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IN THE
COURT OF APPEALS OF INDIANA

Anthony Wilburn,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 20, 2021

Court of Appeals Case No. 20A-CR-1709

Appeal from the Huntington Circuit Court

The Honorable Davin G. Smith, Judge

Trial Court Cause No. 35C01-1905-F2-123

Tavitas, Judge.

Case Summary

[1] Anthony Wilburn appeals his conviction for burglary, a Level 2 felony. Wilburn contends that the trial court abused its discretion by admitting the opinion testimony of a police officer as a skilled witness and that the evidence is

insufficient to sustain his convictions. We conclude that the trial court properly admitted the police officer's opinion testimony as a skilled witness. We also conclude that the evidence is sufficient to identify Wilburn as the perpetrator of the robbery but that the evidence is insufficient to sustain Wilburn's conviction for burglary. Accordingly, we affirm in part, reverse Wilburn's burglary conviction, and remand for the trial court to enter judgment of conviction for robbery, a Level 3 felony, and resentence Wilburn in accordance with this opinion.

Issues

[2] Wilburn raises two issues, which we restate as:

I. Whether the trial court abused its discretion by admitting the opinion testimony of a police officer as a skilled witness.

II. Whether the evidence is sufficient to sustain his convictions.

Facts

[3] On May 25, 2019, Kylie Clay was working as a cashier at the Save-On Liquor store on Parkmoor Drive in Huntington. Save-On Liquor had both interior and exterior surveillance cameras, and the exterior cameras were equipped with infrared technology. The store closed at midnight, and shortly before midnight, Clay started performing the usual closing routine. At two minutes before midnight, Clay locked one of the front doors and was waiting next to the doors until midnight to lock the other door.

[4] A man entered the store and knocked Clay to the ground so hard that she dropped her cell phone and her keys, and the man dropped a black gun. The man was wearing black shoes, black pants, a black hoodie, "green and gray gloves," and a bandana over his face. Tr. Vol. III p. 93. Clay saw a "sliver of skin" between the man's gloves and sleeves and realized that the man was African American. The man told Clay, "[G]et down. Don't be stupid about this." *Id.* at 94. The man made Clay crawl to the register, and he "instantly grabbed a paper bag out from under the counter." *Id.* at 95. While the man held the brown paper bag, Clay put the bills and change, including a roll of nickels and a roll of pennies, into the bag. Less than $150.00 was in the cash register at that time. The man repeatedly asked about the safe, but Clay did not have access to the safe.

[5] The assailant left, and Clay called 911 to report that the store had been robbed by an African American male armed with a "small handgun" and "wearing [a] dark-colored or black bandana and a dark hoodie and black shoes." *Id.* at 43. Clay also reported that the suspect was running toward Guilford Street. Officer Darius Hillman of the Huntington City Police Department heard the dispatch with the suspect's description and direction of travel. Officer Hillman responded to the area of Guilford Street and, a few blocks away from the Save-On Liquor store, observed an African American male, later identified as Wilburn, wearing black pants, black boots, and a white tank top. Wilburn "ducked down" behind a bush, and Officer Hillman exited his police car. *Id.* at 212. Wilburn then walked across the street, and Officer Hillman noticed that

Wilburn was "breathing very heavily." *Id.* at 215. Officer Hillman ordered Wilburn to stop and show his hands, but Wilburn began sprinting away. Eventually, Wilburn fell and was handcuffed by Officer Hillman.

[6] Upon searching Wilburn, Officer Hillman found rolls of coins and a brown paper bag containing loose dollar bills in Wilburn's pants near his ankle. The markings on the bottom of the brown bags found at Save-On Liquor store matched the markings on the bottom of the brown paper bag found in Wilburn's pants. In a yard near the corner of Mulberry and Guilford Streets, officers located a black jacket with a hood; a baseball cap; a black, yellow, and white bandana; two gloves; and a replica handgun. DNA analysis of the jacket showed "very strong support for the proposition that Anthony T. Wilburn is a contributor to the DNA profile." Tr. Vol. IV p. 225.

[7] Although Clay did not initially identify Wilburn as the perpetrator of the robbery, when Clay was interviewed by the police a few hours later that night, she informed officers that she thought Wilburn was the man that robbed the store. Wilburn was a friend of another Save-On Liquor employee, and Clay had seen Wilburn at Save-On Liquor "multiple times." Tr. Vol. III p. 87. Clay was "familiar with his voice." *Id.* at 89.

