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ATTORNEY FOR APPELLANT:

ANTHONY V. LUBER
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

FILED
Aug 12 2011, 9:40 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

CARL S. HALL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1005-CR-318
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Jr., Judge
Cause No. 71D08-0912-FB-146, 71D08-0804-FC-110

August 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Carl Hall appeals the revocation of his probation and his convictions of Class B felony burglary[1] and Class D felony theft.[2] Hall contends the trial court erred when it declined to give his proposed jury instructions regarding the presumption of innocence and lesser included offenses. He also alleges there was insufficient evidence to support the convictions and the probation revocation. We affirm.

FACTS AND PROCEDURAL HISTORY

In 2008, Hall pled guilty to Class C felony burglary.[3] He was sentenced to eight years imprisonment, with three years suspended to probation. Sometime later, Hall was released from the Department of Correction.

In October of 2009, Desiree Smallwood's house in South Bend was burglarized. The burglar broke a window, and the landlord nailed a board over it. In December 2009, Smallwood stayed at the residence of her ailing sister for approximately two weeks. Before she went to her sister's house, Smallwood secured the doors and windows of her own house.

On December 13, 2009, Smallwood and her cousin went to Smallwood's house. Smallwood noticed a blanket hanging near the dining room that she had not placed there, a space heater that was not hers was in the living room, and her television had been moved from the bedroom to the living room. Smallwood noticed the board over the broken window

[1] Ind. Code § 35-43-2-1-1(B)(i).
[2] Ind. Code § 35-43-4-2.
[3] Ind. Code § 35-43-2-1.

was out of place, and she encountered Hall by her garage. Smallwood asked Hall to stay there while she summoned the police, but he left.

Officer Lupicia arrived at Smallwood's house and took a statement from Smallwood. Smallwood reported all items she determined were missing, foreign, or out of place. Officer Lupicia broadcasted Hall's description over the radio and Officer Hibbs located Hall a few blocks away from Smallwood's house. Officer Lupicia drove Smallwood to the location where Hall was being detained and Smallwood identified Hall as the person she found near her garage. Smallwood denied knowing Hall and stated she had not given anyone permission to stay in her house or use her utilities while she was away. Hall's unauthorized use of Smallwood's electricity caused her December electric bill to be higher than normal.

Hall was charged with Class B felony burglary, Class D felony residential entry,[4] Class D felony theft of missing copper pipes,[5] and Class D felony theft of utilities. The State also charged Hall with being an habitual offender,[6] which Hall admitted. The State filed a petition to revoke the probation Hall was serving for his 2008 burglary conviction.

At trial, Hall testified he had known Smallwood for several years and he subleased Smallwood's house for $60 a week. He asserted Smallwood was pressing charges against

[4] Ind. Code § 35-43-2-1.5.
[5] Ind. Code § 35-43-4-2(a).
[6] Ind. Code § 35-50-2-8.

him because their relationship had taken a turn for the worse. Hall requested a revised jury instruction on the presumption of innocence, and he requested instructions on Class C felony burglary and Class A misdemeanor conversion, lesser included offenses of Class B felony burglary and Class D felony theft. The trial court denied these requests.

The jury found Hall guilty of burglary, residential entry, and theft of utilities, but not guilty of theft of copper. The trial court found the residential entry count merged with the burglary count, and entered convictions of burglary and theft of utilities. The trial court sentenced Hall to twenty years for burglary, which reflected the advisory sentence of ten years with a ten-year habitual offender enhancement and to eighteen months for theft of utilities. The trial court ordered the sentences served concurrently. The court then revoked Hall's probation and ordered the three remaining years of Hall's 2008 burglary sentence be served executed and consecutive to the new sentence, for an aggregate sentence of twenty-three years incarcerated.

