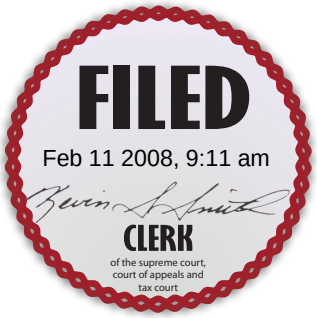


ATTORNEY FOR APPELLANT:

**DAVID A. HAPPE**
Lockwood Williams & Happe
Anderson, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**
Attorney General Of Indiana

**IAN MCLEAN**
Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| RONNIE MURRY, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0706-CR-458 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No.49G02-0701-FB-7321

**February 11, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issues

Following a jury trial, Ronnie Murry was convicted of burglary, a Class B felony, and resisting law enforcement, a Class A misdemeanor. On appeal, Murry raises three issues, which we restate as whether the trial court improperly denied Murry's motion to dismiss following the State's dismissal of a previous case involving the same conduct; whether sufficient evidence supports Murry's burglary conviction; and whether the jury's guilty verdict for burglary and not-guilty verdict for theft are impermissibly inconsistent. Concluding the trial court properly denied Murry's motion to dismiss, sufficient evidence supports Murry's burglary conviction, and the jury's verdicts are not impermissibly inconsistent, we affirm.

## Facts and Procedural History

On May 21, 2006, Robin McMahan drove to the home of William Wilson, who had asked McMahan to take care of his yard while he was in Florida. When McMahan arrived at Wilson's house, she noticed that one of the windows was open and heard noise inside the house. She called the police and drove down the street.

Officer Tom Ashcraft, of the Lawrenceville Police Department, arrived on the scene and observed Murry attempt to exit the house through a window. Officer Ashcraft instructed Murry to stop and display his hands, but Murry disregarded the instructions and re-entered the house. Officer Ashcraft alerted the other officers on the scene, who also began shouting at Murry to exit the house. After determining that firearms were present in Wilson's house, police called the local SWAT team. After SWAT team negotiators were unsuccessful in their

attempts to make contact with Murry, officers entered the house, which they found in "total chaos," with "stuff all over the place . . . . Everything had been just trashed or thrown all over the floor, clothes, canisters, all the cabinets had been opened. It was just complete disarray." Transcript at 112 (testimony of Officer Mark Osborn).

Officers eventually discovered Murry in a storage space above a bedroom closet. Murry refused to put his hands in plain view, and officers had to pull him out of the closet. Officers discovered a knife that apparently had been in Murry's possession.

On May 22, 2006, the State charged Murry with burglary, theft, and resisting law enforcement. On May 23, 2006, the trial court held an initial hearing, at which Murry requested a speedy trial. The trial court scheduled the trial for July 20, 2006. On June 30, 2006, the State filed an information alleging that Murry was an habitual offender. On July 12, 2006, Murry requested a continuance of the July 20 trial, and the trial court rescheduled the jury trial for August 24, 2006. On that date, the State moved to dismiss the charges, as Wilson, an important witness,[1] was unable to make it back from Florida to testify. Murry did not object to the motion, but requested that it be made with prejudice. The trial court granted the motion to dismiss, but indicated that it would not be with prejudice.

On January 19, 2007, the State again charged Murry with burglary, theft, and resisting law enforcement. On April 5, 2007, the State filed an information alleging that Murry was an habitual offender. On April 9, 2007, Murry filed a motion to dismiss all charges. On April 18, 2007, the trial court held a hearing on this motion and subsequently denied it. On April 19, 2007, the trial court held a jury trial. The jury found Murry guilty of burglary and

resisting law enforcement, but not guilty of theft. Murry then pled guilty to being an habitual offender. On April 27, 2007, the trial court sentenced Murry to ten years for burglary, enhanced by ten years because of his habitual offender status, and one year for resisting law enforcement, to run concurrently to Murry's burglary sentence. Murry now appeals.

## Discussion and Decision

### I. Murry's Motion to Dismiss

A prosecutor's ability to dismiss and then refile charges is governed by statute. "Upon motion of the prosecuting attorney, the court shall order the dismissal of the indictment or information." Ind. Code § 35-34-1-13(a). "In any case where an order sustaining a motion to dismiss would otherwise constitute a bar to further prosecution of the crime charged, unless the defendant objects to dismissal, the granting of the motion does not bar a subsequent trial of the defendant on the offense charged." Ind. Code § 35-34-1-13(b).

