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IN THE
COURT OF APPEALS OF INDIANA

K. J.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0903-JV-260
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Geoffrey Gaither, Magistrate
Cause No. 49D09-0810-JD-3244

September 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

K.J. appeals his adjudication as a delinquent child for committing what would be Class C felony attempted burglary if committed by an adult. Specifically, he contends that the State did not prove that when he attempted to break and enter a clothing store, he did so with the intent to commit theft. In accordance with *Freshwater v. State*, 853 N.E.2d 941 (Ind. 2006), there is no evidence that K.J. was near or approaching anything valuable in store. In addition, the time at and method by which K.J. attempted to enter the store suggest nothing more than that he attempted to break in, and he could have done so for any number of reasons that did not include theft. We therefore reverse K.J.'s adjudication for attempted burglary. Because K.J. does not challenge his other adjudications for criminal mischief and resisting law enforcement, we affirm them.

Facts and Procedural History

At 3:37 a.m. on October 15, 2008, Indianapolis Metropolitan Police Department Officers Brian Anders and David Spurgeon were dispatched to an alarm triggered at Davis Jean and Fashion, a store located at the end of a seven-store shopping center on West Washington Street in Indianapolis. Upon arrival, the officers observed K.J. and another juvenile running on the roof of the shopping center. The two juveniles then jumped off the roof at the lowest point of the building, at which point Officer Anders ordered them to stop. The juveniles attempted to flee from Officer Anders but were cornered in by police cars arriving on the scene. Officers Anders and Spurgeon then handcuffed the juveniles.

After handcuffing the juveniles, the officers inspected the inside of Davis Jean and Fashion and the roof of the building. While nothing appeared to be out of place inside the store, one of the roof vents above the store was damaged and another roof vent was damaged and removed. Tr. p. 14; Ex. 1, 2 (roof vent damaged and removed), 3 (roof vent damaged but not removed). Underneath the roof vent that had been removed, the officers noticed fresh footprints on a walk board that was located three feet below the roof in the attic space. The officers also found puddles of saliva on the roof and cement blocks scattered across the roof.

Thereafter, the State filed a petition alleging that K.J. was a delinquent child for committing what would be Class C felony attempted burglary, Class A misdemeanor criminal mischief, and Class A misdemeanor resisting law enforcement if committed by an adult. A denial hearing was then held. During closing argument, defense counsel argued:

> With regard to the attempted burglary, even if we were to, hypothetically, I believe that the boys were on top of [the store] and even if we hypothetically, were to agree that they had kicked around the vents or whatever, burglary doesn't just require that someone have trespassed. It requires that there be an actual . . . breaking and entrance, and in an attempt to commit a felony therein. What we have at best, what the, what the prosecutor has at best, with regard to their case, well they've got children running, they've got the kids on the roof. They, at best, they would have some criminal mischief. There is nothing to indicate that whoever did this, had any intention of doing a felony, if indeed there was even an intention of going in.

Tr. p. 49-50. After some discussion between the parties and trial court about the lack of comparison done on the footprints found in the attic space, defense counsel continued:

> What we don't have here under any circumstances, regardless of how we wanna shape everything else out, we don't have intention at all. We don't

> have the slightest. I mean everybody knows that when people go into a building, some of them have legitimate intentions to commit arson or steal something. Others go in . . . . We've had cases before where . . . . I've had cases where the kids have gone in and broken up some furniture but didn't rise to the level of felony [in] terms of cost. Have, you know, messed up the walls. One case where the kids went in and played cards, it was just a weird little case. There was a residential entry in those sorts of situations, but there was not a burglary. In this sort of situation, the best thing you've got is a, is a trespass. . . . But we don't have a burglary because there's no evidence of intent to commit a felony therein and so I would ask the Court to find my client, [K.J.], not true as to the attempted burglary.

