MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jeffrey N. Crow,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 31, 2023

Court of Appeals Case No. 22A-CR-2295

Appeal from the Clinton Circuit Court

The Honorable Bradley Mohler, Judge

Trial Court Cause No. 12C01-2112-F4-1357

Memorandum Decision by Judge Kenworthy
Judges Bailey and Tavitas concur.

Kenworthy, Judge.

Case Summary

[1] Jeffrey N. Crow appeals his conviction for Level 4 felony burglary.[1] Crow raises two issues for our review: (1) whether the State presented sufficient evidence Crow committed burglary of a "dwelling"; and (2) whether the trial court erred by giving a jury instruction expanding the definition of "dwelling" beyond the statutory definition. Determining the State presented sufficient evidence and the jury instruction, although erroneous, is harmless error, we affirm.

Facts and Procedural History

[2] William Ray was the owner of a two-story house with a detached garage located on North John Street in Frankfort, Indiana. In 1995, Ray bought the house from his mother. The deed listed only Ray's name. Ray maintained his primary residence at his lake house in Monticello but would stay at the house on North John Street when he worked in Indianapolis. Ray tried to visit the house every month, although the Covid-19 pandemic made his visits less frequent. In addition to Ray's visits, Ray's daughter would "come up about once . . . a year and spend maybe a couple of weeks" at the house. *Tr. Vol. 2* at 48.

[3] The house contained furniture and appliances—chairs, a couch, a stove, a refrigerator, and beds. Each bathroom had towels, soap, and shampoo as well.

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[1] Ind. Code § 35-43-2-1(1) (2014).

The house had running water, heat, and electricity. Ray and his family and friends stored assorted personal property in the house and detached garage. Amongst other things, Ray kept his pickup truck, tools, and an old, wind-up Victrola record player in the garage. And in the months prior to the burglary, Ray paid to have the house repainted. Ray considered the house a residence.

[4] On June 1, 2020, Ray returned to the house for the first time in a couple of months and noticed the kitchen was a "mess." *Id.* at 51. After realizing several of his items were missing, Ray called the police. Captain Brady Sorrells with the Frankfort City Police Department arrived and walked through the house with Ray. Captain Sorrells and Ray noticed the deadbolt lock on the house's rear door had been damaged. Ray gave Captain Sorrells a list of missing property. Captain Sorrells and Ray then detected items were missing from the detached garage too. Ray noted his truck's wheels, box springs from a bed, and his wind-up Victrola were missing.

[5] Around the same time, Mark Werner—the owner of several storage facilities in Frankfort—observed one of his unrented storage units was completely full but unlocked. The user of the storage unit had not "check[ed] in," so Werner did not initially know whose property it was. *Id.* at 93. Werner confirmed the unit had not been rented and encountered an individual—later identified as Crow—outside the unit. Crow told Werner the items in the unit were his. Werner informed Crow he would have to pay rent or remove his items immediately. Subsequently, Crow provided his name and address, paid for thirty days, and was notified by Werner he must remove his items from the unit after the thirty-

day period. Crow never returned. Unable to contact Crow, Werner waited sixty days then removed the items from the storage unit. Werner's secretary listed some of the items for sale.

[6] Later, while scanning Facebook Marketplace, Ray discovered a wind-up Victrola for sale. Ray arranged to look at the record player and contacted the police to request they accompany him during the meet-up. Once there, Ray identified the Victrola and several other items stolen from his house and garage.

[7] The State charged Crow with Level 4 felony burglary and alleged he was a habitual offender. During Crow's jury trial, the State proposed a final jury instruction concerning the definition of "dwelling." The trial court—over Crow's objection—delivered a final jury instruction almost identical to the State's proposed instruction. The final instruction read:

> The term "dwelling" is defined by law as meaning a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging.[2]
>
> A structure, once a dwelling, does not lose its status as a dwelling until such time as the inhabiter vacates the premises to the extent that it no longer contains those items usual to the convenience of the inhabiter.

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[2] This portion of the instruction states the statutory definition of dwelling for criminal cases. *See* I.C. § 35-31.5-2-107.

Appellant's App. Vol. 2 at 82.[3]

[8] The jury found Crow guilty of burglary and Crow pleaded guilty to being a habitual offender. The trial court sentenced Crow to an aggregate sentence of twenty years. Crow now appeals.

