ATTORNEY FOR APPELLANT:

ELLEN M. O'CONNOR
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MELLISICA K. FLIPPEN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

FRED GARNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0702-CR-155
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
The Honorable Steven Rubick, Commissioner
Cause No. 49G04-0606-FB-117055

January 28, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Fred Garner appeals from his conviction for Class B felony Burglary[1] and his sentence enhancement by virtue of his status as a habitual offender,[2] contending that both were supported by insufficient evidence. We affirm.

FACTS

At approximately 10:30 to 11:00 p.m. on June 26, 2006, Marvin Bacon, a deacon at the Christ Temple Apostolic Faith Assembly ("Christ Temple") in Indianapolis, received a telephone call from Christ Temple's alarm company and was told that an interior door was open. Soon after Bacon arrived, he noticed a hole in an exterior door, which prompted him to request the alarm company to contact police.

Indianapolis Police Officer Marlin Sechrist soon arrived and entered Christ Temple. In a downstairs room, Officer Sechrist saw Garner kicking a door, and, when Officer Sechrist yelled, "Police! Don't move!", Garner ran off. Tr. p. 62. Officer Sechrist found Garner hiding in a utility closet and, after using his taser on him, apprehended him. Although no Christ Temple property was found on Garner and none was discovered missing, several doors in Christ Temple had been damaged, apparently kicked in, along with a lattice that obstructed access to a cloak room. In an office, several drawers in filing cabinets had been opened. State's Ex. 13. The office "looked like it had been searched[.]" Tr. p. 80.

The State charged Garner with Class B felony burglary, Class D felony criminal mischief, and with being a habitual offender. A jury found Garner guilty of burglary and

[1] Ind. Code § 35-43-2-1 (2006).

[2] Ind. Code § 35-50-2-8 (2006).

criminal mischief and, in the second phase of a bifurcated trial, the trial court found Garner to be a habitual offender. The trial court sentenced Garner to fifteen years of incarceration for burglary,[3] enhanced by ten years by virtue of Garner's status as a habitual offender.

DISCUSSION AND DECISION

Sufficiency of the Evidence

Standard of Review

Garner contends that the State produced insufficient evidence to sustain his burglary conviction and the finding that he is a habitual offender. Our standard of review for challenges to the sufficiency of the evidence supporting a criminal conviction is well-settled:

> In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the verdict and reasonable inferences drawn therefrom. We will affirm the conviction if there is probative evidence from which a reasonable jury could have found Defendant guilty beyond a reasonable doubt.

Vitek v. State, 750 N.E.2d 346, 352 (Ind. 2001) (citations omitted).

A. Burglary

Indiana Code section 35-43-2-1 provides, in relevant part, that "[a] person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, … a Class B felony if … the building or structure is a … structure used for religious worship[.]" Garner claims only that the State failed to

[3] Prior to sentencing, the State filed a motion to dismiss the criminal mischief count, which motion the trial court granted.

establish that he broke and entered Christ Temple with the intent to commit a felony therein, specifically theft.

In order to prove this element of burglary, the State was required to establish that Garner, at the time he broke into Christ Temple, had the intent to "exert[] unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use[.]" Ind. Code § 35-43-4-2(a) (2006). "To establish intent to commit a felony the State must specify what felony the defendant intended to commit." *Justice v. State*, 530 N.E.2d 295, 296 (Ind. 1988).

While intent to commit a given felony may be inferred from the circumstances, some fact in evidence must point to an intent to commit a specific felony. *Gilliam v. State*, 508 N.E.2d 1270, 1271 (Ind. 1987). Intent to commit a felony may not be inferred from proof of breaking and entering alone. *Timmons v. State*, 500 N.E.2d 1212, 1215-16 (Ind. 1986). 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. *Sargent v. State*, 156 Ind. App. 469, 474, 297 N.E.2d 459, 462 (1973). "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." *Justice*, 530 N.E.2d at 297. "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." *Id*. (quoting *Gilliam*, 508 N.E.2d at 1271).

