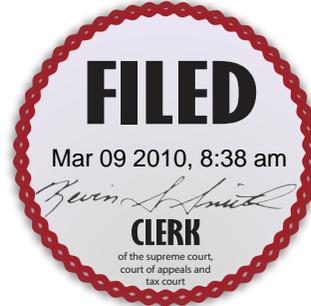


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DAVID ROBERT HANEY,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 71A05-0912-CR-675

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APPEAL FROM THE ST. JOSEPH SUPERIOR COURT  
The Honorable R. W. Chamblee, Jr., Judge  
Cause No. 71D08-0807-FB-91

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**March 9, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

David Robert Haney appeals his conviction for burglary<sup>1</sup> as a Class B felony, and raises the following two restated issues:

- I. Whether the trial court abused its discretion when it refused Haney's proposed jury instruction regarding intent; and
- II. Whether the State presented sufficient evidence to support his conviction for Class B felony burglary.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

In July 2008, Craig King and his girlfriend, Melissa Peoples, rented and resided together in a home located at 1310 Kinyon Street in South Bend ("Peoples's house"). Tyson Ingram lived across the street. At some point in the early morning hours of July 13, 2008, King and Ingram began fighting. More people became involved in the disturbance, including Peoples, Ingram's wife, and Haney. The group was yelling, and they were pushing and shoving each other in the front yard of Peoples's house. Eventually, Ingram hit King in the face with a baseball bat. Thereafter, Haney drove Ingram away from the scene in Haney's white van. Officer John Cox of the South Bend Police Department responded to the radio dispatch call concerning a battery. Upon arriving at Peoples's house, he saw that King had been hit in the face with a baseball bat and called an ambulance to transport King to the hospital.

Officer Cox spoke to Peoples, who was the only witness remaining at the scene. She identified Ingram as the person who had hit King, and she told Officer Cox where he lived.

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<sup>1</sup> See Ind. Code § 35-43-2-1.

As they were talking, Haney drove by in the white van and parked nearby. She identified Haney as the driver of the van that left with Ingram. Officer Cox approached the van and spoke to Haney, who denied having any knowledge about the fight involving Ingram and King. At approximately 5:30 a.m., Officer Cox drove Peoples to the hospital to be with King.

About an hour later, Jeffrey Reihl, a neighbor living across the street from Peoples's house, was "lightly sleeping" when he heard a loud "knocking or hitting" noise outside. *Tr.* at 151. He looked out his window and saw a white male, later identified as Haney, at Peoples's house. Haney was striking the front picture window with some object that Reihl thought might be a staple gun. Because Haney continued striking the window harder and harder, Reihl believed he was trying to gain access to the house. Haney then picked up a log or piece of wood, hit the window, and broke it. When Haney crawled in through the broken window, Reihl called the police. He continued to watch out his window and saw that Haney went to the front door and opened it. Another male, later determined to be M.M.,<sup>2</sup> had been standing on the sidewalk on Reihl's side of the street, and he walked across and entered Peoples's house through the front door.

While Haney and M.M. were still in Peoples's house, South Bend Police Officer Jason Katowich arrived in response to the dispatch call of a burglary in progress. He parked nearby and walked toward the house. He could hear noises inside the house, and he noticed the front window was broken. When he was about twenty-five feet away from the front door, Officer

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<sup>2</sup> We do not know M.M.'s current age, but at the time of the incident, he was a juvenile.

Katowich saw M.M. exit the front door, carrying a black leather coat and a television. Officer Katowich observed Haney start to walk out the door, also carrying a television and a black coat. Officer Katowich immediately identified himself as a police officer and ordered the men to stop. M.M. put down the television and “gave up.” *Tr.* at 165. Haney, however, retreated back inside the house still carrying the television and coat. Officer Katowich ordered Haney to come out of the house, and Haney complied but was empty-handed when he returned. Officer Cox and others arrived at the scene. Haney and M.M. were handcuffed and patted down. In Haney’s pockets, Officer Cox discovered King’s identification card and a cell phone that Haney admitted as having “scooped up” while in Peoples’s house. *Id.* at 199.

