of this case are also readily distinguished from those in Freshwater v. State, 853 N.E.2d 941 (Ind. 2006), which Warren cites in support of his argument. In Freshwater, our supreme court reiterated that the "[i]ntent to commit a given felony may be inferred from the circumstances, but some fact in evidence must point to an intent to commit a specific felony." Id. at 943 (quoting Justice v. State, 530 N.E.2d 295, 297 (Ind. 1988)).

Intent to commit a felony may not be inferred from proof of breaking and entering alone. Similarly, evidence of flight alone may not be used to infer intent, though other factors, such as the removal of property from the premises, may combine with flight to prove the requisite intent for burglary.

Id. (citations omitted). Thus, “in order to sustain a burglary charge, 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.” Id. In Freshwater, there was no such proof. Instead, the time and method by which the defendant entered the building suggested nothing more than that he broke in. Id. at 944. There was no evidence that the defendant was near or approaching anything valuable; instead, he was apprehended outside the building, and the owner of the building testified that nothing was missing from the building and the office had been undisturbed. Id. at 944-45. Therefore, the court held that the State failed to prove that the defendant had intended to commit any specific felony when he broken into the building. Id.

In contrast, here the facts favorable to the verdict show that wires had been torn out of the furnace, wires and outlets had been pulled down from the ceiling, wires had been stripped and laid on the floor, some wires were missing, and the heating unit of the furnace had been removed and placed outside in the yard. In addition, Charles saw Warren take some wires, which appeared to be copper, and put them in his pocket. The jury could reasonably conclude from this evidence that Warren had the intent to commit theft when he broke and entered into the home.

Warren argues that the jury “found that [he] did not remove any property from the house when it found [him] not guilty of theft.” Appellant’s Br. p. 7. He therefore claims that the State cannot prove that he intended to commit theft when he entered the home. However, to prove Warren guilty of burglary, the State was not required to prove that he actually committed theft but only that he *intended* to commit theft in the home when he

broke and entered into it. Moreover, to the extent Warren's argument is that the jury's verdict finding him not guilty of theft but guilty of burglary was inconsistent, our supreme court has recently held that "[j]ury verdicts in criminal cases are not subject to appellate review on grounds that they are inconsistent, contradictory, or irreconcilable. Beattie v. State, 924 N.E.2d 643, 649 (Ind. 2010). Thus, that the jury acquitted Warren of theft has no impact on our review of the sufficiency of the evidence to support his conviction for burglary. See id. at 648-49.

II. Jury Instruction

Warren next claims that the trial court erred when it rejected his tendered jury instruction regarding the intent element of burglary. The manner of instructing a jury is left to the sound discretion of the trial court. Rogers v. State, 897 N.E.2d 955, 962 (Ind. Ct. App. 2008), trans. denied. We will not reverse the trial court's ruling unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury. Id. Jury instructions must be considered as a whole and in reference to each other, and even an erroneous instruction will not constitute reversible error if the instructions, taken as a whole, do not misstate the law or otherwise mislead the jury. Id. In reviewing a trial court's decision to give or refuse a tendered instruction, we consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other given instructions. Id.

Warren tendered an instruction which stated, "Proof of an illegal entry is insufficient to support a conviction for burglary with theft as the underlying felony.

Some fact in evidence must point to intent to commit a specific felony.” Appellant’s App. p. 84. The State objected, claiming that the instruction was not a correct statement of the law and that the instruction was not necessary because “burglary has been sufficiently defined in other instructions as far as the elements and what needs to be proved.” Tr. p. 139. Defense counsel then stated, “You know for some reason that’s not reading right to me. I thought it was ‘unless there was proof of an underlying felony. . . . Well, it obviously doesn’t make any sense to me because obviously a theft is the underlying felony” Id. The trial court then stated, “the Court’s instructions adequately set out the elements of burglary,” and declined to give the tendered instruction. Id. at 139-40.

We are inclined to agree with the State that Warren’s trial counsel effectively conceded at trial that the instruction was improper and should not be given and has therefore waived this issue. But even when we consider his argument on the merits, Warren does not prevail. Assuming *arguendo* that the tendered instruction was a correct statement of the law, we conclude that the substance of the tendered instruction was adequately covered by other instructions. Specifically, the trial court’s preliminary instructions included the following:

The crime of Burglary is defined by law as follows:

A person who breaks and enters the building or structure of another person, *with the intent to commit a felony in it*, commits Burglary, a Class C felony.

Before you may convict the Defendant as charged in Count I, the State must prove each of the following elements beyond a reasonable doubt.

1. the Defendant, Bonnie Warren.
2. knowingly

3. broke and entered
4. the building or structure of Bruce McCord.
5. *with the intent to commit a felony*, to wit: Theft, by knowingly exerting the unauthorized control over the property of Bruce McCord.

If the State fails to prove each of these elements beyond a reasonable doubt, then you must find the Defendant not guilty of Burglary, a Class C felony.

Appellant's App. p. 54 (emphasis added). The jury was also instructed that Warren was presumed innocent, that the State had to prove each element of the crimes charged beyond a reasonable doubt, and that Warren was not required to present any evidence or prove his innocence. *Id.* at 63. And in the final instructions, the trial court instructed the jury to consider the preliminary instructions along with the final instructions given. *Id.* at 72-73. We therefore conclude that the substance of Warren's tendered instruction was adequately covered by the other given instructions.

Warren also complains that the preliminary instructions were insufficient to cover the subject matter of his tendered instruction because they were not repeated in the final instructions. However, it is well settled that preliminary and final instructions are considered as a whole, not in isolation, and where the jury has been fully instructed on all the issues, the order in which it hears the instructions and the evidence provides no basis for a claim of error. *Townsend v. State*, 934 N.E.2d 118, 130-31 (Ind. Ct. App. 2010), trans. denied. The trial court did not abuse its discretion in refusing Warren's tendered jury instruction.

Conclusion

The State presented sufficient evidence to prove that Warren broke and entered into the rental home with the intent to commit theft therein, and the trial court did not abuse its discretion in refusing Warren's tendered jury instruction.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.