COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0530-CR **Cir. Ct. No. 01-CF-2**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON E. FLADHAMMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Dykman, Roggensack and Deininger, JJ.

¶1 DEININGER, J. Jason Fladhammer appeals a judgment convicting him of burglary and nonconsensual entry of a locked building. He challenges only the burglary conviction, arguing that the State presented insufficient evidence of his intent to steal to support the jury's guilty verdict. We disagree and affirm.

BACKGROUND

¶2 At approximately 10:00 p.m. on Halloween night, Fladhammer and Megan Ives drove to the Bloomingdale Church, which sits atop a steep hill just outside of a residential area in rural Vernon County. Ives testified at trial that their initial plan was to go to a cemetery next to the church to "feel spooky." Their plans changed, however, after Fladhammer mentioned a rumor that an "arsenal of guns" was located in the church. Fladhammer and Ives walked around the church and observed a "red and green light" on a door which they believed to be an alarm. With Ives's help, Fladhammer removed a basement window by using keys to push down clips holding it in place.

¶3 Fladhammer did not testify at trial. A Vernon County Sheriff's Department investigator testified that Fladhammer had admitted to entering the church building through the removed window. Fladhammer also told the investigator that he had used car keys to remove the window so as to not leave fingerprints. Fladhammer said that after entering the basement through the window, he looked around for "a couple minutes, turned the [electrical] breaker off and left through the door," which triggered an alarm. In response to questions from the investigator, Fladhammer said that his purpose in entering the church was to look at the arsenal of guns rumored to be there. He also claimed that he wanted to see if there were ghosts in the church, and he flatly denied an intent to steal any of the guns he was hoping to see in the church.

¶4 After the alarm sounded as Fladhammer exited the church via the door, he and Ives left the area in his van. A nearby resident heard the alarm go off at the church and went to investigate. He saw Fladhammer's van and followed it. The witness testified that he drove 70 or 75 miles per hour before he caught up

with the van. He obtained the van's license plate number and provided it to police the next morning. He also accompanied the church caretaker on an inspection of the church, where they found the main door open to the basement, a window pushed out and the "breaker shut off." He said that nothing was discovered to have been taken from the church.

¶5 The State charged Fladhammer with nonconsensual entry of a locked building, a misdemeanor, and with burglary, alleging he entered the church "without consent and with intent to steal." He pled not guilty to both, and the case was tried to a jury. The jury returned a guilty verdict on both counts, and the court entered a judgment of conviction. Fladhammer appeals, challenging only his conviction for felony burglary.

ANALYSIS

¶6 Fladhammer's sole contention is that the State did not present sufficient evidence for the jury to find him guilty of burglary. Specifically, he claims the State failed to prove his "intent to steal."[1] Our task, therefore, is to determine whether the evidence at trial, viewed most favorably to the State and to the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). In doing so, we must keep in mind that the "'credibility of the witnesses and the weight of the evidence is for the trier of fact,'" and we must

[1] Burglary, as defined in WIS. STAT. § 943.10 (1999-2000), "is committed by one who intentionally enters a building without the consent of the person in lawful possession and with intent to steal." WIS JI—CRIMINAL 1421 (footnote omitted). Fladhammer did not contest at trial that he had entered the church without consent, only that he did so with the intent to steal.

adopt all reasonable inferences which support the jury's verdict. ***Id***. at 504 (citation omitted).

¶7 This means that even if competing inferences could be drawn from the "historical facts" in the record, one consistent with guilt and the other with innocence, the jury is at liberty to choose the former and may, "*within the bounds of reason*, reject that inference which is consistent with the innocence of the accused." ***Id***. at 506. Put another way, we may not substitute our judgment for that of the jury. Even if we believe that the jury "should not have found guilt based on the evidence before it," we cannot overturn a guilty verdict unless "the evidence … is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id***. at 507. In short, Fladhammer bears a heavy burden in attempting to convince us to set aside the jury's verdict. *See* ***State v. Allbaugh***, 148 Wis. 2d 807, 808-09, 436 N.W.2d 898 (Ct. App. 1989).

¶8 Intent is "'rarely susceptible to proof by direct evidence,'" and "'must be inferred from the acts and statements of the person, in view of the surrounding circumstances.'" ***W.W.W. v. M.C.S.***, 185 Wis. 2d 468, 489, 518 N.W.2d 285 (Ct. App. 1994) (citations omitted).

> While it remains the law in this state that intent to steal will not be inferred from the fact of entry alone, it is also the law that "...additional circumstances such as time, nature of place entered, method of entry, identity of the accused and other circumstances, without proof of actual larceny, can be sufficient to permit a reasonable person to conclude the defendant entered with an intent to steal."