[8] The State charged Wilburn with burglary, a Level 2 felony; robbery, a Level 3 felony; and resisting law enforcement, a Class A misdemeanor. The State also alleged that Wilburn was an habitual offender. A jury trial was held in July 2020. Wilburn filed a motion to exclude evidence regarding infrared

photography comparison because Wilburn was not informed of Sergeant Timothy Dolby's expert testimony pursuant to Huntington County Local Rule 35-CR-3129. The State argued that Sergeant Dolby was a skilled witness, rather than an expert witness. The trial court denied Wilburn's motion.

[9] Over Wilburn's objection, Sergeant Dolby of the Indiana State Police testified that he is a crime scene investigator with training in the use of a camera to perform infrared photography. Upon reviewing the video from Save-On Liquor store's outdoor infrared-assisted security camera, Sergeant Dolby noticed that the suspect was wearing a baseball cap under the hooded jacket and a black, yellow, and white bandana. From the surveillance video, Sergeant Dolby also noticed reflective stripes on the back of the suspect's pants near his ankles; a reflective marking on the left thigh of the pants; and his boots appeared to be "two-tone[d]" in the infrared lighting.[1] Tr. Vol. IV p. 23.

[10] Sergeant Dolby testified that he then took photographs of the bandana, boots, and pants using his infrared camera and compared the photographs to the surveillance video taken by the infrared-assisted security cameras. Sergeant Dolby testified that: (1) the bandana under the infrared camera was "similar" to the bandana worn in the infrared-assisted security camera footage; (2) the pants collected from Wilburn and the pants in the surveillance video were "similar";

[1]An infrared system "uses infrared light for dark areas or low-light situations where the ambient light is not sufficient." Tr. Vol. IV p. 16.

and (3) the boots collected from Wilburn and the boots in the surveillance video were "similar[.]" *Id.* at 58, 62, 67.

[11] The jury found Wilburn guilty of burglary, a Level 2 felony; robbery, a Level 3 felony; and resisting law enforcement, a Class A misdemeanor. Wilburn entered an admission to the habitual offender enhancement. At sentencing, the trial court "merged" the robbery conviction with the burglary conviction and sentenced Wilburn as follows: (1) twenty-three years for the burglary conviction enhanced by ten years for the habitual offender enhancement; and (2) a consecutive sentence of one year for the resisting law enforcement conviction, for an aggregate sentence of thirty-four years in the Department of Correction.[2]

Analysis

I. Admission of Opinion Testimony

[12] Wilburn first challenges the trial court's admission of Sergeant Dolby's testimony. We review challenges to the admission of evidence for an abuse of the trial court's discretion. *Fansler v. State*, 100 N.E.3d 250, 253 (Ind. 2018) (citing *Williams v. State*, 43 N.E.3d 578, 581 (Ind. 2015)). "In those instances, we will reverse only where the decision is clearly against the logic and effect of the facts and circumstances." *Id.* (citing *Joyner v. State*, 678 N.E.2d 386, 390 (Ind. 1997)).

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[2] Wilburn does not appeal his conviction for resisting law enforcement, a Class A misdemeanor.

[13] Specifically, Wilburn challenges the admission of Sergeant Dolby's testimony. Wilburn contends that Sergeant Dolby was an expert witness and, pursuant to a local rule, Wilburn was entitled to fourteen days of notice prior to trial of an expert's opinions.[3] Wilburn argues that Sergeant "Dolby was a defacto [sic] expert because he testified about complicated issues involving camera lighting, angles, filters, materials, fluorescence variations, wave-length variances, ambient and ultraviolet, infrared lighting comparatively as to wave-length as well as the distance from the camera." Appellant's Br. p. 14. The trial court found that Sergeant Dolby was a skilled witness, not an expert witness.

[14] The Indiana Rules of Evidence contain two rules for opinion testimony—lay witness opinions under Rule 701 and expert witness opinions under Rule 702. Indiana Evidence Rule 701 governs the admission of opinion testimony by a lay witness and provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception; and

[3] Wilburn also seems to contend that Sergeant Dolby was unqualified to collect DNA samples and was an expert because he collected DNA samples and that the DNA analyst's conclusions were "tainted by fundamental error." Appellant's Br. p. 10. Wilburn made no claim to the trial court that Sergeant Dolby was an expert based on the DNA collection. Further, any argument on appeal regarding this issue is waived for failure to make a cogent argument. *See* Ind. Appellate Rule 46(A)(8).

> (b) helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue.

