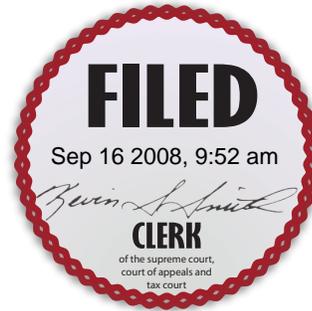


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

M.B.,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0802-JV-126
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Danielle Gregory, Magistrate
The Honorable Marilyn Moores, Judge
Cause No. 49D09-0708-JD-2657

September 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

M.B. appeals his true adjudication for Burglary,¹ a class C felony if committed by an adult. E.T. challenges the sufficiency of the evidence as the sole issue on appeal.

We reverse.

The facts most favorable to the adjudication follow. On August 28, 2007, Tony Peak, the owner and resident of 919 North Denny Street, was home watching television and playing video games. At approximately 4:00 p.m. Peak heard several thumps from the back of his house where his attached garage is located. When he got up to investigate the noise, he looked through the kitchen window and observed that the entry door to the garage had fallen inward.² Peak grabbed his gun and went into the garage where he saw M.B. standing on top of the entry door, approximately two and a half feet inside the garage. Peak pointed his gun at M.B., but lowered the gun when he realized M.B. was not an adult. M.B. and another young man who was standing outside of the garage fled from the scene. Peak followed the two boys into an alley to see where they had run. While standing in the alley Peak saw a third young man running out of his garage. Peak then called police. The entire incident lasted about forty-five seconds.

Upon inspection of his garage, Peak noted that nothing had been disturbed and that, as far as he could tell, nothing was taken. As for the entry door, the frame around the door was removed from the wall. Peak had braced the door with a piece of wood nailed to a frame on the inside of the door. The brace came down with the frame. When Peak inspected the door, he found the piece of wood underneath it.

¹ Ind. Code Ann. § 35-43-2-1 (West, PREMISE through 2007 1st Regular Sess.).

Approximately two hours after the intrusion, the police called Peak and asked him to come to another location where they had picked up a young man. Peak's father drove him to the location, and Peak identified M.B. as the young man he saw in his garage earlier that day.

On August 29, 2007, the State filed a petition alleging M.B. was a delinquent child for having committed Count I, burglary, a class C felony if committed by an adult, and Count II, criminal mischief, a class B misdemeanor if committed by an adult. At a denial hearing held on October 30, 2007, the State moved to add Count III, alleging that M.B. committed what would be class D felony residential entry if committed by an adult. The court granted the motion. At the conclusion of the denial hearing, the court entered a true finding on Counts I and II; the court entered a not true finding with respect to Count III. The court held a disposition hearing on January 10, 2008. The court ordered M.B. committed to the Department of Correction, but suspended the commitment to probation on condition that M.B.: (1) write a letter of apology to the victim and his own mother; (2) have no other contact with the victim; (3) attend school every day; (4) complete additional chores for his mother; (5) abide by a 7:00 p.m. curfew for sixty days; and (6) complete counseling programs.

On appeal, M.B. challenges the sufficiency of the evidence only with regard to the true finding for burglary, a class C felony if committed by an adult. Our standard of review with respect to juvenile adjudications is well settled.

We neither reweigh the evidence nor judge the credibility of witnesses. The State must prove beyond a reasonable doubt that the juvenile committed the

²Peak has an attached garage that was added on to the back of his house. The kitchen was located at the back of the house before the addition was made, and through the kitchen window, Peak could see the entry door to the garage. The entry door was a standard three-foot wide door.

charged offense. We examine only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom. We will affirm if there exists substantive evidence of probative value to establish every material element of the offense.

K.D. v. State, 754 N.E.2d 36, 38-39 (Ind. Ct. App. 2001) (citations omitted).