DISCUSSION AND DECISION

1. Jury Instructions

We review instructions to the jury for abuse of discretion. *Henson v. State*, 786 N.E.2d 274, 277 (Ind. 2003). A decision is an abuse of discretion when it "is clearly against the logic and effect of the facts and circumstances." *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). In determining whether there was an abuse of discretion, a reviewing court looks to three factors: whether the tendered instruction correctly states the law, whether there

was sufficient evidence presented at trial to warrant giving the tendered instruction, and whether the substance of the tendered instruction was covered by other instructions that were given. *Henson*, 786 N.E.2d at 277. If a proposed instruction incorrectly states the law, is not supported by the evidence, or is covered by other instructions, then a trial court would not abuse its discretion by rejecting the proposed instruction. *See Dearman v. State*, 743 N.E.2d 757, 760 (Ind. 2001) (holding trial court properly refused instruction on reckless homicide because tendered instruction was not supported by the evidence).

a. Presumption of Innocence

Hall argues the trial court's instructions did not properly convey "the duty of the jury to reconcile the evidence upon the theory of the defendant's innocence if they [sic] could do so." (Appellant's Br. at 20) (quoting *Robey v. State*, 454 N.E. 2d 1221, 1222 (Ind. 1983).) Hall proposed the following instruction:

> Under the law of this state, a person charged with a crime is presumed to be innocent. This presumption continues in favor of the accused throughout the trial of this cause. To overcome the presumption of innocence, the state must prove the Defendant guilty of each essential element of the crime charged, beyond a reasonable doubt.
>
> The defendant is not required to present any evidence to prove his or her innocence or to prove or explain anything. You should attempt to fit the evidence to the presumption that the Defendant is innocent.
>
> If the evidence in this case is susceptible of two (2) constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the Defendant, and the other to his or her innocence, it is your duty, under the law, to adopt the

> interpretation which is consistent with the Defendant's innocence, and reject that which points to his or her guilt.

(App. at 63.)

The trial court's rejection of this proposed instruction was not an abuse of discretion because the substance of the tendered instruction was covered by other instructions that were given. *See Forte v. State*, 759 N.E.2d 206, 209 (Ind. 2001) (holding no abuse of discretion where substance of proposed instruction covered by other instructions). The trial court instructed the jury on the presumption of innocence:

> Under the law you must presume that the Defendant is innocent, and must continue to do so throughout the trial, unless the State proves, beyond a reasonable doubt, every essential element of the crime(s) with which the Defendant is charged.
>
> Because he is presumed to be innocent, the Defendant is not required to present any evidence to prove his innocence or to provide any explanation. If, at the end of the trial, you have a reasonable doubt concerning the Defendant's guilt, you must find him not guilty.

(App. at 45.) It also instructed the jury regarding the legal standard for reasonable doubt[7] and

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[7] Instruction 5 was:

> A 'reasonable doubt' is a fair, actual and logical doubt. It is a doubt based upon reason and common sense, and not a doubt based upon imagination or speculation.
>
> If, after impartially considering all of the evidence and circumstances in the case, you reach such a firm belief in the Defendant's guilt that you would feel safe to act upon that belief, without hesitation, in a matter of the highest concern and importance to you when you are not required to act at all, then you will have reached that degree of certainty which excludes reasonable doubt and

instructed the jurors they were the exclusive judges of the evidence and they were to judge the credibility of the witnesses.[8]

A trial court is required to instruct the jury to "fit the evidence to the presumption that a defendant is innocent." *Simpson v. State*, 915 N.E.2d 511, 520 (Ind. Ct. App. 2009), *trans. denied*. The jury was instructed to presume Hall innocent throughout the trial unless the

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> allows conviction. A reasonable doubt may arise either from the evidence or from a lack of evidence.
>
> The rule of law which requires proof of guilt beyond a reasonable doubt applies to each juror individually. Each of you must refuse to vote for a conviction unless you are convinced beyond a reasonable doubt of the Defendant's guilt.
>
> Your verdict must be unanimous.

(App. at 46.)