"The requirement that the opinion be 'rationally based' on perception simply means that the opinion must be one that a reasonable person could normally form from the perceived facts, which are facts received directly through any of the [witness's own] senses." *Satterfield v. State*, 33 N.E.3d 344, 352 (Ind. 2015) (cleaned up). "The witness's opinion is 'helpful' 'if the testimony gives substance to facts, which were difficult to articulate.'" *Id.* (quoting *McCutchan v. Blanck*, 846 N.E.2d 256, 262 (Ind. Ct. App. 2006)).

[15] Indiana Evidence Rule 702, on the other hand, governs the admission of expert witness opinion testimony and provides:

> (a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.

[16] Our Supreme Court has held that Rule 701 encompasses both ordinary lay witness opinions and skilled witness opinions. *Satterfield*, 33 N.E.3d at 352. "The difference between skilled witnesses and ordinary lay witnesses is their degree of knowledge concerning the subject of their testimony." *Id.* "Neither has the 'scientific, technical, or other specialized knowledge' of experts, Evid.

R. 702(a), and both ordinary lay [witnesses] and skilled witnesses testify from their perceptions alone, not necessarily established scientific principles." *Id.* "Skilled witnesses, though, possess knowledge beyond that of the average juror." *Id.* "This additional knowledge allows a skilled witness to perceive more information from the same set of facts and circumstances than an unskilled witness would." *Id.* "All opinion testimony is helpful, 'giv[ing] substance to facts, which [are] difficult to articulate.'" *Id.* (quoting *McCutchan*, 846 N.E.2d at 262). Skilled witness testimony, however, is "helpful because it involves conclusions that escape the average observer." *Id.* We have noted that "[s]killed witness testimony generally needs only rise to a relatively low bar in order to be admissible . . . ." *Hawkins v. State*, 884 N.E.2d 939, 945 (Ind. Ct. App. 2008), *trans. denied*.

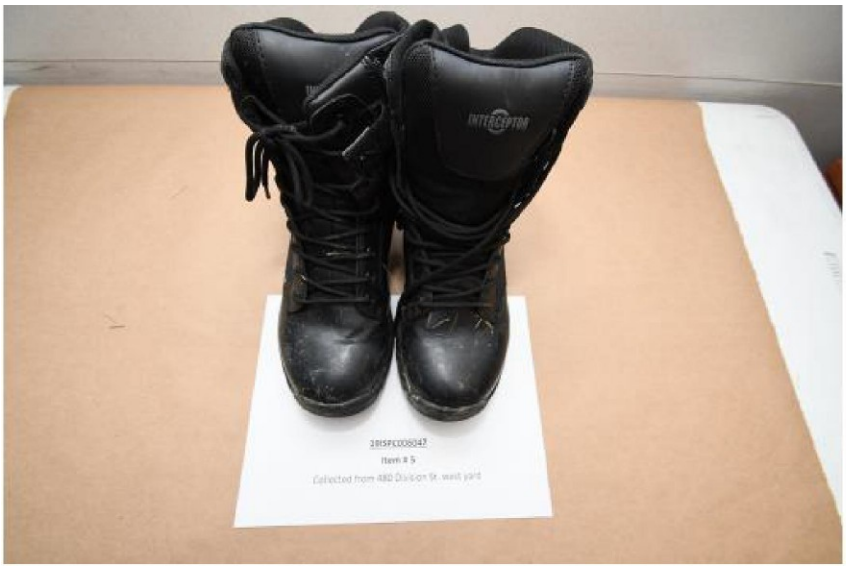
[17] Sergeant Dolby testified that he is a crime scene investigator, and he took an eight-hour course on infrared photography. Sergeant Dolby testified that, during the training:

> We were issued a modified camera— Nikon camera— [ ] that accepts or uses a bypass— or has it's [sic] bypass filter removed [ ] to allow additional spectrums of light to hit the sensor and we were used— or we were trained on how to operate that camera, take photographs of all kinds of different mediums [sic], [ ] surfaces, [ ] fabrics, US currency just to see how the different spectrums [sic] of light can reflect and fluoresce off different types of surfaces.

Tr. Vol. IV p. 5.

[18] The heart of Sergeant Dolby's testimony involved a comparison of: (1) still photographs taken from the store's infrared-assisted surveillance cameras with (2) infrared photographs taken by Sergeant Dolby of items of clothing taken from Wilburn and found between the store and Wilburn's location at the time of his arrest. For example, the boots recovered from Wilburn's person at the time of his arrest appeared to be black to the naked eye. *See* Figure 1. Under infrared photography, the boots appear to be black and white. *See* Figure 2. The boots worn by the suspect, as shown in the infrared-assisted surveillance cameras appeared to be black and white. *See* Figure 3.