We conclude that a solid basis exists to support a reasonable inference that Garner broke and entered Christ Temple with the intent to commit theft therein. Although no Christ Temple property was either found missing or on Garner, the evidence supports a reasonable inference that Garner's object was theft and not something else, such as vandalism. In the music office, several drawers had been opened and apparently searched, but not emptied onto the floor. Doors and a lattice were damaged when Garner gained access to the music office, a robe room, a nurse's station, and a cloak room, but we find it particularly significant that there is no evidence that any of the *contents* of those rooms were damaged, with only the music office even being disturbed. Indeed, the *only* property damaged in the incident occurred to doors or other objects that impeded Garner's access to other areas of Christ Temple. This lack of additional damage belies the notion that Garner's intent was purely destructive. All in all, the evidence suggests a methodical, room-to-room survey of Christ Temple's basement in search of items worthy of theft, and, to the extent that Garner damaged Christ Temple's property, it was not the wanton and random damage of a vandal, but, rather, damage caused by his attempts to gain access to other rooms.

Garner relies on the Indiana Supreme Court's decision in *Freshwater v. State*, 853 N.E.2d 941 (Ind. 2006), in which the court concluded that Freshwater's burglary conviction was not supported by sufficient evidence. In our view, however, *Freshwater* is easily distinguished. In that case, Freshwater successfully broke into a car wash, only to run off when an alarm sounded. *Id*. at 942. No car wash property was found on Freshwater, and the owner of the car wash verified that nothing was missing and that the

office did not appear to have been disturbed at all. *Id*. Essentially, the evidence indicated that Freshwater succeeded only in breaking into the car wash before the alarm caused him to flee. Faced with this evidence of mere entry, the *Freshwater* Court concluded that the State had failed to prove a specific fact supporting a reasonable inference that Freshwater had the specific intent to commit theft, noting that "[t]he time at and method by which [he] entered the car wash suggest nothing more than that he broke in." *Id*. at 944.

Here, in contrast to the mere entry in *Freshwater*, the evidence shows damage to several interior doors, a dearth of damage to any other property, and an office that appears to have been rifled. It is of no significance that Garner did not actually take anything from Christ Temple and was not found in the vicinity of valuables; the fact that he did not take anything does not mean that he did not *intend* to. It could well be that Garner was interrupted before finding anything worth taking or that Christ Temple contained no such items. In short, this evidence goes beyond mere entry and supports a reasonable inference that Garner intended to commit theft within Christ Temple.

B. Habitual Offender

The trial court found Garner to be a habitual offender by virtue of prior unrelated convictions for theft in 1992 and burglary in 2002. Garner challenges only the finding that he has a prior conviction for theft. Indiana Code section 35-50-2-8 provides, in relevant part, that "[a] person is a habitual offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions." Garner argues, essentially, that the State was required to produce an

abstract of judgment to prove his prior theft conviction, and relies on *Abdullah v. State*, 847 N.E.2d 1031 (Ind. Ct. App. 2006). *Abdullah*, however, does not stand for the proposition that an abstract of judgment is necessary, only that, if the abstract is the only document offered tending to indicate a conviction, it must be signed pursuant to Indiana Trial Rule 58. *See id*. at 1034 ("[W]e cannot agree … that a conviction can be proved with an unsigned abstract of judgment absent any other supporting documents showing the fact of a conviction.").

Indeed, there are myriad ways in which the State may elect to prove a prior unrelated felony conviction. *Id*. As we have noted, "[p]rosecutors routinely admit a wide variety of readily-available evidence for this purpose, including but certainly not limited to copies of sentencing orders, case chronologies, plea agreements, testimony from prosecutors or others involved in or witness to the prior conviction, or transcripts from the convicting court's proceedings." *Id*. "If the evidence yields logical and reasonable inferences from which the finder of fact may determine beyond a reasonable doubt that it was a defendant who was convicted of the prior felony, then a sufficient connection has been shown." *Hernandez v. State*, 716 N.E.2d 948, 953 (Ind. 1999) (citing *Pointer v. State*, 499 N.E.2d 1087, 1089 (Ind. 1986)).

