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.

FILED
Aug 30 2011, 8:46 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

JOHN PINNOW
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KATHERINE M. COOPER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

TOM KENNETH,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 49A02-1102-CR-167
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49G04-0907-FA-65859

August 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Following a jury trial, Tom Kenneth appeals his conviction for burglary, a Class A felony. The sole issue on appeal is whether sufficient evidence was presented to sustain his conviction. Concluding that sufficient evidence was presented, we affirm.

Facts and Procedural History

In 2007, Kenneth and Marie Austin had a child together, T.K.[1] Although their relationship ended soon thereafter, they agreed to Kenneth's continued visitation with T.K., and Kenneth attended her second birthday party in July 2009. Austin agreed that Kenneth would take T.K. after the party for a week or so to spend time together.

The next day, Austin visited a friend's grandmother and aunt, Charlotte and Theresa Westerfield. On that day, the Westerfields' home bustled with visiting grandchildren and other relatives. At some point, Kenneth arrived at the home with T.K., was allowed to enter, and spoke with Austin both inside and outside of the house.

After a disagreement, Kenneth left with T.K. but returned a short while later. This time Kenneth entered uninvited, and he again spoke with Austin inside and later outside of the house. The two continued their conversation in Kenneth's truck parked outside. Kenneth asked Austin to join him and T.K. for the day, but Austin declined. Kenneth sped off with Austin in the passenger seat anyway, but Austin jumped out of the moving vehicle. Kenneth then attempted to run her over by reversing his truck, but Austin dodged it and returned to the Westerfields' home.

[1] We note that the State refers to this child as T.C. No one suggests more than one child was born of the relationship, and, in any event, this matter is irrelevant to this case.

Austin re-entered the Westerfields' home and directed Theresa Westerfield to not let Kenneth in if he returned. Theresa shut the door. Kenneth did return, and despite Theresa's protest, he entered the home and headed towards Austin. At trial, Theresa testified regarding Kenneth's third entry into her home:

> He come [sic] in – he come [sic] in and I told him I don't want no stuff and he said – and then all at once he just ran standing by the – and just pulled [a sword] out and just ran towards her . . . .

Transcript at 104. When asked to clarify how Kenneth entered, Theresa stated "[h]e just come [sic] in." Id.

Kenneth entered the home, ran past Theresa to Austin, pulled a four-foot long sword out of his pant leg, and stabbed Austin multiple times in both hips, her back, stomach, left shoulder, and right hand. He then told Austin, "Well, if I can't have you, you ain't gonna get nobody; I hope you die, bitch." Id. at 108. Kenneth walked out of the house with the sword dripping blood on the floor, leaving Austin seriously injured.

The State charged Kenneth with burglary as a Class A felony and aggravated battery as a Class B felony. A jury found him guilty as charged, and the trial court entered a judgment of conviction as to burglary and set aside the guilty verdict as to aggravated battery because a conviction on that count would violate double jeopardy. The trial court sentenced Kenneth to thirty years with four years suspended. Kenneth now appeals.

Discussion and Decision

I. Standard of Review

Our standard of review for sufficiency claims is well-settled: when we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the

credibility of the witnesses. Parahams v. State, 908 N.E.2d 689, 691 (Ind. Ct. App. 2009). We consider only the evidence supporting the verdict and any reasonable inferences therefrom to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the verdict, we will affirm. Id. It is the trier of fact's function to resolve conflicts in testimony and to determine the weight to be given to the evidence and the credibility of the witnesses. Yowler v. State, 894 N.E.2d 1000, 1002 (Ind. Ct. App. 2008).

II. Burglary

Burglary involves "[a] person who breaks and enters the building or structure of another person, with intent to commit a felony in it . . . ." Ind. Code § 35-43-2-1. Burglary is a Class A felony if it results in bodily injury or serious bodily injury to anyone other than the defendant. Ind. Code § 35-43-2-1(2). Kenneth argues insufficient evidence was presented as to the element of "breaking."

Kenneth concedes that the element of breaking may be proven entirely by circumstantial evidence, and that "[u]sing even the slightest force to gain unauthorized entry satisfies the breaking element of the crime." Davis v. State, 770 N.E.2d 319, 322 (Ind. 2002). Indeed, "opening an unlocked door or pushing a door that is slightly ajar constitutes a breaking." Id.

Even considering Theresa's testimony that she did not let in Kenneth, he contends no evidence was presented to exclude the possibility of another letting him in. Based on our standard of appellate review allowing for reasonable inferences from evidence supporting the verdict, we disagree. Theresa's testimony leads to a reasonable inference

that she was present at the door and saw Kenneth open the closed door despite her protest. This testimony allows a reasonable trier of fact to make a reasonable inference that Kenneth used at least "the slightest force," Davis, 770 N.E.2d at 322, to open the closed door as he ran to repeatedly stab the mother of his young child. We disregard as irrelevant Kenneth's assertion that the door showed no sign of damage or forced entry.

Conclusion

The State presented sufficient evidence to sustain Kenneth's conviction for burglary, and therefore we affirm.

Affirmed.

BARNES, J., and BRADFORD, J., concur.