The State Presented Sufficient Evidence Crow Committed Burglary of a Dwelling

[9] Crow does not argue the State presented insufficient evidence he committed burglary as a Level 5 felony. Instead, Crow contends the State presented insufficient evidence Ray's home on North John Street constituted a "dwelling" under Indiana's burglary statute, elevating the crime to a Level 4 felony.

[10] A sufficiency-of-the-evidence claim warrants a "deferential standard of appellate review, in which we 'neither reweigh the evidence nor judge witness credibility[.]'" *Owen v. State*, 210 N.E.3d 256, 264 (Ind. 2023) (quoting *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). Rather, "we consider only

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[3] The trial court in part cited *Howell v. State* as authority supporting the instruction. 53 N.E.3d 546 (Ind. Ct. App. 2016), *trans. denied*. The challenged language, however, does not appear in *Howell*. Instead, *Burwell v. State*, a sufficiency-of-the-evidence case of this Court, is the likely source. 517 N.E.2d 812, 815 (Ind. Ct. App. 1988) ("We posit that a structure, once a dwelling, does not lose that character until such time as its inhabiter vacates the premises to the extent it no longer contains those accoutrements usual to the convenience of habitation."), *trans. denied*. Indeed, the State cited *Burwell* in its proposed jury instruction. *Appellant's App. Vol. 2* at 50. "The mere fact that certain language or expression [is] used in the opinions of [an appellate court] to reach its final conclusion does not make it proper language for instructions to a jury." *Ludy v. State*, 784 N.E.2d 459, 462 (Ind. 2003) (quoting *Drollinger v. State*, 408 N.E.2d 1228, 1241 (Ind. 1980)). The State correctly notes "there is no blanket prohibition against the use of appellate decision language or holdings that refine the law in jury instructions," *Appellee's Br.* at 14 (citing *Munford v. State*, 923 N.E.2d 11, 15 (Ind. Ct. App. 2010)), but "[a]ppellate review of the sufficiency of evidence . . . will 'rarely, if ever,' be an appropriate basis for a jury instruction," *Keller v. State*, 47 N.E.3d 1205, 1209 (Ind. 2016) (quoting *Garfield v. State*, 74 Ind. 60, 64 (1881)). This instruction displays the shortcomings recognized by our Supreme Court.

probative evidence and reasonable inferences that support the judgment of the trier of fact." *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). "We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* It is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)).

[11] "A person who breaks and enters the building or structure of another person, with intent to commit a felony or theft in it, commits burglary." I.C. § 35-43-2-1. Burglary is a Level 5 felony but is enhanced to a Level 4 felony if the building or structure was a dwelling. *See* I.C. § 35-43-2-1(1). 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*." I.C. § 35-31.5-2-107 (emphasis added).

[12] Burglary is "not so much an offense against the property as it is an offense against the sanctity and security of the habitation." *Fix v. State*, 186 N.E.3d 1134, 1141 (Ind. 2022) (quoting *Howell*, 53 N.E.3d at 549). For several reasons, like the increased risk of violence when a burglar surprises a homeowner, Indiana law has long punished home invasions more severely than break-ins of other buildings. *See* I.C. § 35-43-2-1; *see also Byers v. State*, 521 N.E.2d 318, 319 (Ind. 1988). Indeed, the "risk that someone might be there justifies a more serious charge, even if the risk is low in a particular situation." *Keller*, 47 N.E.3d at 1210 (Massa, J., dissenting).

[13] This does not mean an occupant must be present at the time of the burglary for the building or structure to constitute a dwelling. *See Howell*, 53 N.E.3d at 549. Rather, it is "well established that if a house is left empty temporarily by its occupant, the house does not lose its status as a dwelling if the occupant intends to return." *Id*; *see also Phillips v. State*, 514 N.E.2d 1073, 1075 (Ind. 1987) (concluding occupants' temporary absence from their homes when the burglaries were committed did not remove their homes from the definition of dwellings).

[14] Here, Ray testified he tried to visit the house each month and would stay there overnight when working in Indianapolis. Ray further testified his daughter visited the house about once a year for one to two weeks at a time. Additionally, the house was furnished, its utility services remained in place, and Ray recently paid to have it repainted. Although the house was temporarily empty, Ray intended to return periodically. Thus, the State presented sufficient evidence from which a jury could reasonably find Crow committed burglary of a dwelling.