Here, the State produced a certified charging information and certified chronological case summary ("CCS") for cause number 49G01-9106-CF-75123,[4] both of which listed the defendant as "Fred Garner." State's Exs. 19. The CCS clearly indicates

[4] The charging information lists one count of Class B felony robbery, and the CCS indicates that the State ultimately moved to add a Class D felony theft charge as Count III, which motion the trial court granted.

that Garner pled guilty to theft, that judgment of conviction was entered on his guilty plea, and that he was subsequently sentenced. In the absence of any indication that the Fred Garner named in the documents is not the same one before us today or that the documents produced by the State are inaccurate or not authentic, we find the above evidence sufficient to support the trial court's habitual offender finding. *See Tate v. State*, 835 N.E.2d 499, 512 (Ind. Ct. App. 2005) (concluding that certified information and CCS bearing the same cause number and name were sufficient to prove prior conviction).

The judgment of the trial court is affirmed.

MATHIAS, J., concurs.

NAJAM, J., dissents with opinion.

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	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

NAJAM, Judge, dissenting.

I respectfully dissent. It is well-settled 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." Justice v. State, 530 N.E.2d 295, 297 (Ind. 1988). As noted by the majority, "[e]vidence of breaking and entering and flight are not probative unless tied to some other evidence which is strongly corrobative of the actor's intent." Id. That 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." Id. (quoting Gilliam v. State, 508 N.E.2d 1270, 1271 (Ind. 1987)).

In Justice, the defendant broke into and entered a home while wearing black socks on his hands. Justice came upon the homeowner in her bedroom. When the homeowner

recognized Justice and called him by name, he fled. Reversing Justice's conviction for burglary with intent to commit theft, our supreme court held that, "[w]hile there [was] evidence of breaking and entering, and evidence of flight in this case, there [was] no evidence that Justice touched, disturbed or even approached any valuable property." Id. The court further observed that Justice's "precautions designed to avoid leaving fingerprints point[ed] to illegal intent, [but] they [did] not by themselves establish intent to commit a particular felony." Id.

Here, Garner broke into and entered the church late at night, kicking in several doors and rifling through filing cabinets and a standing cabinet. Garner left drawers and a cabinet door open and rifled through those areas. Officers Marlin Sechrist and Danny Reynolds testified that Garner did not stop when ordered, and they were subsequently compelled to taser Garner to stop him. Officer Reynolds also testified that Garner was belligerent and "smelled of alcohol." Transcript at 79. That evidence does not establish that Garner "searched" the drawers and cabinet rather than merely creating disorder in them.

As in Justice, the State did not introduce evidence linking Garner to any valuable property in the church. And there was no testimony or other evidence to show that Garner "touched, disturbed, or even approached any valuable property" in any of the cabinets he searched, nor any evidence that he was looking for valuable property. See Justice, 530 N.E.2d at 297. Under the majority's reasoning, the mere act of disturbing or damaging property is equivalent to an intent to commit theft. Instead, such vandalism equates only to criminal mischief, of which Garner was also convicted, and he does not

appeal from that conviction.[5] Thus, I believe that the State failed to demonstrate beyond a reasonable doubt that Garner intended to commit theft.

Further, the majority equates ransacking with intent to commit theft in a simple "if A, then B" analysis. The majority opines, without proof, that Garner was engaged "in search of items worthy of theft." While not rising to the level of double jeopardy, the majority is using the same actual evidence to support two crimes, criminal mischief and burglary. Thus, I respectfully dissent.

[5] A person who "recklessly, knowingly, or intentionally damages or defaces the property of another person without the other person's consent . . . commits criminal mischief, a Class B misdemeanor. . . ." Ind. Code § 35-43-1-2(a). A person who "recklessly, knowingly, or intentionally damages . . . a structure used for religious worship . . . without consent of the owner, possessor, or occupant of the property that is damages, commits institutional mischief, a Class A misdemeanor. . . ." Ind. Code § 35-43-1-2(b).