



Appellant-defendant Paul Rogers appeals his conviction for Burglary,<sup>1</sup> a class B felony. Rogers argues that the evidence is insufficient to support the conviction and that the trial court erred by refusing his request for a jury instruction on the lesser-included offense of theft. Finding the evidence sufficient but also finding that the jury should have been instructed on theft, we reverse and remand for a new trial.

### FACTS

Ralph Evans lives in a duplex in Indianapolis with his girlfriend, daughter, and grandson. On October 4, 2009, Evans finished work at 11:00 p.m. and returned home. After checking on his daughter and six-month-old grandson, Evans went to bed, dropping his pants at the side of his bed before falling asleep. The pants contained Evans's wallet, cash, and some papers.

At some point, Evans woke up with a feeling that someone was in the room with him. He heard a noise and looked toward the doorway, where he saw his "pants just slowly like being pulled out, real slow." Tr. p. 22. Then he saw a huge shadow. Evans heard somebody fall in the kitchen and then again at the back door of the house. Because he believed the intruder was leaving the house, Evans left his bedroom. He went out the back door and observed a man running away, carrying Evans's pants. Evans saw the man's face illuminated by a street light and recognized him as Rogers, whom Evans had met several times.

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<sup>1</sup> Ind. Code § 35-43-2-1.

Evans reentered his house and found Rogers's State ID card on the floor, inside the back door. Evans called the police, and after the officer arrived and heard Evans's description of events, he left to patrol the area. Later that night, the officer found Rogers and arrested him. Rogers told the officer that a man named "Danny" came to his house and wanted to sell him a vase for \$75. According to Rogers, Danny took Rogers to Evans's home while Rogers and another person waited outside.

At trial, Rogers changed his story. Rogers testified that he smoked cocaine at his house with Danny and someone named Andrey. Rogers believed that Danny was Evans's brother who lived in the basement of Evans's house. He did not know Danny's last name. According to Rogers, Danny suggested that they finish smoking at Danny's house—which turned out to be Evans's home. The door was left unlocked for Danny, who turned the knob and opened the door before the men entered the house. Rogers also testified that it was Danny's idea to take Evans's pants to get money for more crack cocaine.

Daniel Perez, Evans's brother-in-law, testified that he did not know Rogers. Perez also testified that he did not live at Evans's house and that, in fact, he had never even visited. Rogers confirmed that Perez was not the "Danny" that he knew as Evans's brother.

On October 7, 2009, the State charged Rogers with class B felony burglary. Rogers requested that the jury be instructed on the lesser-included offense of theft. The trial court refused, concluding that in this case, theft was not a lesser-included offense of

the burglary charge. Following the April 22, 2010, jury trial, the jury convicted Rogers as charged. On May 3, 2010, the trial court sentenced Rogers to ten years imprisonment. Rogers now appeals.

## DISCUSSION AND DECISION

### I. Sufficiency of the Evidence

Rogers first argues that the evidence is insufficient to support his conviction. In reviewing claims of insufficient evidence, we neither reweigh the evidence nor assess witness credibility, and will affirm unless no rational factfinder could have found the defendant guilty beyond a reasonable doubt. Clark v. State, 728 N.E.2d 880, 887 (Ind. Ct. App. 2000). To convict Rogers of class B felony burglary, the State was required to prove beyond a reasonable doubt that he broke and entered Evans's home with the intent to commit theft therein. I.C. § 35-43-2-1.

Rogers concedes that he entered Evans's home and stole Evans's pants, but he argues that the evidence does not establish beyond a reasonable doubt that he broke into Evans's home. Specifically, Rogers emphasizes his own testimony that "Danny," who allegedly had permission to enter the residence, asked Rogers to come inside. Therefore, Rogers argues that the evidence establishes that he did not break into the home.

While Rogers did testify to that effect, it was within the jury's province to assess Rogers's credibility as a witness. We cannot and will not second-guess the jury's apparent assessment that Rogers was not credible. The jurors declined to believe Rogers's version of events, as they were free to do. The remaining evidence in the record

establishes that someone entered Evans's home without permission, stole his pants, and ran away. Evans identified Rogers as the man he saw running away with his pants, and Rogers's ID was found inside Evans's home. We find this evidence sufficient to support the conviction.

## II. Jury Instruction

Rogers next argues that the trial court erroneously refused to instruct the jury on theft. The trial court found, "based on the evidence that has been presented in this case, that theft is not a lesser included offense of the crime that has been charged here, burglary." Tr. p. 140.

Our Supreme Court has set forth a three-part test to determine whether a jury should be instructed on a lesser-included offense of the crime charged. Wright v. State, 658 N.E.2d 563, 566-67 (Ind. 1995). First, the trial court must consider whether the lesser offense is inherently included in the crime charged. Theft is not an inherently lesser-included offense of burglary. Jones v. State, 519 N.E.2d 1233, 1235 (Ind. 1988).

Consequently, the trial court should have turned to the second step of the test, determining whether the lesser included offense is factually included in the crime charged. "If the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense," then the lesser offense is factually included. Wright, 658 N.E.2d at 567. Here, the charging information states, in relevant part, as follows:

Paul Rogers, on or about October 5, 2009, did break and enter the building or structure, and dwelling of Ralph Evans, . . . with intent to commit the felony of Theft therein, that is, with intent to knowingly exert unauthorized control over the property of Ralph Evans, with intent to deprive Ralph Evans of any part of its value or use . . . .

Appellant's App. p. 24. Inasmuch as the charging information explicitly alleges that Rogers entered Evans's home with the intent to commit theft therein, and goes on to list each of the elements of theft, it is evident that in this case, theft is a factually lesser-included offense of burglary.

Turning to the third part of the test, the trial court should examine the evidence presented by the parties.

If there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater, then it is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense.

Wright, 658 N.E.2d at 567. In this case, as noted above, Rogers testified that he was with a man named Danny, whom Rogers believed lived with Evans, who opened the door to Evans's home and invited Rogers in. In other words, Rogers claimed that he stole the pants but did not break into the house.

While we found the jury within its province to disbelieve this evidence, it likewise would have been within its province to believe it. It is possible that if the jury had the option of convicting Rogers of theft rather than burglary, it would have chosen to do so based on Rogers's testimony that he did not break into Evans's home. We find that Rogers's testimony creates a serious evidentiary dispute such that the trial court should

have given the requested jury instruction on theft. Cf. Sanchez v. State, 675 N.E.2d 306, 309 (Ind. 1996) (holding that “error in the giving and refusing of instructions [is] harmless where a conviction is clearly sustained by all of the other evidence presented before the jury”) (emphasis added). Its failure to do so was error, and we must reverse and remand for a new trial.

The judgment of the trial court is reversed and remanded for a new trial.

VAIDIK, J., and BARNES, J., concur.