[19] *Figure 1*



[20] *Figure 2*


19ISPC0060047
Item # 5
Collected from 480 Division St. west yard

[21] *Figure 3*


robbery may 25, 2019 - SOL000017_EXT DELIVERY_05-25-2019 23-42-00_794

[22] Sergeant Dolby did not testify that the pants, boots, and bandana seen in the video were the *same* pants, boots, and bandana recovered by the police. Rather, Sergeant Dolby testified that the pants, boots, and bandana shown in the surveillance video were *similar* to the pants, boots, and bandana recovered by the police.

[23] As a result of specialized training in infrared photography, Sergeant Dolby possessed knowledge beyond that of the average juror regarding infrared-assisted surveillance cameras and infrared photography. His opinion testimony was helpful to the determination of a fact in issue. Without this testimony, the jury would not likely have been able to understand the significance of the infrared-assisted surveillance video and the photographs taken of the pants, boots, and bandana.

[24] Sergeant Dolby's testimony, however, did not rise to the level of expert testimony. *See, e.g., Hawkins*, 884 N.E.2d at 945 (holding that a crime scene investigator's testimony was admissible as skilled witness testimony where, "[w]ithout this testimony, the jury would not likely be able to understand the significance of the missing upholstery or understand how the various pieces of physical evidence related to one another and to the larger investigation"). Sergeant Dolby merely testified regarding the differences in how items appear under ambient lighting and infrared lighting, which the jurors could observe for themselves in the photographs and surveillance videos. He did not testify regarding scientific principles or methodology. *Cf. Kubsch v. State,* 784 N.E.2d 905, 921 (Ind. 2003) (holding that an officer's testimony that murder victim's

faces are covered more often where the killer knows the victim was not supported by "reliable scientific methodology"); *Hape v. State*, 903 N.E.2d 977, 993 (Ind. Ct. App. 2009) (holding that it was improper to allow a police officer to testify as to the effect of a chemical substance upon a person's body because such information is "scientific in nature" and requires expert testimony), *trans. denied*.

[25] Sergeant Dolby's testimony was rationally based on his perceptions of the two types of photographs and was helpful to a determination of a fact in issue. *See* Ind. Evidence Rule 701. Accordingly, the trial court did not abuse its discretion by finding that Sergeant Dolby was a skilled witness and not an expert witness.

II. Sufficiency of the Evidence

[26] Next, Wilburn challenges the sufficiency of the evidence to sustain his conviction. Sufficiency of the evidence claims "warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020). We consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Id.* We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt. *Id.*

A. Burglary

[27] Wilburn first challenges his conviction for burglary. The offense of burglary is governed by Indiana Code Section 35-43-2-1, which provides: "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[.]" The offense is a Level 2 felony if it is "committed while armed with a deadly weapon." Ind. Code § 35-43-2-1(3)(A). According to Wilburn, there was no breaking here because he entered a retail establishment during business hours through a public, unlocked door.

[28] Our Supreme Court has held that "a 'breaking' is proved by showing that even the slightest force was used to gain unauthorized entry." *State v. Hancock*, 65 N.E.3d 585, 591 (Ind. 2016). "For example, opening an unlocked door or pushing a door that is slightly ajar constitutes a breaking" if the entry was unauthorized. *Davis v. State*, 770 N.E.2d 319, 322 (Ind. 2002); *see also Anderson v. State*, 37 N.E.3d 972, 974-75 (Ind. Ct. App. 2015) (finding sufficient evidence of a "breaking" where defendant "rushed" past a victim to gain entry into her home after she voluntarily opened the door for a different person), *trans. denied*.

[29] Indiana courts have not had occasion to determine whether entering a business establishment during its hours of operation through an unlocked public entrance can constitute a "breaking" in the context of burglary. It is well-established, however, that "[w]alking through an open door does not constitute a 'breaking' as such element is known in the crime of burglary[.]" *Hooker v. State*, 120 N.E.3d 639, 646 (Ind. Ct. App. 2019) (citing *Cockerham v. State*, 246 Ind. 303, 307, 204 N.E.2d 654, 657 (1965)), *trans. denied*. Further, our Supreme Court has held: "In jurisdictions, such as Indiana, which retain the common law definition of burglary by requiring a breaking, there can be no breaking and

therefore no burglary where the owner or other authorized person consents to entry, since a consensual entry is not an unlawful or illegal entry." *Smith v. State*, 477 N.E.2d 857, 862 (Ind. 1985).

