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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL W. BAKER,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 89A01-1010-CR-536

APPEAL FROM THE WAYNE CIRCUIT COURT
The Honorable David A. Kolger, Judge
Cause No. 89C01-0809-FB-017

June 17, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Following a jury trial, Michael Baker was convicted of burglary, a Class B felony, and found to be an habitual offender. He was sentenced to the Indiana Department of Correction for an aggregate of forty years. Baker appeals, raising the sole issue of whether the evidence was sufficient to support his conviction of burglary. Concluding there is insufficient evidence of Baker's intent to commit a felony and therefore insufficient evidence of burglary, we reverse the burglary conviction and the habitual offender finding which is based on it. Further concluding there is sufficient evidence of the lesser-included offense of criminal trespass, however, we remand for entry of judgment of conviction and sentence on that offense.

Facts and Procedural History

On the morning of January 22, 2008, Robert Porter arrived at Harvest Time Tabernacle Church in Richmond, Indiana, to pray before going to work. Porter is a member of the church and he has a key to gain entrance. As he went into the church basement, he noticed a broken window and blood around the window frame. He called Sam Scalf, pastor of the church, and the police. Scalf arrived first and the two men looked around the church. Two doors into the church had pry marks on them. In the basement kitchen, cabinets and drawers were open, and there were blood smears on some of the cabinet doors and drawers. Pastor Scalf testified there is nothing of value in the kitchen, just basic kitchenwares. Although there was sound and musical equipment in the sanctuary, there was no trail of blood or broken glass leading into the sanctuary or church office. Nothing was taken from the church and no one was found inside the church.

Police collected DNA evidence from the blood at the scene and identified Baker as the source.¹ The State charged Baker with burglary as a Class B felony because the building he allegedly entered was used for religious worship. The State also alleged Baker was an habitual offender. At the conclusion of the evidence, the jury was instructed on the elements of burglary and also on the elements of the included offense of criminal trespass. The jury found Baker guilty of burglary and Baker then admitted to the habitual offender allegation. The trial court sentenced Baker to fifteen years for the burglary conviction, enhanced by an additional twenty-five years for the habitual offender finding. Baker now appeals his conviction of burglary.

Discussion and Decision

I. Standard of Review

Our standard of review for sufficiency claims is well-settled: when we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Parahams v. State, 908 N.E.2d 689, 691 (Ind. Ct. App. 2009). We consider only the evidence supporting the verdict and any reasonable inferences therefrom to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the verdict, we will affirm. Id. It is the trier of fact's function to resolve conflicts in testimony and to determine the weight to be given to the evidence and the credibility of the witnesses. Yowler v. State, 894 N.E.2d 1000, 1002 (Ind. Ct. App. 2008).

¹ The parties stipulated at trial that Baker was the source of the DNA collected from the scene. See State's Exhibit 1.

II. Evidence of Intent to Commit Theft

Burglary is committed by a person who “breaks and enters the building or structure of another person, with intent to commit a felony in it” Ind. Code § 35-43-2-1.² Our supreme court has noted that to establish intent, the State must specify what felony the defendant intended to commit. Justice v. State, 530 N.E.2d 295, 296 (Ind. 1988). Intent to commit a given felony may be inferred from the circumstances, but may not be inferred from proof of breaking and entering alone. Id. at 297.

Baker contends there is no evidence of his intent to commit a felony inside the church. The State alleged Baker broke and entered the church to commit the felony of theft. See Appellant’s Appendix at 11. The State maintains that although it is true that nothing was taken from the church, it may be reasonably inferred from the circumstances that Baker intended to commit theft. The State specifically notes that Baker opened cabinet doors and drawers in the kitchen and that he left a trail of blood and broken glass around the stairs and kitchen. The State posits it was reasonable for the jury to infer that Baker opened the cabinets and drawers looking for something to steal and that he left without taking anything because he realized he was leaving blood evidence behind and because he could not find any valuable property that could be easily concealed and carried away from the church.

