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IN THE
COURT OF APPEALS OF INDIANA

ZACHARY THOMAS,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 49A02-1009-CR-1143
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Teresa Hall, Judge
Cause No. 49G16-0904-FD-37769

October 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Following a bench trial, Zachary Thomas appeals his conviction of residential entry, a Class D felony. Thomas raises one issue for our review: whether sufficient evidence supports his conviction.[1] Concluding the evidence is sufficient, we affirm.

Facts and Procedural History

Thomas and Inger Fridel had a lengthy relationship that ended in November 2008, approximately six months before the incident in question. During the time that Thomas and Fridel dated, they never lived together. Since their break up, Thomas and Fridel maintained contact by way of text messages, and occasionally seeing each other in person. In one text exchange several weeks prior to the incident in question, Thomas told Fridel that he had a key to her condominium. Fridel apparently dismissed the message because she had never given Thomas a key.

The parties exchanged an unspecified number of text messages on April 4, 2009, and into the early morning hours of April 5, 2009. At approximately 3:00 a.m. on April 5, Fridel awoke after falling asleep on a couch in her condominium to find Thomas in her residence, standing near her. Heated conversation ensued and Fridel repeatedly asked Thomas to leave her home. Fridel testified that Thomas forcefully grabbed her at least twice. Fridel eventually walked to her neighbors' home and asked that they call the police.

The State charged Thomas with residential entry and criminal confinement, both Class D felonies, and battery, domestic battery, and interfering with reporting of a crime,

[1] Thomas was also convicted of interfering with reporting of a crime, a Class A misdemeanor; however, he does not challenge this conviction.

all Class A misdemeanors. The trial court held a bench trial on May 21, 2010, at the conclusion of which it convicted Thomas of residential entry and interfering with reporting of a crime. Thomas was sentenced to concurrent terms of 365 days in jail for each conviction, with four days executed and 361 days suspended. Thomas now appeals his conviction for residential entry.

Discussion and Decision

I. Standard of Review

When reviewing the sufficiency of the evidence to support a criminal conviction, we neither reweigh the evidence nor judge witnesses' credibility. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). Rather, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). Where the evidence is in conflict, we are bound to view only that evidence which is most favorable to the verdict and judgment of the trial court. McKinney v. State, 653 N.E.2d 115, 117 (Ind. Ct. App. 1995). Therefore, we will affirm the conviction if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find all elements of the crime proven beyond a reasonable doubt. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005).

II. Residential Entry

To convict Thomas of residential entry, the State must prove beyond a reasonable doubt that Thomas (1) knowingly or intentionally; (2) broke and entered; (3) the dwelling of another person. Ind. Code § 35-43-2-1.5. Thomas does not dispute that his actions may meet the standard of Indiana Code section 35-43-2-1.5. Rather, Thomas argues that his possession of a key to Friedel's condominium equates to consent to enter. Lack of

consent is not an element of residential entry that the State is required to prove. Lyles v. State, 576 N.E.2d 1344, 1348 (Ind. Ct. App. 1991), abrogated on other grounds by Peterson v. State, 650 N.E.2d 339, 340 (Ind. Ct. App. 1995). It is the defendant who must claim and prove the defense of consent. Id. A defendant's belief that he has permission to enter must be reasonable in order for the defendant to avail himself of the defense of consent. Id.

This court addressed the defense of consent with respect to residential entry in McKinney, 653 N.E.2d 115. In McKinney, this court held that, based on the circumstances, the defendant's belief that he had consent to enter his wife's sister's residence, where his children were, was not reasonable. Id. at 118. The sister, after becoming aware of the defendant's presence outside her home, attempted to shut the front door once the children's mother entered. Id. The defendant angrily resisted, eventually overcoming the sister's efforts by shoving the door open and entering the house. Id. We held that from the evidence presented, including the couple's impending divorce, the sister's attempt to close the door, and the defendant's anger, the trial court could have reasonably inferred that the defendant did not reasonably believe his entry was authorized. Id.

Applying the analysis used in McKinney, we turn to the evidence most favorable to the trial court's judgment in this case. Fridel testified that she awoke around 3:00 a.m. and saw Thomas standing over her as she lay on her couch. Although Fridel and Thomas exchanged text messages throughout the day, it is undisputed that Fridel never explicitly invited Thomas to her residence. Fridel and Thomas had been broken up for some six months, and at no point had they lived together. Although Thomas had previously told

Fridel he had a key to her residence, Fridel testified she had not given him a key and therefore believed he was joking. Moreover, even if she had given him a key, we would be reluctant to equate having possession of a key to another's residence with having consent to enter at will.

Once Thomas entered the residence, the situation quickly escalated into conflict. Fridel testified that Thomas forcefully grabbed her on at least two occasions. Fridel repeatedly asked Thomas to leave, but he refused. Viewing the evidence in the light most favorable to the trial court's judgment, we cannot agree with Thomas that he reasonably believed Fridel consented to his entry into her residence. Here, the inferences that may be drawn from the evidence, like those in McKinney, lead us to conclude that the trial court could have reasonably inferred that Thomas's belief that he had consent to enter Fridel's residence was not reasonable. Fridel testified she had not given Thomas a key and, although he told her he had a key, she thought he was joking. However Thomas came into possession of the key, the evidence most favorable to the judgment establishes he did not get it under circumstances that would raise a reasonable belief Fridel consented to him using it to gain entry at any time.

The undisputed fact that Fridel, upon waking up, did not immediately request that Thomas leave her home does not affect our decision. By not immediately protesting Thomas's presence, Fridel did not ratify his entry into her condominium. See Lyles, 576 N.E.2d at 1348 (holding victim's delay in protesting entry is not necessarily equivalent to a belated invitation). Fridel's initial hesitancy should not be treated as a belated invitation into her home, but can instead be interpreted as being due to the circumstances of Thomas's presence, such as the time of day, her sleepy state, and the conflict that

quickly developed between her and Thomas. See id. As such, we conclude that the State presented sufficient evidence to support Thomas's conviction for residential entry.

Conclusion

Sufficient evidence supports Thomas's conviction of residential entry. The conviction is therefore affirmed.

Affirmed.

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