[8] Instruction 6 was:

> You are the exclusive judges of the evidence, the credibility of the witnesses, and the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; the memory, manner and conduct of the witness while testifying; any interest, bias or prejudice the witness may have; any relationship with other witnesses or interested parties; and the reasonableness of the testimony of the witness considered in the light of all of the evidence in the case.
>
> You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony that you cannot reconcile, you must determine which of the witnesses you believe and which of them you disbelieve.
>
> In weighing the testimony to determine what or whom you believe, you should use your own knowledge, experience, and common sense gained from day-to-day living. The number of witnesses who testify to a particular fact or the quantity of evidence on a particular point need not control your determination of the truth. You should give the greatest weight to the evidence that convinces you most strongly of its truthfulness.

(App. at 47.)

State proved each essential element of the crime beyond a reasonable doubt. The trial court did so.

Nevertheless, Hall argues this was an incorrect statement of law because the trial court did not effectively instruct the jury about what to do if the evidence leads to two conflicting interpretations. However, Hall's proposed instruction is an incomplete statement of the law because it did not inform the jury that if the evidence is susceptible to two constructions the jury is allowed to conclude that one of the two constructions is unreasonable.[9] *See Robey v. State*, 454 N.E.2d 1221, 1222 (Ind. 1983) (holding the given instructions on the presumption of innocence were equivalent to the proposed instruction, so the trial court did not err by declining to give the proposed instruction). Therefore, the trial court did not abuse its discretion by rejecting this proposed instruction. *See id*.

b. Lesser Included Offenses

Hall also contends the trial court should have instructed the jury on the lesser included offenses of Class C felony burglary and Class A misdemeanor criminal conversion. A trial court should include an instruction regarding a lesser included offense if the lesser offense

[9] The proposed instruction differed from the instruction in *Robey* because it did not include the paragraph:

> You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force

"may be established 'by proof of the same material elements or less than all the material elements' defining the crime charged," *Wright v. State*, 658 N.E.2d 563, 566 (Ind. 1995) (quoting Ind. Code § 35-41-1-16(1)), or "the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense," *id.* at 567, and the trial court finds a serious evidentiary dispute regarding an element that distinguishes the lesser from the greater offense. *Id*. If the trial court determines there is no serious evidentiary dispute, we treat that finding with deference and review it for an abuse of discretion. *McEwen v. State*, 695 N.E.2d 79, 84 (Ind. 1998).

Hall alleges he was entitled to an instruction on Class C felony burglary as a lesser included offense of Class B felony burglary. The element that distinguishes those crimes is that in Class B felony burglary the perpetrator is armed with a deadly weapon or the burglarized structure is a dwelling or place of religious worship, compare Ind. Code 35-43-2-1(1) with Ind. Code 35-43-2-1, and Hall argues there was a serious evidentiary dispute as to whether Smallwood's house was a dwelling.

A "dwelling" is "a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging." Ind. Code § 35-41-1-10. When the resident has left the structure, we must consider the occupant's intention

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required by law to support a verdict of guilt. *Robey v. State*, 454 N.E.2d 1221, 1222 (Ind. 1983).

to return to a structure because "a dwelling loses its character as a dwelling for burglary purposes, 'if the occupant leaves it without the intention to return.'" *Burwell v. State*, 517 N.E.2d 812, 814 (Ind. Ct. App. 1988) (quoting *Carrier v. State*, 227 Ind. 726, 732, 89 N.E.2d 74, 76 (Ind. 1949)), *reh'g denied*, *trans. denied*. A dwelling also loses its character as a dwelling if "it no longer contains those accoutrements usual to the convenience of habitation." *Id.* at 815.

Hall argues Smallwood's house was not a dwelling because Smallwood had been away from the house for weeks, she had a different address listed on her Indiana identification card, and her gas and water lines were disconnected. That Smallwood had been absent from the house for weeks does not preclude a finding her house was a dwelling. *See Phillips v. State*, 514 N.E.2d 1073, 1075 (Ind. 1987) (holding two houses were dwellings even though the inhabitants were on vacation at the time of the burglaries); *see also Ferrell v. State*, 565 N.E.2d 1070, 1072 (Ind. 1991) (holding house where occupant kept personal belongings and received mail was a dwelling, even though he did not sleep there). Smallwood testified her gas and water lines were disconnected because she had missed appointments with repair people. Smallwood lived at the house for two years prior to the burglary, received mail at the house, paid the electric bill, and kept personal belongings inside the house. Therefore, the trial court was within its discretion to determine there was no serious evidentiary dispute whether the house was a dwelling. *See Brown v. State*, 580 N.E.2d 329, 331 (Ind. Ct. App. 1991) (holding an instruction on Class C felony burglary was

properly denied when the evidence demonstrated the structure was a dwelling).

