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IN THE
COURT OF APPEALS OF INDIANA

SEAN HOLTSCLAW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-1103-CR-118
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee Jr., Judge
Cause No. 71D08-1008-FB-101

November 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Sean Holtsclaw challenges his conviction of Class B felony burglary.[1] Holtsclaw argues jury misconduct denied him a fair trial and the evidence was insufficient to support his conviction. We affirm.

FACTS AND PROCEDURAL HISTORY

On August 20, 2010, Holtsclaw visited Terry and Elizabeth Page, who were having a yard sale at their home. During the sale, Holstclaw and Terry drank heavily and Holtsclaw left twice to buy more Magnum-brand beer. Later in the afternoon, Holtsclaw announced he was going home to retrieve some belongings he wished to sell and he would return in about an hour.[2] Holtsclaw took two cans of Magnum-brand beer with him in a brown paper bag. Approximately fifteen minutes later, Holtsclaw returned with a laundry basket full of items such as an Xbox 360 game console, a DVD player, various DVDs, and a pair of shoes.

At 5:30 p.m. that same day, Mary Pendergrass and her sister returned to their home next door to the Pages' house to find a screen and fan had been removed from one of their windows. Upon further investigation, Pendergrass noticed several items were missing from her residence including an Xbox 360 game console, a laundry basket, and a DVD player. She also found a brown paper bag containing a full can of Magnum-brand beer. Pendergrass called police to report her home had been burglarized.

Around that same time, Don Beattie, Kimberly Cripe, and Cripe's 11-year-old son, B.D., stopped at the Pages' house. Upon arrival, they noticed Terry and Holtsclaw were

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[1] Ind. Code § 35-43-2-1.

[2] Holtsclaw arrived at the Pages' house that day by bus. The round-trip commute by bus between the two residences was one hour.

heavily intoxicated. B.D. saw the Xbox 360 in the laundry basket, and Holtsclaw agreed to sell it to Beattie for $20.00. Beattie and Cripe agreed to drop Holtsclaw off at a gas station on their way home, so Holtsclaw placed the laundry basket full of items in the trunk of Cripe's car as the group prepared to leave.

Mishawaka Police Corporal Greg Dawson arrived at the scene to investigate Pendergrass' report of a burglary. Upon arrival, Corporal Dawson interviewed Pendergrass and noticed Beattie, Cripe, Holtsclaw, and others standing a short distance away. After talking with Pendergrass, Corporal Dawson approached the group to inquire if they had seen any part of the burglary. Dawson took particular notice of Holtsclaw, who appeared intoxicated and unusually nervous. After conducting interviews, Corporal Dawson asked if he could look inside the trunk of Cripe's car, and Cripe agreed. Corporal Dawson discovered a laundry basket containing several items Pendergrass immediately identified as those taken from her home. In Holtsclaw's pocket, police found a twenty-dollar bill that Beattie identified as the money he had given Holtsclaw for the Xbox.

The State charged Holtsclaw with one count of Class B felony burglary and alleged Holtsclaw was an habitual offender. In addition, because Holtsclaw was on probation at the time of the instant crime, the State filed a petition to revoke his probation based on his alleged commission of this burglary. The court consolidated the probation revocation hearing with the trial on the burglary charge; while a jury determined whether Holtsclaw was guilty of burglary, the trial court judge was the fact-finder for the probation revocation. The jury found him guilty of burglary, and Holtsclaw admitted being an habitual offender. The

judge found Holtsclaw had not violated his probation, but ordered a sixteen-year sentence for burglary, enhanced by ten years for being a habitual offender, with six years suspended.

DISCUSSION AND DECISION

1. Jury Misconduct

During deliberation of Holtsclaw's burglary charge, the judge received a note stating one juror had used a personal computerized atlas to learn the distance between the crime scene and the liquor store where Holtsclaw went to buy beer was 0.47 miles. The note also indicated the jury would not rely on the information or allow the information to affect its decision. Holtsclaw now claims it was fundamental error[3] not to poll the jury and require each member to state the information would not affect his or her decision in any way.

At trial, Holtsclaw did not object, did not request the court poll the jury, and did not request a mistrial. Instead, the judge and lawyers for each side discussed the situation, tried to discern possible prejudice, and reached a mutual decision that the juror's conduct was harmless. During that discussion, Holtclaw's counsel stated, "I don't believe that the information itself is prejudicial because I don't believe there is a contest such as distance, line of sight, any of that other kind of stuff." (Tr. at 289.) Further, after the judge asked the parties if they would like the jury polled, defense counsel suggested instead the jury be given a note thanking them for the information and nothing more.

By conceding to the court that the information was not prejudicial and declining the

[3] Errors are fundamental only if they are so prejudicial that they render a fair trial impossible. *Caron v. State*, 824 N.E.2d 745, 751 (Ind. Ct. App. 2005).

judge's offer to poll the jury, Holtsclaw invited the very result he now claims was fundamental error. A party may not invite error and later argue the error supports reversal, because error invited by the complaining party is not reversible error. *Booher v. State*, 773 N.E.2d 814, 822 (Ind. 2002). As such, invited errors are not subject to appellate review. *Gamble v. State*, 831 N.E.2d 178, 184 (Ind. Ct. App. 2005), *trans. denied*. Therefore, we have no obligation to address Holtsclaw's allegation of error.

