

STATEMENT OF THE CASE

Appellant-Defendant, Marlon Snead (Snead), appeals his conviction for residential entry, a Class D felony, Ind. Code § 35-43-2-1.5.

We affirm and remand with instructions.

ISSUES

On appeal, Snead raises one issue, which we restate as follows: Whether the State produced sufficient evidence to prove beyond a reasonable doubt that he committed the crime of residential entry.

On cross-appeal, the State raises one issue, which we restate as follows: Whether the trial court erroneously sentenced Snead.

FACTS AND PROCEDURAL HISTORY

Margaret Douglas (Douglas) and Marketa Diggins (Diggins) rented an apartment in East Chicago, Indiana, during April and May of 2010 pursuant to a month-to-month lease. In May of 2010, Douglas and Diggins failed to pay their rent, and the apartment landlord told them that they had to leave. The landlord granted them time to move out, though, so over Mother's Day weekend of 2010, the two women moved several of their belongings out of the apartment. They gave Snead and his girlfriend, who lived together in another apartment upstairs, all of their groceries. The utilities in Douglas and Diggins' apartment were about to be shut off and Douglas and Diggins did not want the food to spoil. In return, Snead helped them move some of their belongings. Douglas and Diggins did not move completely out of the apartment before the end of the day, so they left a couch, a love seat, two televisions, a

radio system, clothes, two air mattresses, a microwave, and everything except pictures and dishes in the apartment.

Later that evening, Snead and his girlfriend got into an argument, and Snead's girlfriend asked him to leave. He took several bags of his possessions with him and entered Douglas and Diggins' downstairs apartment while they were gone. Snead deposited his bags in their apartment and plugged in his cell phone so that it could charge. Thereafter, Douglas and Diggins returned home. Diggins waited in the car outside while Douglas ran into the apartment to use the washroom. When Douglas entered the apartment, Snead came up behind her and said he "didn't want no trouble." (Tr. p. 27). He apologized and explained his situation, but then gathered his belongings and left. Douglas was scared and called the police. Later, Snead returned to Douglas and Diggins' apartment to get his cell phone, which he had accidentally left there, and Diggins told him that he would have to pick it up from the police. During the police investigation of this incident, Douglas and Diggins discovered that they were missing a \$20 CD player without headphones, as well as a folder holding their tax papers.

On June 9, 2010, the State filed an Information charging Snead with burglary, a Class B felony, I.C. § 35-44-2-1. Then, on August 3, 2010, the State filed an Amended Information adding Count II, residential entry, a Class D felony, I.C. § 35-43-2-1.5, and Count III, for being an habitual offender. A jury trial was held on August 9 and 10, 2010. At the close of the evidence, the jury found Snead not guilty of Count I, burglary, but guilty of Count II, residential entry. Following the verdict, Snead pled guilty to being an habitual

offender. On September 20, 2010, the trial court sentenced Snead to six months executed for residential entry and eighteen months executed for being an habitual offender, with sentences to run consecutively.

Snead now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

APPEAL

On appeal, Snead argues that the State failed to provide sufficient evidence that he committed residential entry. The standard of review for a sufficiency of the evidence claim is that this court should only reverse a conviction when reasonable persons would not be able to form inferences as to each material element of the offense. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. This court does not reweigh evidence or judge the credibility of witnesses. *Id.* at 213. In addition, we only consider the evidence most favorable to the verdict and the reasonable inferences stemming from that evidence. *Id.*

In order to establish that Snead committed residential entry, the State was required to prove beyond a reasonable doubt that Snead “knowingly or intentionally [broke] and [entered] the dwelling of another person.” I.C. § 35-43-2-1.5. Under Indiana Code section 35-41-1-10, a “dwelling” is “a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person’s home or place of lodging.” In determining what constitutes a dwelling, this court has given dwelling its “plain and usual meaning.” *White v. State*, 846 N.E.2d 1026, 1031 (Ind. Ct. App. 2006). The “operative word defining ‘dwelling’ is a ‘home’—a settled residence house for a family and their personal

possessions.” *Id.* (quoting *Wyatt v. State*, 446 N.E.2d 644, 645 (Ind. Ct. App. 1983)). We also affirmed in *White* that a house can still be considered a dwelling even when the owner is moving into or out of it. *White*, 846 N.E.2d at 1031.

Here, Snead does not dispute that Douglas and Diggins’ apartment was a dwelling; instead, he argues that he did not have the culpability to commit residential entry because he thought that Douglas and Diggins had already moved out of the apartment. Under this interpretation, he did not “knowingly or intentionally” break into a dwelling because he did not know the apartment was still a dwelling. I.C. § 35-43-2-1.5. We cannot agree with Snead’s argument. In Snead’s brief, he admits that he already argued at trial that he “in effect made a ‘mistake of fact.’” (Appellant’s Br. p. 7). From this statement, it is evident that the jury already considered Snead’s argument that he made a mistake of fact and rejected that possibility. In essence, then, Snead is asking us to reweigh the evidence considered by the jury, which we cannot do.

Moreover, there is sufficient evidence in the record to support the trial court’s judgment because evidence indicates that Snead knew Douglas and Diggins had not finished moving out. Douglas and Diggins testified at trial that they had left a couch, a love seat, two televisions, a radio system, clothes, two air mattresses, and a microwave in the apartment, which would have indicated to Snead that the apartment was still occupied. In addition, neither Douglas nor Diggins told Snead that their utilities were about to be shut off. They also both testified that they locked the door to their apartment before they left for the night. Viewing this evidence in the light most favorable to the trial court, it is sufficient to prove

beyond a reasonable doubt that Snead knew Douglas and Diggins were still living in the apartment.

CROSS-APPEAL

Next, the State argues that the trial court erroneously sentenced Snead. Specifically, the State notes that the trial court treated Snead's plea of guilty to being a habitual offender as a separate consecutive sentence, which we held is erroneous in *Barnett*. *Barnett v. State*, 834 N.E.2d 169, 173 (Ind. Ct. App. 2005). Instead, "[a] habitual offender finding does not constitute a separate crime nor does it result in a separate sentence. . . . [I]t results in a sentence enhancement imposed upon the conviction of a subsequent felony." *Id.* at 173. For this reason, the State requests that we remand this cause to the trial court for correction of Snead's sentence. We agree with the State's argument and remand for resentencing in accordance with this opinion.

CONCLUSION

Based on the foregoing, we conclude that (1) the State presented sufficient evidence to prove beyond a reasonable doubt that Snead committed residential entry, and (2) Snead's sentence is erroneous. We remand for resentencing.

Affirmed and remanded with instructions.

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