Hall also argues the trial court should have instructed the jury on Class A misdemeanor criminal conversion as a lesser included offense of theft. Criminal conversion is an inherently lesser included offense of theft. *Aschliman v. State*, 589 N.E.2d 1160, 1161 (Ind. 1992). The elements of theft and criminal conversion are the same, except that theft requires the additional element of "intent to deprive the other person of any part of [the property's] value or use." *Compare* Ind. Code § 35-43-4-2 *with* Ind. Code § 35-43-4-3. The trial court did not give Hall's proposed instruction "because there had been a general denial as opposed to a different intent." (Tr. at 187.) *See also Wojtowicz v. State*, 545 N.E.2d 562, 564 (Ind. 1989) (no error in denial of conversion instruction where defense to theft was general denial of act, rather than claim of no intent to deprive).

Hall argues he did assert a different intent as a defense. Hall testified he was subleasing the house from Smallwood. He claims the alleged sublease created a serious evidentiary dispute about whether he was using Smallwood's utilities pursuant to the sublease agreement or he intended to deprive Smallwood of the value of her utilities. Therefore, Hall argues, there was a serious evidentiary dispute about his intent, which required the trial court to instruct the jury on criminal conversion.

Assuming *arguendo* there was a serious evidentiary dispute about Hall's intent, any error in the court's denial of his proposed instruction was harmless. See, e.g., *Spires v. State*, 670 N.E.2d 1313, 1317 (Ind. Ct. App. 1996) (court need not reverse for erroneous denial of

proposed instruction if error was harmless). Hall's assertion that he lacked the requisite intent for theft is based on his testimony that he was subleasing from Smallwood. But the jury found Hall committed burglary; therefore it must have believed Hall broke and entered Smallwood's house and was not subleasing. As there is no reasonable possibility the jury would have found Hall had no intent to steal because he was a sublessee, any error in the denial of his proposed instruction on conversion was harmless. *See Atkins v. State*, 887 N.E.2d 934, 938 (Ind. 2008) (holding jury instruction was harmless error in light of the evidence).

2. Sufficiency of the Evidence

Hall argues there was insufficient evidence to support his burglary and theft convictions. In reviewing insufficiency of the evidence claims, we may not reweigh evidence or judge credibility of witnesses. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, *id.*, and affirm unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000).

Hall argues there was insufficient evidence he committed burglary because Smallwood's house was not a dwelling. As explained above, Smallwood's house was a dwelling.

Hall also claims there was insufficient evidence he broke into the house,[10] as there was no evidence of forced entry by Hall and the house had been burglarized before. The "breaking" element is satisfied "by showing that the slightest force, even the opening of an unlocked door, was used to gain unauthorized entry." *Dupree v. State*, 712 N.E.2d 1076, 1080 (Ind. Ct. App. 1999).

Smallwood testified she locked the doors and the landlord had placed a board over a broken window in response to a previous break-in. She testified Hall did not have permission to be in her house. Officer Lupica testified he found a plywood board on the ground. As the windows and doors were secured prior to Hall's entry and Hall admits he was inside the house, a reasonable fact-finder could find Hall's entry into the house was a breaking. *See Wadsworth v. State*, 750 N.E.2d 774, 777 (Ind. 2001) (holding circumstantial evidence sufficient to prove a breaking when it was deemed highly unlikely the victim would have allowed Wadsworth into house).