The State charged Haney with Class B felony burglary. At the June 2009 jury trial, Reihl testified that, after calling police, he had continued to watch the situation unfold. He saw the police arrive, he recalled that both Haney and the other man were each carrying a television out of the house, and he observed the arrest of the two men. Haney testified and denied having carried a television. He claimed that when he broke the window and entered Peoples’s house, he intended not to steal anything, but to “beat [] up” Peoples, who he said had cut his arm with a steak knife during the earlier disturbance in Peoples’s yard. *Id.* at 196.

During a recess from trial, the trial court discussed with counsel for both parties the matter of final jury instructions. Haney had tendered a jury instruction regarding intent, which the trial court refused on the basis that it was confusing. Ultimately, the jury convicted Haney as charged, and he now appeals. Additional facts will be supplied as necessary.

## DISCUSSION AND DECISION

### I. Haney's Proposed Instruction No. 2

Haney argues that the trial court failed “to properly instruct the jury on the issue of criminal intent.” *Appellant's Br.* at 10. Instructing the jury is a matter within the discretion of the trial court. *VanWanzeele v. State*, 910 N.E.2d 240, 246 (Ind. Ct. App. 2009), *trans. denied*. As such, we will reverse a trial court's decision regarding jury instructions only for an abuse of discretion. *Id.* An abuse of the trial court's discretion occurs “when ‘the instructions as a whole mislead the jury as to the law in the case.’” *Ham v. State*, 826 N.E.2d 640, 641 (Ind. 2005) (quoting *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002)).

To convict Haney of Class B felony burglary, the State was required to prove beyond a reasonable doubt that Haney knowingly broke and entered the dwelling of Peoples with the intent to commit a felony in it, specifically, theft, which is knowingly exerting unauthorized control over the property of another person with the intent to deprive that person of any part of the value or use of the property. Ind. Code § 35-42-2-1; *Appellant's App.* at 13-14. Haney's defense at trial was that, at the time that he broke into Peoples's house, his intent was not to commit the offense of theft, but rather to commit a battery upon Peoples. As explained in his Appellant's Brief,

Once inside the house, Haney searched for Melissa Peoples in order to commit what he intended to do when he broke into the house, that is a battery. Finding that Peoples was not in the house once he entered, Haney did pick up a cell phone, which would constitute theft. However, Haney's intent to commit theft, was not present when he broke and entered Peoples'[s] residence.

*Appellant's Br.* at 13.

On appeal, Haney claims that the trial court erred when it refused his tendered Instruction No. 2, which addressed the intent element, and read as follows:

To constitute a crime, criminal intent must be united with an overt act, and they must occur at the same time. There must be a criminal act or omission as well as a criminal intent. A criminal intent that is unconnected to an unlawful act, does not constitute a crime, because mere criminal intention cannot be punished. A person can only be punished for an offense he *has* committed, and never for an offense he may commit in the future. A crime can't be based on future acts or contingencies, or that some future activity will take effect. An opportunity to commit a crime is also insufficient to convict an accused.

*Appellant's App.* at 22 (emphasis in original). The trial court declined to read it to the jury, finding that it was "confusing." *Tr.* at 176. Haney's counsel objected, but the trial court overruled the objection. The final instructions that the trial court read to the jury included the following with regard to the issue of intent:

The intent to commit the theft must exist at the time of the breaking and entering.  
Intent may be formulated instantaneously.

*Appellant's App.* at 14. Haney asserts that the trial court's instructions "do not fully explain that a criminal intent that is unconnected to the [un]lawful act does not constitute a crime" and that his theory of the case was not adequately covered in the trial court's instructions to the jury. *Appellant's Br.* at 13.