State v. Barclay, 54 Wis. 2d 651, 654, 196 N.W.2d 745 (1972) (footnote omitted). The supreme court in ***Gilbertson v. State***, 69 Wis. 2d 587, 230 N.W.2d 874 (1975), provided a slightly different listing of circumstances ("type of entry,

manner of entry, type of building entered, place of entry, time of entry, and defendant's conduct when arrested or interrupted") that "can be sufficient to permit a reasonable person to conclude that the defendant entered with an intent to steal." ***Id***. at 595.

¶9 Accordingly, we review the evidence the State presented of the circumstances surrounding Fladhammer's entry of the locked church to determine whether it was sufficient to permit jurors to reasonably infer that his entry of the church was with the intent to steal. Fladhammer entered the church forcibly and surreptitiously by prying open a basement window with car keys so as to leave no fingerprints. This occurred at 10:00 p.m., at an unoccupied church situated in a relatively remote area where, as one witness testified, "you pretty much got to stumble around up there; it's pretty dark." After he crawled into the church basement, Fladhammer shut off electrical power in an attempt to disable an alarm. He believed that there was "an arsenal of guns" hidden in the church basement, and when he found no guns, he left, triggering an alarm, which prompted him to flee in his vehicle at high speed.

¶10 Viewing the foregoing evidence in the light most favorable to the verdict, we conclude the jury could reasonably infer that Fladhammer had the intent to locate and steal guns when he entered the church. Fladhammer points out, however, that the jury was informed that he had flatly denied to police that he had any intention of stealing guns from the church. He argues that this testimony spawned an impermissible "negative inference" that his intent was precisely that. *See* ***Stewart v. State***, 83 Wis. 2d 185, 193, 265 N.W.2d 489 (1978) ("[C]ourts generally hold that a negative inference drawn from the witnesses' testimony is, standing alone, insufficient to support a conviction …."). Had Fladhammer's denial been the only basis in the record for the jury to have reached its guilty

verdict, Fladhammer's point might be well taken. But, as we have described, other facts and circumstances made known to jurors permitted them to reasonably infer an intent to steal. Thus, "[t]he principle that the negative inference drawn from the defendant's claim of innocence must be supported by independent evidence" is not violated on this record. *See* ***id***. at 194.

¶11 Finally, Fladhammer notes in his reply brief that other "facts and circumstances" in the record support the assertions by Fladhammer and Ives that their intent was simply to "feel spooky." It was Halloween night. Ives never heard Fladhammer mention any intention to steal. Speeding away from the church shows consciousness of wrongdoing—a trespass—and nothing more. We agree that jurors could reasonably have reached a not guilty verdict on the burglary charge based on the points Fladhammer cites. But, as we have noted, if "*any* possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Poellinger***, 153 Wis. 2d at 507 (emphasis added).[2]

[2] The closing arguments of counsel emphasized the evidence at trial that would support the inference each party asked jurors to draw regarding Fladhammer's intent. For example, the prosecutor asked (rhetorically), "Would a reasonable person break into a building that's alarmed looking for ghosts, ghouls and goblins?" He then urged the jury to reject the claim, noting that Fladhammer "took extraordinary steps" to get at the guns he thought were in the church: "In order for him to squeeze his body through … a window … climb down into the basement, look around for anywhere from two to five minutes, shut the breaker and then leave through the front door. There had to be something involved in that. That was not a practical joke."

Defense counsel, on the other hand, told jurors, "[b]ut people do go to cemeteries on Halloween to scare themselves…. [W]e can't say that for certain they didn't go to this place to be scared by ghosts and spooks or just the idea of being around dead people at 10:00 at night on Halloween night."

¶12 We conclude that Wisconsin case law plainly endorses as reasonable a jury's inference of intent to steal from just such evidence as was presented to the jury in this case. As the supreme court has put it:

> It can be said as a verity that the intent most often associated with an unlawful entry of a building is an intent to steal. Crime statistics universally recognize it. An unauthorized person in your home or at your place of work or business during non-business hours without a rational explanation usually creates a belief the person is there with the intent to steal.… When there is proof of an unlawful entry without consent of the person in lawful possession, in the absence of a rational explanation, proof of circumstances which would lead the ordinary person to conclude beyond reasonable doubt that the entry was with the intent to steal is sufficient to sustain a finding of guilt.

Strait v. State, 41 Wis. 2d 552, 562, 164 N.W.2d 505 (1969).

CONCLUSION

¶13 For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

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