A trial court is required to grant a prosecutor's motion to dismiss. Willoughby v. State, 660 N.E.2d 570, 577 (Ind. 1996). Such a dismissal is not necessarily a bar to a refiling of charges. Davenport v. State, 689 N.E.2d 1226, 1229 (Ind. 1997), corrected in part on reh'g, 696 N.E.2d 870 (Ind. 1998). Refiling the charges will not be permitted "if doing so will prejudice the substantial rights of the defendant." Id. "[I]n cases where dismissal occurs prior to jeopardy attaching . . . there is no bar to refiling an information charging the same offense in identical terms." Willoughby, 660 N.E.2d at 577. Our supreme court has similarly stated that "the State does not necessarily prejudice a defendant's substantial rights if it dismissed the charge because it is not ready to prosecute and then refiles an information

---

[1] Wilson was to testify that Murry did not have permission to be in Wilson's house.

for the same offense." Davenport, 689 N.E.2d at 1229.

As the State dismissed the original charges before the jury was impaneled, jeopardy had not yet attached in the original proceeding. See Willoughby, 660 N.E.2d at 577; Ind. Code § 35-41-4-3. Moreover, as the State charged Murry with the same offenses, he could "receive a fair trial on the same facts and employ the same defense in the second trial as in the first." Davenport, 689 N.E.2d at 1229; see also Davenport v. State, 696 N.E.2d 870, 871 (Ind. 1998) (opinion on reh'g) (recognizing that the case before it "significantly differs from the previous cases [in which refiling was permitted] in that the State used its inherent power and the administrative power of the trial court to force defendant to discard his prior preparation for trial and begin anew on a trial with different charges, strategies, and defenses"). Although the delay may have caused him some inconvenience, Murry has failed to point to any prejudice on his part. See State v. Joyner, 482 N.E.2d 1377, 1379 (Ind. Ct. App. 1985) ("The inconvenience and financial hardship in Joyner's case, while regrettable do not prejudice his substantial rights."). Murry has not alleged that the statute of limitations had run or that his right to a speedy trial was somehow affected. See Dennis v. State, 412 N.E.2d 303, 305 (Ind. Ct. App. 1980) (affirming the trial court's denial of a defendant's motion to dismiss refiled charges where the defendant was unable to "show expiration of the statute of limitations, denial of speedy trial rights or that jeopardy attached in the prior proceeding").

Murry also argues that the State dismissed the charges "to avoid the trial court's authority," citing Davenport for support. See Appellant's Br. at 12. In Davenport, the State

received an adverse ruling on its motion to amend its complaint by adding additional counts. In response, the State moved to dismiss the complaint, refiled with the additional counts, and was granted transfer to a different court. 689 N.E.2d at 1230. Our supreme court reversed the defendant's subsequent convictions of the additional charges, noting that "[b]ecause of a sleight of hand, the State was able to escape the ruling of the original court and pursue the case on the charges the State had sought to add belatedly." Id. Here, on the other hand, the State charged Murry with the same offenses in both proceedings, did not receive an adverse ruling before moving to dismiss,[2] and kept the case in the same court. In short, the State committed no sleight of hand and in no way sought to avoid the trial court's authority.

We recognize that the State could have done a better job of ensuring that it was prepared on the date of Murry's original trial, and that Murry may be dissatisfied with the procedural posture of his case. However, absent some showing that his substantial rights were prejudiced, Murry's "discontent must be subordinated to the public policy favoring the prosecution of persons accused of committing criminal offenses when a fair trial is available." Gregor v. State, 646 N.E.2d 52, 54 (Ind. Ct. App. 1994). We conclude the trial court properly denied Murry's motion to dismiss.

## II. Sufficiency of the Evidence

When reviewing a claim of insufficient evidence, we will not reweigh evidence or

---

[2] We recognize Murry's argument that the prosecutor may have anticipated that the trial court would deny a motion for continuance. We first note that such an argument is speculatory. Secondly, the denial of such a motion is hardly the same as the action taken by the trial court in Davenport. Although the State wished to call Wilson in order to establish that Murry did not have permission to be in the house, nothing in the record indicates that Murry had any "reasonable cause to believe that he in fact had any consent to enter the home." Hicks v. State, 510 N.E.2d 676, 680 (Ind. 1987); see Griesinger v. State, 699 N.E.2d 279, 282

judge witnesses' credibility. Grim v. State, 797 N.E.2d 825, 830 (Ind. Ct. App. 2003). We will consider only the evidence favorable to the judgment and the reasonable inferences drawn therefrom. Id. We will affirm a conviction if the lower court's finding is supported by substantial evidence of probative value. Id. Our supreme court has recently summarized our standard of review when assessing claims of insufficient evidence.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

Murry argues that insufficient evidence supports his burglary conviction. One commits burglary when he "breaks and enters the building or structure of another person, with intent to commit a felony in it." Ind. Code § 35-43-2-1. Murry argues that insufficient evidence exists that he broke into the house and that he had the intent to commit a felony within the house.

