

STATEMENT OF THE CASE

Brandon D. Berry appeals his conviction for burglary as a class B felony.¹

We affirm.

ISSUE

Whether there is sufficient evidence to support the conviction.

FACTS

Shortly before 5:00 p.m. on November 12, 2008, Stephen Power was napping in an upstairs bedroom of his Fort Wayne home when a noise woke him. Believing it to be the wind, he fell back asleep. Shortly thereafter, he woke to find a man standing in the doorway. Although the room was “a little bit dark,” Power could see the man’s face and that he was wearing a gray knit cap. (Tr. 116). Power chased the man out the back door. After the man fled the house, he stopped, turned, and looked at Power, allowing Power to see his face again.

Power subsequently discovered the downstairs of his home had been ransacked and that several items, including a laptop computer, were missing. He also discovered that the man had gained access to his home by using a rock to break the back door’s glass.

Power telephoned 911 and described the person that had been in his house as a black male, wearing dark clothing and a stocking cap. Fort Wayne Police Officer Dale

¹ Ind. Code § 35-43-2-1.

Lieweilyn responded. After interviewing Power, he radioed the suspect's description to the police units in the area.

After receiving the suspect's description, Officer John Drummer began patrolling an eight-block area around Power's residence. When he was "just over two blocks" from Power's residence, Officer Drummer observed Berry and another man standing on the porch of an abandoned house. (Tr. 256). Berry matched the suspect's description.

Officer Drummer exited his vehicle; verified that the men did not live at the house; and proceeded to conduct a pat-down of the men for safety. Upon patting down Berry, Officer Drummer noticed that he "was breathing real heavy," and he could feel Berry's "heart beating really fast as if he just got done running." (Tr. 237).

Another police officer transported Berry to Power's home and removed him from the police vehicle. Viewing Berry through a window, Power instantly identified him as the man who had been in his home. When Officer Lieweilyn informed Berry that he had been identified, Berry asked "to speak to the victim" and offered to "pay for the laptop that was missing." (Tr. 200).

After Power identified Berry, Officer Drummer took his canine partner, Bodo, to the back of Power's residence "to see where the track would take [them.]" (Tr. 243). Bodo tracked to the porch where Officer Drummer had located Berry.

Detective Calvin Dubose later transported Power to the police station, where he showed Power a photographic array, which included a picture of Berry. Power first identified Berry and then another man as possible suspects. He, however, "couldn't be

sure” because the man in his house had been wearing a hat, whereas the men in the array were not wearing hats. (Tr. 181).

On November 18, 2008, the State charged Berry with burglary as a class B felony. Specifically, it charged Berry with breaking and entering into Power’s residence, with intent to commit theft. The trial court commenced a two-day jury trial on April 29, 2009, after which the jury found Berry guilty. Following a sentencing hearing on May 26, 2009, the trial court sentenced Berry to eighteen years.

DECISION

Berry asserts that the evidence is insufficient to support his conviction for burglary. Specifically, he contends that “[t]he identification testimony offered by the State was conflicting”; and “there was insufficient probative evidence of [his] alleged intent to commit a felony upon breaking and entering” into Power’s home. Berry’s Br. at 7, 8.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court’s ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

1. Identification Testimony

Berry invokes the “incredible dubiousity rule” in arguing that Power “offered inherently contradictory testimony in which he claimed that he picked one face out of the array as the perpetrator, while also claiming that he had been unable to do the very same thing.” Berry’s Br. at 9. We do not find the incredible dubiousity rule to be applicable to this case.

“It is well-established that ‘the uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal.’” *Scott v. State*, 871 N.E.2d 341, 343 (Ind. Ct. App. 2007) (quoting *Toney v. State*, 715 N.E.2d 367, 369 (Ind. 1999)), *trans. denied*. Furthermore, even “equivocal identification testimony is sufficient to support a conviction.” *Scott*, 871 N.E.2d at 343.

When identification is the only evidence, however, the identification must be unequivocal. *Id.* at 344.

This interpretation is in accord with the “incredible dubiousity” rule, under which we will impinge upon the trier of fact’s responsibility to weigh the evidence only “where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant’s guilt.”

Id. at 344-45 (quoting *Tillman v. State*, 642 N.E.2d 221, 223 (Ind. 1994)). This does not mean, however, that equivocal testimony cannot contribute to a finding of guilt beyond a reasonable doubt. *Id.* at 345.

In this case, Power testified that he chose Berry from the photographic array shown to him by Detective Dubose. He further testified that he did not recall picking out

anyone else but that he did point to Berry's picture. On cross-examination, Power testified that out of the many familiar-looking faces in the array, he chose Berry's picture but admitted that he had difficulty identifying Berry as the man in his house because the subjects depicted in the array were not wearing hats.

Detective Dubose subsequently testified, explaining that Power first identified Berry from the array, but "also said that it could" have been another subject. (Tr. 181). According to Detective Dubose, Power informed him that he could not be sure because the person he saw in his house had been wearing a hat.

Contrary to Berry's assertion, Power did not present contradictory testimony regarding whether he identified Berry from the photographic array. Furthermore, he unequivocally identified Berry as the man who had been in his home during the show-up identification.

We cannot say that Power's testimony was inherently dubious or inherently improbable. Berry's counsel cross-examined him, and the jury was able to independently evaluate his testimony. Thus, Berry's argument is nothing more than an invitation to judge Power's credibility, which we decline to do.

In addition, the State presented evidence that Berry was apprehended shortly after the burglary, only two blocks from Power's residence. Officer Drummer testified that Berry matched the description of the suspect given by Power and appeared to have been running. Officer Drummer's canine partner also tracked a scent from Power's residence

to the porch, where Officer Drummer found Berry. Thus, there was also circumstantial evidence of Berry's guilt.

Berry is asking this Court to reweigh the evidence and judge Power's credibility, which we will not do. The evidence presented at trial is sufficient to support his conviction.

2. Intent to Commit a Felony

Berry also asserts that the “[t]here is a complete absence of evidence, absent employment of rank speculation, that [he] entered the Power home with the requisite intent to commit theft,” where none of the items taken from Power's residence were found in his possession. Berry's Br. at 9. He therefore argues that his conviction for burglary cannot be sustained.

Indiana Code section 35-43-2-1 provides that a person who breaks and enters another person's dwelling, with the intent to commit a felony in it, commits class B felony burglary. “[I]n 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.” *Freshwater v. State*, 853 N.E.2d 941, 944 (Ind. 2006).

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.

Justice v. State, 530 N.E.2d 295, 297 (Ind. 1988) (internal citations omitted).

Here, the evidence shows that Berry entered Power's home after breaking a window in the back door; ransacked the home; and then fled when Power awoke. Shortly thereafter, Power discovered several items, including a laptop computer, were missing. This evidence supports a reasonable inference that Berry broke and entered into Power's residence with the intent to commit theft. *See Gee v. State*, 526 N.E.2d 1152, 1154 (Ind. 1988) (finding a reasonable inference that the defendant intended to commit theft where "the door of the home was broken to gain entry, the interior of the home was partially ransacked, and [the defendant] fled from the scene").

Berry's argument is merely an invitation for us to reweigh the evidence, which we will not do. We therefore find the evidence sufficient to support his conviction for burglary.

Affirmed.

MAY, J., and KIRSCH, J., concur.