When reviewing the propriety of the trial court's decision to refuse a tendered jury instruction, we consider the following factors: (1) whether the instruction was supported by evidence in the record; (2) whether the instruction correctly states the law; and (3) whether other instructions adequately cover the substance of the denied instruction. *Washington v. State*, 840 N.E.2d 873, 888 (Ind. Ct. App. 2006), *trans. denied*. "A defendant is only entitled

to a reversal if he affirmatively demonstrates that the instructional error prejudiced his substantial rights.” *Id.*

Here, we conclude that the trial court properly refused Haney’s Instruction No. 2. We agree with the State that, although Haney’s intent instruction began with language that was similar to the trial court’s instructions, it then became “ambiguous, confusing, and inapplicable,” by including statements such as “mere criminal intention cannot be punished,” “[a] crime can’t be based on future acts or contingencies,” and including language about whether “[a]n opportunity to commit a crime” is sufficient to convict. *Appellee’s Br.* at 6-7; *Appellant’s App.* at 22. These statements are superfluous to what the State was required to prove with regard to Haney’s intent. Moreover, the trial court’s instructions adequately and concisely explained the essential point, namely that intent to commit the theft must exist at the time of the breaking and entering. The crux of Haney’s defense is that he did not possess the requisite intent to commit theft when he broke into Peoples’s house. It was the jury’s task to determine, based on the evidence it heard, whether Haney did or did not possess that requisite intent.

Haney has failed to affirmatively demonstrate that the trial court’s rejection of his tendered Instruction No. 2 prejudiced his substantial rights. We discern no trial court instructional error.

## **II. Sufficiency of the Evidence**

Haney claims that the evidence was insufficient to sustain his conviction. Specifically, he argues that the State failed to prove beyond a reasonable doubt that, when he

broke into Peoples's home, he intended to commit the crime of theft. When reviewing claims of insufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of the witnesses. *Klaff v. State*, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008). Rather, we examine only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom. *Id.* We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.* It is the function of the trier of fact to determine the weight of the evidence and the credibility of the witnesses. *Wright v. State*, 828 N.E.2d 904, 906 (Ind. 2005); *Klaff*, 884 N.E.2d at 274. As a result, the jury is free to believe whomever they wish. *Klaff*, 884 N.E.2d at 274.

As we stated above, to convict Haney of Class B felony burglary, the State was required to prove that, when Haney broke into Peoples's home and entered it, he acted with the intent to commit a specific felony, theft. Ind. Code § 35-43-2-1; *Appellant's App.* at 33. To establish the intent to commit a felony element of a burglary charge, the State must prove beyond a reasonable doubt the defendant's intent to commit a felony specified in the charge. *Justice v. State*, 530 N.E.2d 295, 296 (Ind. 1988). Intent may not be inferred from the mere proof of breaking and entering alone. *Id.* at 297 (citing *Timmons v. State*, 500 N.E.2d 1212, 1215-16 (Ind. 1986)). However, a burglary conviction may rely on circumstantial evidence and does not need to exclude every reasonable hypothesis of innocence so long as an inference may be reasonably drawn that supports the fact finder's conclusions. *Calhoon v. State*, 842 N.E.2d 432, 434 (Ind. Ct. App. 2006).

On the issue of intent, we take a moment to recognize and discuss a recent Indiana Supreme Court case, *Fortson v. State*, 919 N.E.2d 1136 (Ind. 2010), where Fortson had been convicted of Class D felony receiving stolen property, after being spotted driving a stolen pick-up truck within a few hours after the owner had reported it as missing. On transfer, our Supreme Court reversed Fortson’s conviction and, in so doing, explained the evidentiary effect of being in possession of stolen property, not only with regard to the offense of receiving stolen property, but also with regard to the offense of theft. In its analysis, the *Fortson* Court reviewed the varying viewpoints on the subject throughout different jurisdictions, with some jurisdictions holding a defendant’s unexplained possession of recently stolen property represents prima facie evidence of guilt, and others holding that the possession raises a presumption that the possessor is the thief. For a number of years, Indiana followed the rule that exclusive, unexplained possession of recently stolen property was a circumstance from which a factfinder could draw an inference of guilt, to be considered along with all other facts and circumstances. However, after a 1970 decision, *Bolton v. State*, 254 Ind. 648, 261 N.E.2d 841 (1970), Indiana courts “adhered to some variation of the rule that the unexplained possession of recently stolen property standing alone [was] sufficient to sustain a verdict of guilty of theft.” *Id.* at 1142. The *Fortson* Court took the opportunity to reject that view, holding,

[T]he mere unexplained possession of recently stolen property standing alone does not automatically support a conviction for theft. Rather, such possession is to be considered along with all the other evidence in a case, such as how recent or distant in time was the possession from the moment the item was stolen, and what are the circumstances of the possession . . . In essence, the fact of possession and all the surrounding evidence about the possession must be

assessed to determine whether any rational jury could find the defendant guilty beyond a reasonable doubt.