With regard to the breaking element, "the use of even the slightest force to gain entry establishes the breaking element in the offense of burglary." Calhoon v. State, 842 N.E.2d

---

(Ind. Ct. App. 1998) (recognizing that consent to enter is a defense to a residential entry charge, but not an

432, 435 (Ind. Ct. App. 2006). The occurrence of a breaking may be shown by purely circumstantial evidence. Payne v. State, 777 N.E.2d 63, 66 (Ind. Ct. App. 2002). Here, Murry was discovered in a home in which a window screen had been pushed in. Pots and pans, which appeared to have been hung near this window, were on the floor near the screen. Removing a screen from a home to gain entry constitutes an act sufficient to satisfy the breaking element of the burglary statute. See England v. State, 530 N.E.2d 100, 101 (Ind. 1988) (indicating that "[t]he term 'breaking' as used in our statute . . . includes . . . removing a window screen") (quoting Barrick v. State, 233 Ind. 333, 339, 119 N.E.2d 550, 553-54 (1954)); Gilliam v. State, 509 N.E.2d 815, 817 (Ind. 1987). Murry argues that although the evidence may indicate that someone broke into Wilson's home, no evidence indicates that Murry actually committed a breaking in order to enter the house. Murry points to Wilson's testimony that property was missing from his house that was not recovered, and that therefore "[t]he inescapable conclusion to be drawn from these facts is that someone broke and entered the property prior to the incident with which [Murry] is charged." Appellant's Brief at 7. Although this conclusion is possible, it is not "inescapable." Instead, we conclude a reasonable jury could have inferred that Murry had gained access to the house through the window, which he had to push, pry, or otherwise move in order to open.

With regard to the intent element, the intent to commit a felony may be established by circumstantial evidence regarding the commission of the crime. Webster v. State, 708 N.E.2d 610, 615 (Ind. Ct. App. 1999), trans. denied. "[A]lthough the fact of breaking and entering is not itself sufficient to prove entry with intent to commit a felony, such intent may

---

element of the crime), trans. denied.

be inferred from the defendant's subsequent conduct once inside the premises." Murray v. State, 761 N.E.2d 406, 410 (Ind. 2002). "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." Freshwater v. State, 853 N.E.2d 941, 943 (Ind. 2006) (quoting Justice v. State, 530 N.E.2d 295, 297 (Ind. 1988)).

Here, the State presented evidence that Murry was in a home in which he did not have permission to be. A window to the house had been forced open and the contents of the home had been strewn around; drawers, cupboards, and file cabinets were open; and a stereo system was unplugged and sitting on a chair. Murry was seen attempting to leave this house through a window, and he refused police requests to exit the house, choosing instead to hide in a storage space above a closet. Based on this evidence, the jury clearly could have reasonably concluded that Murry entered Wilson's house with the intent to commit a felony, namely, theft.

We recognize that there are possible sets of circumstances under which Murry could have been discovered hiding in Wilson's closet, after attempting unsuccessfully to flee from a house which had been ransacked and which had signs of forced entry, and not committed burglary. However, "a burglary conviction may rely on circumstantial evidence, and does not need to exclude every reasonable hypothesis of innocence so long as an inference may be reasonably drawn that supports the factfinder's conclusions." Calhoon, 842 N.E.2d at 434. It suffices to conclude an inference that Murry broke into Wilson's house with the intent to commit theft can reasonably be drawn from the evidence. Sufficient evidence supports

Murry's conviction.

III. Consistency of the Jury Verdicts

Under federal law, "consistency in the verdict is not necessary." Dunn v. United States, 284 U.S. 390, 393-94 (1932) (recognizing that verdicts "cannot be upset by speculation or inquiry" into whether the verdict is the result of compromise or mistake). However, our supreme court has rejected Dunn's approach, indicating that the court "has looked and will continue to look at verdicts to determine if they are inconsistent." Marsh v. State, 271 Ind. 454, 460, 393 N.E.2d 757, 761 (1979).