In Justice, the defendant broke and entered a home through a window by removing the screen and walked into the owner’s bedroom wearing socks on his hands. When the owner recognized him and called him by name, he turned and immediately left. The

² Burglary is presumptively a Class C felony, but is elevated to a Class B felony if, among other things, the building or structure which the defendant breaks and enters is used for religious worship. Ind. Code § 35-43-2-1(1)(B)(ii).

defendant was charged with burglary for breaking and entering the home with intent to commit theft therein. Our supreme court held there was insufficient evidence of intent to commit theft because “[e]vidence 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.” 530 N.E.2d at 297. Although the State argued that it was reasonable to infer the defendant wore socks on his hands because he intended to commit theft and did not want to leave fingerprints, the court agreed only that it supported a reasonable inference that he intended to commit some criminal offense, but not necessarily theft. Id. As there was no evidence the defendant touched, disturbed, or even approached any valuable property, the court reversed his conviction of burglary. Id.; see also Gebhart v. State, 531 N.E.2d 211, 212 (Ind. 1988) (reversing defendant’s conviction for attempted burglary where evidence defendant used a tire iron to break and enter a home and fled upon seeing the owner was “insufficient in probative value to warrant the conclusion of a rational trier of fact, to a moral certainty beyond a reasonable doubt, that [defendant] had the intent to steal from the house”).

More recently, in Freshwater v. State, 853 N.E.2d 941 (Ind. 2006), our supreme court summarized the holdings of Justice and Gebhart as “dictat[ing] 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. at 944. The defendant therein was observed unsuccessfully attempting to enter a car wash through two different doors and then, after disappearing from sight for a moment, reappeared inside the building. The building alarm sounded and the defendant ran out of the building and was soon apprehended by police. The car wash owner

testified there was nothing missing from the car wash and neither the office nor the cash register appeared to have been disturbed. The defendant's conviction of burglary was reversed for insufficient evidence. Although the State argued evidence is generally sufficient to show intent to steal where the defendant was found near or approaching valuable property when interrupted, the court noted this defendant was discovered by police outside the building and there was no evidence he was near or approaching anything valuable while in the car wash. No fact providing a solid basis to infer the defendant had the specific intent to commit a felony was proven: "[t]he time at and method by which [defendant] 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.

The facts of this case are strikingly similar to those in Freshwater. There is no dispute Baker was inside the church without permission. There is no dispute he opened cabinets and drawers in the church kitchen. However, there is no evidence that anything was missing from the church, that he touched any items in the kitchen cabinets or drawers, that he went anywhere else in the church, or that he went near anything valuable. Perhaps more importantly, unlike the defendants in Freshwater, Justice, or Gebhart, Baker was not interrupted in the act of breaking and entering before his intent could be manifested. Porter testified that when he entered the church, he did not hear anyone else in the building, and as he and Pastor Scalf looked around, they did not find Baker. Under these circumstances, we cannot say the State proved any fact that is strongly corroborative of Baker's intent to commit theft within the church. His burglary conviction, and the habitual offender determination which rested on it, are therefore reversed. See Deslover v. State, 734 N.E.2d 633, 635 (Ind. Ct. App. 2000) (holding

insufficient evidence to support burglary conviction when evidence showed only defendant broke and entered dwelling and fled upon being discovered), trans. denied.

When a conviction is reversed because of insufficient evidence, however, we may remand for the trial court to enter a judgment of conviction upon a lesser-included offense if the evidence is sufficient to support the lesser offense. Neville v. State, 802 N.E.2d 516, 519 (Ind. Ct. App. 2004), trans. denied. The jury in this case was instructed on the elements of criminal trespass, a Class A misdemeanor, as an included offense.

The instruction stated:

In order to prove the defendant guilty of Trespass, the State must prove beyond a reasonable doubt each of the following elements:

That between January 20, 2008 and January 22, 2008, the defendant did:

1. knowingly or intentionally;
2. interfere with the possession or use of the property of another person;
3. without the person's consent.

Appellant's App. at 126-27; see Ind. Code § 35-43-2-2(a)(4). Our supreme court has noted that where the State cannot establish intent to commit a particular underlying felony, criminal trespass is the appropriate charge. Justice, 530 N.E.2d at 296.

The evidence in this case showed Baker had no property interest in the church or anything in it; he was in the church without permission; and he broke a window, damaged two doors, and at least looked through the contents of the kitchen. This is sufficient evidence from which it could be concluded Baker interfered with the possession or use of the property of another without consent. We therefore remand this case to the trial court with instructions to enter a conviction and sentence for the lesser included offense of criminal trespass, a Class A misdemeanor. See Gilliam v. State, 508 N.E.2d 1270, 1271

(Ind. 1987) (reversing conviction of attempted burglary because the State had not presented any evidence from which the jury could infer the nature of the felony the defendant intended to commit when he broke and entered a home and remanding with instructions “to enter a conviction for the lesser included offense of attempted criminal trespass, upon which an instruction had been given.”).

Conclusion

There is insufficient evidence of Baker’s intent to commit theft within the church and his conviction of burglary, as well as the corresponding finding that he is an habitual offender, are reversed. There is sufficient evidence that Baker committed criminal trespass, however, and we therefore remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

NAJAM, J., and CRONE, J., concur.