*Id.* at 1143. Because in Fortson's case the State could only prove that Fortson was in possession of recently stolen property, namely a truck, a panel of this court reversed Fortson's conviction because the circumstances did not support a reasonable inference that he knew the truck was stolen. Our Supreme Court agreed with this analysis and extended the holding to apply in the context of theft, stating, "And ... the same conclusion would obtain had Fortson been charged with theft as opposed to receiving stolen property." *Id.* at 1144. With that in mind, we turn to the circumstances of Haney's case to determine whether sufficient evidence supports his conviction for burglary, and more specifically, whether the evidence supports the jury's conclusion that he intended to commit theft when he broke into Peoples's house.

Haney argues that he did not intend to commit theft, but rather he intended to commit battery by beating up Peoples because, according to Haney, she had inflicted some sort of physical injury to his arm with a steak knife during the day's earlier altercation between Ingram and King. He asserts that when he was repeatedly slamming objects on the home's window, he thought Peoples was hiding inside. He said that M.M., who was waiting across the street until Haney gained access to the home, was there to assist him with the battery. Haney contends that the State presented "no evidence" that he had attempted to enter Peoples's home to steal items. *Appellant's Br.* at 15. We disagree with his "no evidence" proposition.

The State presented evidence that at approximately 6:30 a.m. on July 13, 2008, Haney pounded on the big front window several times with various objects until it broke. He immediately climbed in through the window and promptly opened the front door for M.M., who then entered the home to join Haney. As witnessed by Officer Katowich and Reihl, both Haney and the accomplice were exiting the house through the front door, each carrying a television and a coat. When ordered to stop, M.M. “gave up,” but Haney fled back into the house, and when he returned, he was not carrying the items. *Tr.* at 165. A subsequent pat-down revealed that Haney had in his possession a cell phone, which he admitted to taking from Peoples’s house, and King’s ID card. From these facts, there is ample evidence from which the jury could have found that Haney intended to commit the underlying theft when he broke into and entered the residence.

In arguing that the evidence is insufficient, Haney relies on *Freshwater v. State*, 853 N.E.2d 941 (Ind. 2006). There, Freshwater broke into a car wash by prying open a back door with a screwdriver, and he fled when the alarm sounded. When authorities found Freshwater, no car wash property was found on him, and the owner of the car wash reported that nothing was missing or disturbed in the office. The *Freshwater* Court determined that “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.* at 944. Faced only with evidence that Freshwater broke into the premises, the *Freshwater* Court concluded that the State had failed meet its burden in this regard. *Id.*

Here, in contrast to the mere entry in *Freshwater*, the State presented evidence that Haney broke and entered Peoples's house through a large window, and he immediately opened the front door to welcome M.M., his waiting accomplice, into the residence. According to two witnesses, both Haney and M.M. were seen walking out through the front door each carrying a television and a coat. Haney fled back inside when ordered to stop by police and returned with empty hands. However, police found on his person King's identification and a cell phone taken from Peoples's residence. This evidence extends beyond mere entry and supports a reasonable inference that Haney intended to commit theft when he entered Peoples's home.

Haney's argument that his intent when he broke into the house was to commit battery upon Peoples and his claim that he did not attempt to carry a television or coat out of the house constitutes his version of events, which the jury was free to believe or disbelieve. *Klaff*, 884 N.E.2d at 274 (citing *McClendon v. State*, 671 N.E.2d 486, 488 (Ind. Ct. App. 1996)) (quotations omitted). In this case, the jury apparently did not believe Haney. We will not disturb the jury's judgment of credibility on review. *See id.* The State proved specific facts that provide a solid basis to support a reasonable inference that Haney had the specific intent to commit theft when he entered Peoples's home.

Affirmed.

DARDEN, J., and MAY, J., concur.