To support a true finding for burglary, the State was required to prove beyond a reasonable doubt that M.B. broke and entered a building or structure of another person with intent to commit a felony therein. *See* I.C. § 35-43-2-1. Specifically, the delinquency petition alleged that “[o]n or about the 28th day of August, 2007, [M.B.] did knowingly and intentionally break and enter the building or structure of Tony Peak, located at 919 South Denny Street, with the intent to commit a felony therein, that is: theft.” M.B. argues that the evidence is insufficient to establish that he had the intent to commit theft.

“Intent to commit a given felony may be inferred from the circumstances, but some fact in evidence must point to an intent to commit a specific felony.” *Freshwater v. State*, 853 N.E.2d 941, 943 (Ind. 2006) (quoting *Justice v. State*, 530 N.E.2d 295, 297 (Ind. 1988)); *see also Gilliam v. State*, 508 N.E.2d 1270 (Ind. 1987). The State argues that the force necessary to knock in the entire door frame coupled with the fact that another young man was present outside the garage, perhaps as a lookout, was sufficient evidence from which the court could infer beyond a reasonable doubt that M.B. broke into the garage with the intent to commit the felony of theft, if committed by an adult, once inside. We find the State’s argument unpersuasive.

We are guided by our Supreme Court’s analysis in *Freshwater*. In that case, Freshwater made two unsuccessful attempts to enter a car wash that had closed for the night. Freshwater eventually gained entry into the car wash, but immediately fled after the alarm

sounded. An officer responding to the alarm came upon Freshwater, who matched the description of the individual who broke into the car wash, and noticed that he was carrying a screwdriver. It was later determined that the screwdriver matched the pry marks on the door to the car wash.

On appeal, our Supreme Court explained:

“ Intent to commit a felony may not be inferred from proof of breaking and entering alone. Similarly, evidence of flight alone may not be used to infer intent, though other factors, such as the removal of property from the premises, may combine with flight to prove the requisite intent for burglary.

Evidence of breaking and entering, and evidence of flight are not probative unless tied to some other evidence which is strongly corroborative of the actor’s intent. The evidence does not need to be insurmountable, but it must provide “a solid basis to support a reasonable inference” that the defendant intended to commit the underlying felony.”

Freshwater v. State, 853 N.E.2d at 943 (quoting *Justice v. State*, 530 N.E.2d at 297) (citations omitted). The Court rejected the State’s argument that evidence that Freshwater broke in at night after the car wash was closed, that he made several attempts to enter the building, and that he immediately fled after the alarm sounded demonstrated the requisite intent to commit theft. The Court stated, “[t]he 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.” *Id.* at 944. The Court specifically noted the complete lack of evidence that Freshwater was near or had approached anything of value in the car wash. Because there was no evidence indicating his purpose for entering the car wash, the Supreme Court reversed Freshwater’s conviction.

Like evidence of breaking and entering and evidence of flight, the force necessary to knock down the door and the fact that another young man was present do not provide a

reasonable inference that M.B. intended to commit theft rather than some other felony in Peak's attached garage. See *Freshwater v. State*, 853 N.E.2d 941; *Justice v. State*, 530 N.E.2d 295 (reversing conviction for attempted burglary because evidence that intruder wore black socks on hands and fled from scene after being recognized did not establish intent to commit theft); *Gebhart v. State*, 531 N.E.2d 211 (Ind. 1988) (reversing a conviction for attempted burglary upon finding insufficient evidence of intent to steal where evidence that defendant pried open back door to home, but fled when a resident of the home saw him was insufficient to establish intent to steal); *Deslover v. State*, 734 N.E.2d 633 (Ind. Ct. App. 2000) (reversing burglary conviction upon finding insufficient evidence of intent to steal where evidence showed defendant, who had talked about breaking into houses, rang doorbell and then broke a bedroom window during early morning hours, but fled after being shot by resident when trying to enter home), *trans. denied*. We therefore reverse M.B.'s true finding for burglary, a class C felony if committed by an adult.

Judgment reversed.

DARDEN, J., and BARNES, J., concur