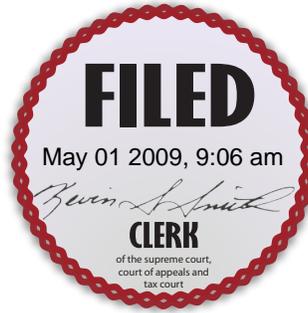


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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TOMMIE J. COBBINS, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 49A02-0810-CR-936  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
CRIMINAL DIVISION, ROOM 3  
The Honorable Stanley E. Kroh, Commissioner  
The Honorable Sheila A. Carlisle, Judge  
Cause No. 49G03-0804-FB-82841

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**May 1, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Tommie J. Cobbins (Cobbins), appeals his conviction for burglary, as a Class C felony, Ind. Code § 35-43-2-1.

We affirm.

## ISSUE

Cobbins presents a single issue for our review: Whether the State presented sufficient evidence to prove beyond a reasonable doubt that Cobbins broke into the building in question with the intent to commit theft.

## FACTS AND PROCEDURAL HISTORY

The following is the evidence most favorable to Cobbins' conviction. In April of 2008, Andrew Martenet (Martenet) owned a duplex at 4322 and 4324 Crittenden Avenue in Indianapolis. 4322 was being rented, but 4324 had been vacated in February. On the night of April 15, the tenant renting 4322 called Martenet and told him that there was "a lot of noise" coming from 4324. (Transcript p. 11). Martenet called police. Indianapolis Metropolitan Police Department Officer Gregory Shue (Officer Shue) responded to the call and, through the open side door, saw Cobbins in the kitchen "holding on to the sink." (Tr. p. 27). The sink had been pulled loose from the counter, and the sink and countertop had been damaged. Martenet eventually arrived on the scene. He did not know Cobbins and had not given him permission to be in the unit. Moreover, Martenet had walked through the unit two weeks earlier and had not seen any of the damage.

On April 21, 2008, the State filed an Information charging Cobbins with Count I, burglary, as a Class C felony, I.C. § 35-43-2-1, and Count II, theft, as a Class D felony, I.C. § 35-43-4-2. Following a bench trial, the trial court found Cobbins guilty as charged. The trial court entered judgment of conviction on Count I only and sentenced Cobbins to four years in prison.

Cobbins now appeals. Additional facts will be provided as necessary.

### DISCUSSION AND DECISION

Cobbins contends that the State failed to present sufficient evidence to prove beyond a reasonable doubt that he had committed burglary. In reviewing a claim of insufficient evidence, we consider only the evidence most favorable to the conviction and any reasonable inferences that may be drawn from that evidence. *Freshwater v. State*, 853 N.E.2d 941, 942 (Ind. 2006). If a reasonable finder of fact could determine from the evidence that the defendant was guilty beyond a reasonable doubt, then we will affirm the conviction. *Id.*

In order to convict a person of burglary, the State must prove that he or she broke and entered the building or structure of another person with intent to commit a felony in it. I.C. § 35-43-2-1. Cobbins does not deny that he broke and entered 4324 Crittenden. Rather, he argues that the State failed to present sufficient evidence to prove that he did so with the intent to commit a felony therein. We disagree.

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 the felony specified in the charging information. *Freshwater*, 853 N.E.2d at 942. Intent to commit a given felony

may be inferred from the circumstances, but some fact in evidence must point to an intent to commit the specified felony. *Id.* at 943. Here, the State alleged, and therefore was required to prove, that Cobbins had the intent to commit theft when he entered 4324 Crittenden.

Our supreme court dealt with a similar issue in *Freshwater*. Freshwater broke into a car wash but ran out when the alarm sounded. There was no evidence that Freshwater touched anything when he was inside the car wash or that he took anything with him when he left. Freshwater was charged with and convicted of burglary and then appealed. Our supreme court reversed his conviction, holding 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. The court concluded that no such fact had been proven against Freshwater: there was no evidence that he was near or approaching anything valuable in the car wash, and the owner of the car wash testified “that nothing was missing from the building or the cash register and that the office appeared to have been undisturbed.” *Id.* at 944-45.

Here, on the other hand, Cobbins was still inside the unit holding on to the sink when Officer Shue arrived. Moreover, the sink and countertop had suffered damage that did not exist the last time Martenet had been to 4324 Crittenden. These specific facts provided a

solid basis to support a reasonable inference that Cobbins had the specific intent to commit theft when he broke into the unit. Therefore, we affirm Cobbins' conviction for burglary.<sup>1</sup>

### CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to prove beyond a reasonable doubt that Cobbins committed burglary.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.

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<sup>1</sup> Though the State prevails in this case, we are troubled by its reliance on our statement in *Gray v. State*, 797 N.E.2d 333, 336 (Ind. Ct. App. 2003), that the intent to commit theft “can be inferred from the time, force, and manner of entry if there is no evidence that the entry was made with some lawful intent.” In *Freshwater*, our supreme court disapproved of that portion of *Gray*, declaring that “this is not a correct statement of the law.” 853 N.E.2d at 944. The court concluded: “The time at and method by which Freshwater entered the car wash suggest nothing more than that he broke in. He could have done so for any number of reasons that do not include theft. The State has failed to provide evidence that his reason was to commit theft.” *Id.*