Hall also argues there was insufficient evidence he intended to commit a felony in Smallwood's house. Hall contends the presence of his possessions in Smallwood's house indicates his intent to "squat," not an intent to commit theft. (Br. of Appellant at 16.) Hall points to *Freshwater v. State*, 853 N.E.2d 941 (Ind. 2006), to support his argument that proof of a breaking and entering alone is not sufficient to support the conclusion a felony was

[10] Hall advances similar arguments in challenging the sufficiency of the evidence supporting residential entry, and we reject those arguments for the reasons explained below.

intended. However, the present case differs from *Freshwater* because there, nothing was missing or disturbed. *Id.* at 944-45. In contrast, Smallwood's house was disturbed, Hall was found near Smallwood's garage, Hall brought space heaters into the house, and Hall moved and used Smallwood's television. These facts permit an inference Hall had the specific intent to commit a felony. *See id.* at 944. The jury reasonably could conclude Hall entered Smallwood's house with the intent to commit a felony from the fact he committed a felony in the house by commandeering Smallwood's electricity. *See Mull v. State*, 770 N.E.2d 308, 313 (Ind. 2002) (stating "one may infer the intent at the time of entry from the fact of subsequent commission of a felony").

Hall also claims the State did not show he intended to deprive Smallwood of the value or use of her utilities, so there was insufficient evidence to support his theft conviction. He argues unauthorized control alone is not sufficient to show a specific intent to deprive. However, we have consistently held intent can be inferred from a person's conduct and the natural and usual sequence to which such conduct logically and reasonably points. *See Hayworth v. State*, 798 N.E.2d 503, 508 (Ind. Ct. App. 2003). Hall used Smallwood's electricity without her permission to operate his space heaters and her television. As a result, Smallwood's electricity bill in December was approximately double her electricity bill in November. The natural and usual sequence of using another's electricity without permission reasonably points to intent to deprive that person of the electricity's value. Thus, sufficient evidence was presented for the jury to conclude Hall had the intent to deprive Smallwood of

the value of her electricity.

3. Probation Revocation

"Probation is a matter of grace left to trial court discretion, not a right to which a criminal defendant is entitled." *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). A probationer is entitled to a hearing before having his probation revoked. Ind. Code § 35-38-2-3(d). The State must prove a probation violation by a preponderance of the evidence. Ind. Code § 35-38-2-3(e). The probationer also has the right to confrontation, cross-examination, and representation by counsel. *Id*. We will affirm a revocation if there is substantial evidence of probative value to support it. *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999).

Hall argues the trial court erred in revoking his probation because the trial court did not independently determine Hall violated his terms of probation. At the sentencing hearing, the trial court properly determined Hall's commission of these new offenses in 2009 violated the terms of the probation stemming from his 2008 conviction. *See Henderson v. State*, 544 N.E.2d 507, 513 (Ind. 1989) (holding Henderson's burglary conviction provided proper grounds to revoke his probation). Hall's trial on the new charges afforded him the procedural due process rights required in probation revocation proceedings. *See Lightcap v. State*, 863 N.E.2d 907, 911 (Ind. Ct. App. 2007) (holding probationer's due process rights were satisfied when evidence heard at trial was used as evidence in probation revocation proceeding). While the judge did remark that the jury's verdict could be considered "a bizarre set of concurrences," the judge entered a judgment of conviction after the verdict. (Sent. Tr. at 8.)

The State presented sufficient evidence for a jury to conclude beyond a reasonable doubt that Hall committed criminal offenses in 2009. That was sufficient probative evidence to permit the trial court to find Hall violated the terms of his probation. *See Strowmatt v. State*, 686 N.E.2d 154, 159 (Ind. Ct. App. 1997), (upholding the revocation of Strowmatt's probation after court considered the evidence presented at trial as evidence in the subsequent probation revocation proceeding and determined it was sufficient to show he violated his probation), *reh'g denied*; *see also Gleason v. State*, 634 N.E.2d 67, 68 (Ind. Ct. App. 1994) ("a criminal conviction is prima facie evidence of a violation and will alone support a revocation of probation").

Affirmed.

BAKER, J., and BRADFORD, J., concur.