Id. at 51-52. The trial court concluded:

> All right. Well the Court having heard the evidence in this matter and the testimony presented, I think this . . . . Well, I think the evidence here has shown that this is a, a classic circumstantial evidence case. With respect certainly to count 1 [attempted burglary]. Not so much circumstantial as to, as to counts 1 [sic] and 2, and not so much circumstantial as, as to count 3. An[] abbreviated review of the testimony will show that there was [an] alarm that went off about 3:30 in the morning. Officer[s] Anders and Spurgeon arrived about 3:38 and discovered that [K.J.] and [the other juvenile] were on top of the roof. Further testimony was that the alarm went off in the western part of the store where the vent was located. I think that a reasonable inference is that the, the damage that was done to the roof was caused by the individuals that were on the roof and that was testified to directive [sic] as to [K.J.] and [the other juvenile]. Accordingly, I'm going to enter a true finding as to count 1, count 2, and count 3.

Id. at 54.

Following the dispositional hearing, the trial court placed K.J. on a suspended commitment to the Department of Correction with several conditions. K.J. now appeals.

Discussion and Decision

K.J. raises one issue on appeal. Specifically, he contends that the evidence is insufficient to support the trial court's delinquency finding for attempted burglary because the State failed to prove that when he attempted to break and enter Davis Jean and Fashion, he did so with the intent to commit theft. When the State seeks to have a

juvenile adjudicated as a delinquent child for committing an act that would be a crime if a committed by an adult, the State must prove every element of the crime beyond a reasonable doubt. *J.S. v. State*, 843 N.E.2d 1013, 1016 (Ind. Ct. App. 2006), *trans. denied*. When reviewing a juvenile adjudication, this Court will consider only the evidence and reasonable inferences supporting the judgment and will neither reweigh evidence nor judge the credibility of the witnesses. *Id.* If there is substantial evidence of probative value from which a reasonable trier of fact could conclude that the juvenile was guilty beyond a reasonable doubt, we will affirm the adjudication. *Id.*

In order to find K.J. to be a delinquent child for committing Class C felony attempted burglary, the State must have proved that K.J. took a substantial step toward breaking and entering Davis Jean and Fashion with intent to commit a felony in it, to wit: theft. Ind. Code §§ 35-43-2-1, 35-41-5-1; *see also* Appellant's App. 14. 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. *Freshwater*, 853 N.E.2d at 942. "Where the State cannot establish intent to commit a particular underlying felony, criminal trespass is the appropriate charge." *Id.* (quotation omitted).

The Indiana Supreme Court expounded upon the burden of proof required for the intent to commit a felony element in burglary cases in *Freshwater*. In that case, Terry Covey was sitting on his front porch when he saw a man attempt to enter a car wash. Covey observed the man unsuccessfully try to enter the car wash through two doors. Then, the man went out of Covey's sight and appeared inside the building. When the car

wash alarm sounded, the man ran out of the building, and Covey called the police. Soon after receiving a call about the break-in, Officer Chris Butche spotted Otis Freshwater, who matched Covey's description and was carrying a screwdriver. The owner of the car wash was called to the scene. There was a cash register with money in the building, but according to the owner, nothing was missing and the office had not been disturbed. Freshwater was convicted of Class C felony burglary.

On appeal, our Supreme Court turned to its own precedent in *Justice v. State* and *Gebhart v. State*. It first noted that "[i]ntent 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*, 853 N.E.2d at 943 (quoting *Justice v. State*, 530 N.E.2d 295, 297 (Ind. 1988)). In addition, "[i]ntent 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." *Id.* (quoting *Justice*, 530 N.E.2d at 297) (citations omitted). The Court, referring to the facts of *Justice*, continued:

> 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. *Gilliam [v. State]*, 508 N.E.2d [1270,] 1271 [(Ind. 1987)]. While there is evidence of breaking and entering, and evidence of flight in this case, there is no evidence that Justice touched, disturbed or even approached any valuable property.

Id. (quoting *Justice*, 530 N.E.2d at 297). Finally, the Court, referring to the facts in *Gebhart* wherein the defendant pried open the door of the victim's home and fled upon seeing the victim, said:

> The evidence here is insufficient in probative value to warrant the conclusion of a rational trier of fact, to a moral certainty beyond a reasonable doubt, that appellant had the intent to steal from the house. It might well support that conclusion by a preponderance of the evidence, but then this is a criminal case and not a civil one. It might well support the conclusion that appellant intended some undetermined sort of wrongdoing, mischief, misdeed, or immoral or illegal act. However that is not the issue to be resolved. A criminal conviction for burglary requires proof beyond a reasonable doubt of a specific criminal intent which coincides in time with the acts constituting the breaking and entering, and such specific criminal offense must be clearly stated in the charge. It is the crime as defined in the burglary statute which was charged in this case and which must have been proved. The evidence might well support a conviction for . . . criminal trespass, however that charge was not made.