In addressing claims of inconsistent jury verdicts "we will take corrective action only when the verdicts are extremely contradictory and irreconcilable." Powell v. State, 769 N.E.2d 1128, 1131 (Ind. 2002). To uphold inconsistent or illogical jury verdicts, the guilty verdicts must be supported by sufficient evidence. Baber v. State, 870 N.E.2d 486, 490 (Ind. Ct. App. 2007), trans. denied. We will conclude that jury verdicts are inconsistent "only where they cannot be explained by weight and credibility assigned to the evidence." Neuhausel v. State, 530 N.E.2d 121, 123 n.2 (Ind. Ct. App. 1988). We recognize jury verdicts that seem inconsistent at first blush may be explained by the jury's province to accept, reject, and weigh various pieces of evidence. See Carmona v. State, 827 N.E.2d 588, 592-93 (Ind. Ct. App. 2005). If we conclude that jury verdicts are impermissibly inconsistent, the remedy is to remand for a new trial on the charge or charges of which the defendant was convicted, and to bar retrial on the charges of which he was found not guilty. See Owsley v. State, 769 N.E.2d 181, 187 (Ind. Ct. App. 2002) (adopting the view taken in

DeSacia v. State, 469 P.2d 369, 381 (Alaska 1970), and rejecting that of People v. Hoffman, 655 P.2d 393, 396 (Colo. 1982), in which the court directed that the conviction be vacated and a judgment of acquittal be entered), trans. denied. It appears that only one published Indiana decision has reversed a conviction based on inconsistent jury verdicts. See Owsley, 769 N.E.2d at 183. In Owsley, a panel of this court reversed the defendant's conviction of conspiracy to deal cocaine based on inconsistent verdicts where the jury found the defendant not guilty of possession of cocaine and dealing cocaine. Id. at 182. The court noted that these verdicts indicated that the State failed to prove that the defendant possessed the cocaine, but proved that the defendant provided a third party with the cocaine. Id. at 186. Under these circumstances, the court held the defendant's conviction for conspiracy to deal cocaine "cannot be rationally reconciled with the acquittal for possession of cocaine." Id. at 185.[3]

Here, the jury found Murry guilty of burglary, but not guilty of theft. One commits burglary when he "breaks and enters the building or structure of another person, with intent to commit a felony in it." Ind. Code § 35-43-2-1. One commits theft when he "knowingly or intentionally exerts 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. Therefore,

[3] The court recognized that the verdicts were likely the result of leniency on the part of the jury, and noted that in systems that permit inconsistent verdicts, such room for leniency is seen as beneficial. Id. at 186 n.4. We also wish to point out that disallowing such lenient verdicts seems to contravene Article I, section 19 of the Indiana Constitution, which provides: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Our supreme court has held that pursuant to this article, "a jury is not bound to convict even in the face of proof beyond a reasonable doubt." Bivins v. State, 642 N.E.2d 928, 946 (Ind. 1994) (citing Peck v. State, 563 N.E.2d 554, 560 (Ind. 1990)), cert. denied, 516 U.S. 1077 (1996).

the offenses have different elements, and a verdict of acquittal for theft is not necessarily inconsistent with a verdict of guilty for burglary. See McCovens v. State, 539 N.E.2d 26, 30 (Ind. 1989) (concluding conviction of burglary was not inconsistent with acquittal of theft, as crimes have different elements); cf. Jackson v. State, 576 N.E.2d 607, 611 (Ind. Ct. App. 1991) (concluding jury verdicts were not inconsistent where offenses required proof of different elements).

The basis for the theft charge was a jar of currency found outside the house. See Appellant's Appendix at 20-21 (State's charging information indicating that Murry "exercised unauthorized control over . . . a jar of United States currency"). Murry argues that the verdicts in this case are impermissibly inconsistent because "the jar must have been how the jury concluded [Murry] committed burglary." Appellant's Br. at 11. However, the jury had before it other evidence from which it could have concluded Murry broke into Wilson's house with the intent to commit a felony. Murry was found inside the house, which had been ransacked and in which valuables had been stacked in different areas. Without evidence of the jar, which was found outside the house, the jury had evidence from which it could have inferred the requisite intent. Like in McCovens, "[t]he jury could have had a reasonable doubt as to whether [the defendant] exercised unauthorized control of the property but still could have believed that he broke into the grounds with the intent to commit a felony." 539 N.E.2d at 30; cf. Wilson v. State, 511 N.E.2d 1014, 1018-19 (Ind. 1987) ("The jury could have had a reasonable doubt as to whether appellant broke into the church, but this doubt

---

Nonetheless, as we recognized in Owsley, our supreme court has made clear that we are to review jury verdicts for consistency. 769 N.E.2d at 186 n.4, 188.

would not have precluded the jury from finding that appellant exerted unauthorized control over the property of another with the intent to deprive them of its value."). Indeed, the jury could have found that Murry had nothing to do with the jar and still found the requisite elements of burglary. We conclude that the jury's finding Murry guilty of burglary is not impermissibly inconsistent with its finding that the State failed to prove Murry had exercised unauthorized control over the jar.

## Conclusion

We conclude the trial court properly denied Murry's motion to dismiss, as the State's prior dismissal of charges against Murry did not preclude its refiling of identical charges. We also conclude sufficient evidence exists to support Murry's burglary conviction and the jury's verdicts are not impermissibly inconsistent.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.