Nonetheless, we note Holtsclaw cannot demonstrate the juror's misconduct affected his ability to receive a fair trial. As Holtclaw's counsel stated, "I don't believe that the information itself is prejudicial because I don't believe there is a contest such as distance, line of sight, any of that other kind of stuff." (Tr. at 289.) More importantly, however, the distance between the liquor store and the crime scene had no bearing on any theory of the crime or defense. When Holtsclaw left to retrieve the items, he did not do so under the pretense that he was going to the liquor store; instead, he stated that he was going home. Because the distance from the Pages' house to the liquor store was not a material issue in the case, Holtsclaw could not demonstrate fundamental error. *See, e.g.*, *Saperito v. State*, 490 N.E.2d 274, 278 (Ind. 1986) (misconduct was not fundamental error because information researched by the juror did not go to a material element of the crime or defense).

2. <u>Sufficiency of Evidence</u>

In reviewing sufficiency of evidence, we may not reweigh evidence or judge witness credibility. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the trial court's decision, *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). Where proof of guilt is entirely circumstantial in nature, the evidence must be sufficiently conclusive for a jury to exclude every reasonable theory of innocence. *Craig v. State*, 730 N.E.2d 1262, 1266 (Ind. 2000); but when reviewing a jury's verdict based solely on circumstantial evidence, we "need not find that the evidence overcomes every reasonable hypothesis of innocence but only that an inference may be drawn from the circumstantial evidence that supports the jury's verdict." *Id.*

The State presented evidence Holtsclaw took the bus to the Page residence on the day in question, Holtsclaw and the Pages drank Magnum-brand beer, and Holtsclaw took two Magnum-brand beers with him in a brown paper bag when he left for what he said was a trip home to retrieve some personal items to sell at the yard sale. Although a bus trip from the Pages' residence to Holtsclaw's home and back would take about an hour, Holtsclaw returned after only fifteen minutes carrying a laundry basket containing an Xbox 360, a DVD player, and DVDs. Pendergrass identified those items as property missing from her home after someone had removed a screen and a fan to enter her house through a window. Holtsclaw was the only person who tried to sell Pendergrass' items -- in fact, he sold the Xbox 360 for $20.00 and had the $20 bill in his pocket. Pendergrass found a full can of Magnum beer in a brown paper bag inside her home, even though no one in her residence drank that type of beer, and Holtsclaw appeared unusually nervous when Corporal Dawson approached the group to ask questions. Though Holtsclaw is correct that no one actually saw

him enter the Pendergrass residence, the jury nevertheless could reasonably infer from the collective testimony that Holtsclaw committed the burglary. *See Craig*, 730 N.E.2d at 1266 (conviction for child molestation affirmed even though no witnesses saw the act because testimony presented was enough for jury to make reasonable inference).

Holtsclaw also argues the trial court finding that he did not violate his probation demonstrates there was insufficient evidence to convict Holtsclaw of burglary. We find this argument unpersuasive under the specific circumstances presented herein. Holtsclaw's probation revocation hearing for committing a new offense was consolidated with the State's presentation of evidence on the burglary charge. For the purposes of the probation revocation hearing, the judge acted as the finder of fact. *See Hubbard v. State*, 683 N.E.2d 618, 620 (Ind. Ct. App. 1997) (whether to revoke probation is a matter addressed to the sole discretion of the trial judge).

It is true that, to find a probation violation, the trial judge would have had to find Holtsclaw committed the burglary by only a preponderance of the evidence,[4] while to find Holtsclaw guilty of burglary, the jury had to find beyond a reasonable doubt that Holtsclaw committed the burglary. Although it is statistically unlikely a person would be convicted of a crime beyond a reasonable doubt, and simultaneously found not to have violated probation based thereon, we nevertheless cannot say the results herein are logically inconsistent due to the fact the decisions were made by separate fact finders. Each finder of fact is entitled to an independent interpretation of the evidence and is allowed to assign weight and credibility to

[4] Ind. Code § 35-38-2-3.

the evidence presented. That the trial court may have rejected some of evidence favorable to the judgment and come to a different conclusion than the jury does not change our standard of review for the sufficiency of the evidence to support the jury's verdict. As always, we review only whether the facts and inferences most favorable to the judgment would permit a reasonable trier-of-fact to find the defendant guilty beyond a reasonable doubt, *Carmona v. State*, 827 N.E.2d 588, 592-93 (Ind. Ct. App. 2005), and as discussed above, the evidence herein meets that criteria.

Because Holtsclaw may not challenge the manner in which he agreed the trial court should handle the alleged juror misconduct and the evidence was sufficient to support his conviction, the judgment is affirmed.

Affirmed.

NAJAM, J., and RILEY, J., concur.