Id. (quoting *Gebhart v. State*, 531 N.E.2d 211, 212 (Ind. 1988)).

Our Supreme Court then noted that there was language in several opinions of the Court of Appeals "to the effect that a lesser quantum of evidence than that demanded by *Justice* and *Gebhart* will satisfy the intent to commit a felony element in a burglary case." *Freshwater*, 853 N.E.2d at 944. For example, the Court noted that in *Gray v. State*, the Court of Appeals said that "[t]he intent to commit a felony 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." *Id.* (citing *Gray*, 797 N.E.2d 333, 336 (Ind. Ct. App. 2003)). The Court also noted that *Gentry v. State* has similar language. *Id.* (citing *Gentry*, 835 N.E.2d 569, 573 (Ind. Ct. App. 2005)). Our Supreme Court concluded, "As should be clear from the foregoing discussion, *this is not a correct statement of the law*. *Justice* and *Gebhart* dictate 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.* (emphasis added).

Our Supreme Court then applied the law to the facts of the case. Although the State argued that it could be reasonably inferred that Freshwater was approaching the money in the cash register when the alarm interrupted his entry into the building, our Supreme Court concluded that there was no evidence that Freshwater "was near or approaching anything valuable in the car wash. Freshwater was discovered by the police outside the building. Furthermore, . . . 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. "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.* at 944. As such, the Court reversed Freshwater's conviction for burglary.

This case is very similar to *Freshwater*. Notably, however, the State cites both *Gray* and *Gentry* for the proposition that the intent to commit a felony 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. Appellee's Br. p. 5. However, our Supreme Court in *Freshwater* clarified that this is not a correct statement of the law.[1] 853 N.E.2d at 944.

[1] As for the State's citation to Judge Brook's concurring opinion in *Desloover v. State*, 734 N.E.2d 633 (Ind. Ct. App. 2000), *trans. denied*, in which he concurred with the majority's reversal of the defendant's conviction for burglary because he felt "bound" by *Justice* and *Gebhart* but nevertheless believed that *Justice* and *Gebhart* were wrongfully decided, *id.* at 636 (Brook, J., concurring), we note that our Supreme Court noted in *Freshwater* that the majority correctly applied *Justice* and *Gebhart* in *Desloover*. *Freshwater*, 853 N.E.2d at 944 n.2.

Rather, the test is 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.*

Here, the State argues it may be reasonably inferred from the circumstances that K.J. intended to commit theft because: (1) K.J. was on the roof of Davis Jean and Fashion at a time when the store would likely be unoccupied, (2) he damaged the roof vents only above that store, (3) the store contained valuable merchandise, and (4) he fled following the sounding of the alarm. However, most of these facts were also present in *Freshwater*. That is, in *Freshwater*, the defendant was *inside* a car wash, to which he gained entry using a screwdriver, the car wash contained a cash register (undoubtedly valuable merchandise), and the defendant fled when the alarm sounded. Nevertheless, because nothing was missing from the car wash and Freshwater was apprehended outside the car wash, our Supreme Court concluded that there was no evidence that he was near or approaching anything valuable in the car wash. Because there is no evidence that K.J. was near or approaching anything valuable in Davis Jean and Fashion, the same can be said here, too. The time at and method by which K.J. attempted to enter Davis Jean and Fashion suggest nothing more than that he attempted to break in. Like defense counsel argued during closing argument, K.J. could have done so for any number of reasons that did not include theft. Because the State did not prove intent to commit theft, we reverse K.J.'s true finding for attempted burglary. We, however, affirm his adjudication as a juvenile delinquent for committing what would be criminal mischief and resisting law enforcement if committed by an adult.

Reversed in part, affirmed in part.

BAILEY, J., and BRADFORD, J., concur.