The Jury Instruction was Erroneous

[15] "Instructing a jury is left to the sound discretion of the trial court and we review its decision only for an abuse of discretion." *Washington v. State*, 997 N.E.2d 342, 345 (Ind. 2013). The trial court abuses its discretion "when the instruction is erroneous and the instructions taken as a whole misstate the law or otherwise

mislead the jury." *Keller*, 47 N.E.3d at 1208 (quoting *Isom v. State*, 31 N.E.3d 469, 484–85 (Ind. 2015)).

[16] Crow argues the challenged instruction "invaded the province of the jury" because it "emphasized certain facts" and "misled the jury." *Appellant's Br.* at 17. We agree. Article 1, Section 19 of the Indiana Constitution "protects the province of the jury in criminal trials," *Keller*, 47 N.E.3d at 1208, and states: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Ind. Const. art. 1, § 19. "In performing this fact-finding function, the jury must consider *all* the evidence presented at trial." *Ludy*, 784 N.E.2d at 461. A jury instruction "that invades this province by inappropriately emphasizing certain facts is erroneous and misleads the jury." *Keller*, 47 N.E.3d at 1208; *accord Ludy*, 784 N.E.2d at 461 ("Instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved.").

[17] Applying these principles, our Supreme Court has rejected several jury instructions. For example, the *Keller* Court concluded the following portion of an instruction defining "dwelling" misled the jury and restricted its discretion: "Any such place where a person keeps personal items with the intent to reside at some future time is considered a dwelling." *Keller*, 47 N.E.3d at 1207.

[18] Like the instruction in *Keller*, the instruction Crow challenges unduly emphasized a particular evidentiary fact—the presence of personal items in Ray's house on North John Street. The challenged instruction improperly

amplified the statutory definition of dwelling by telling the jury the definition would be satisfied by a specific set of facts not identified by the statute. Because the instruction restricted the jury's discretion and encouraged it to single out certain facts while ignoring others—thereby misleading the jury—the trial court erred by giving the instruction.

Giving the Erroneous Instruction was Harmless

[19] Having concluded the challenged instruction was erroneous, we must determine whether the error prejudiced Crow's substantial rights. Ind. Appellate Rule 66(A); *Hernandez v. State*, 45 N.E.3d 373, 376 (Ind. 2015). Regarding an instruction error, "we presume the error affected the verdict, and will reverse the defendant's conviction 'unless the verdict would have been the same under a proper instruction.'" *Kane v. State*, 976 N.E.2d 1228, 1232 (Ind. 2012) (quoting *LaPorte Cmty. Sch. Corp. v. Rosales*, 963 N.E.2d 520, 525 (Ind. 2012)). Stated differently, "[a]n instruction error will result in reversal when the reviewing court 'cannot say with complete confidence' that a reasonable jury would have rendered a guilty verdict had the instruction not been given." *Dill v. State*, 741 N.E.2d 1230, 1233 (Ind. 2001) (quoting *White v. State*, 675 N.E.2d 345, 349 (Ind. Ct. App. 1996), *trans. denied*). In this case, we can say with certainty, the jury's verdict would have been the same under a proper "dwelling" instruction.

[20] Although Ray had not been to the house since about four months before the burglary—due to the Covid-19 pandemic—it is "well established that if a house is left empty temporarily by its occupant, the house does not lose its status as a

dwelling if the occupant intends to return." *Howell*, 53 N.E.3d at 549. The jury heard testimony Ray stayed at the house when working in Indianapolis and intended to visit the house each month. In addition to Ray's visits, Ray's daughter would come to the house once or twice per year and stay for a week or two. And the jury heard testimony regarding the numerous personal items contained within the house, including furniture, appliances, and assorted personal property—like clothes and family heirlooms.

[21] Based on this evidence, a reasonable jury would have found Crow committed burglary of a dwelling even if the erroneous "dwelling" instruction had not been given. Therefore, the instruction error was harmless and does not require reversal.

Conclusion

[22] Concluding the State presented sufficient evidence Crow committed burglary of a "dwelling" and giving the erroneous, challenged instruction was harmless, we affirm.

[23] Affirmed.

Bailey, J., and Tavitas, J., concur.