[30] It is clear that a business owner invites members of the public into the establishment during operating hours and, thus, consents to the entry into the establishment through public, unlocked doors. The State, however, argues that "there is no consent to enter a business when a person's actions go beyond these legitimate commercial purposes." Appellee's Br. p. 18; *see also* Judy E. Zelin, *Maintainability of Burglary Charge, Where Entry Into Building is Made with Consent*, 58 A.L.R.4th 335 ("[S]ome courts have held or recognized that authority to enter a public place extends only to those who enter with a purpose consistent with the reason the building is open, and that therefore an entry with criminal intent is not within the limited authority to enter granted to the public."). Thus, under the State's argument, whether a person has consent to enter is dependent upon the person's intent. A burglary offense would be complete when a person entered a public business during business hours with the intent to commit a felony even if the person changed his or her mind and merely shopped in the store.

[31] A plain reading of the statutory language refutes the State's argument. Our primary goal in statutory interpretation is to determine and give effect to the intent of the legislature. *D.A. v. State*, 58 N.E.3d 169, 171 (Ind. 2016). The best evidence of legislative intent is the statute's language, so we begin our analysis with those words. *Id.* "When a statute's language allows only one meaning,

we accept what it says without enlarging or restricting its plain and obvious meaning." *Id.* at 171-72. The burglary statute requires that the defendant "breaks and enters the building or structure of another person, with intent to commit a felony or theft in it." I.C. § 35-43-2-1. Accordingly, the statute requires *both* a breaking and entering *and* the intent to commit a felony or theft. Under the State's argument, the breaking element would be ignored.[4]

[32] Here, Save-On Liquor was still open for business, and Wilburn entered through the unlocked front door. We conclude that the evidence is insufficient to sustain Wilburn's conviction for burglary of a business open to the public during business hours because there is a lack of evidence as to breaking. *See, e.g., State v. Ferguson*, 229 S.W.3d 312, 316 (Tenn. Crim. App. 2007) (reversing burglary convictions where the court concluded that "it was apparent to a person who approached the laundromat during the hours it was open for business that the person had the owner's consent to enter. The Defendant entered the facility during these hours, and thus the owners gave effective consent in fact for the entry."); *State v. Hall*, 14 P.3d 404 (Kan. 2000) (affirming the court of appeals' reversal of the defendant's burglary convictions where he entered the stockroom of a public store and stole items). Accordingly, we reverse Wilburn's conviction for burglary. We remand for the trial court to

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[4] We acknowledge our Supreme Court's statement in *Bailey v. State*, 473 N.E.2d 609, 611 (Ind. 1985), that "regardless of authorization, if entry is established and is coupled with independent evidence of felonious intent, a burglary is proved." The Supreme Court, however, was not confronted with the same factual situation. Rather, in *Bailey*, the defendant entered the victims' house at night through a door with a broken window. The victim testified that she did not give permission for the defendant to enter her house.

enter judgment of conviction on Wilburn's robbery guilty verdict and resentence Wilburn on the robbery conviction.

B. Identification

[33] Wilburn also challenges the sufficiency of the evidence identifying him as the perpetrator. Wilburn contends Clay's identification of Wilburn as the perpetrator of the robbery was "incredibly dubious" because she did not immediately identify him and Clay could have heard the dispatches regarding Wilburn on the police radios.

[34] Application of the incredibly dubiosity doctrine requires that there be: "1) a sole testifying witness; 2) testimony that is inherently contradictory, equivocal, or the result of coercion; and 3) a complete absence of circumstantial evidence." *Moore v. State*, 27 N.E.3d 749, 756 (Ind. 2015). "[W]hile incredible dubiosity provides a standard that is 'not impossible' to meet, it is a 'difficult standard to meet, [and] one that requires great ambiguity and inconsistency in the evidence.'" *Id.* (quoting *Edwards v. State*, 753 N.E.2d 618, 622 (Ind. 2001)). "'The testimony must be so convoluted and/or contrary to human experience that no reasonable person could believe it.'" *Id.* (quoting *Edward*s, 753 N.E.2d at 622).

[35] When Clay was first interviewed by the officers, she was unable to identify the perpetrator of the robbery. A few hours later, after she had time to calm down and reflect, she told officers that she thought Wilburn was the man that robbed the store. Wilburn was a friend of another employee at Save-On Liquor, and

Clay had seen Wilburn at Save-On Liquor "multiple times." Tr. Vol. III p. 87. Additionally, Clay was "familiar with his voice." *Id.* at 89. Clay testified that, between the time of the incident and her interview with police where she identified Wilburn, she did not hear from the officers or on the police radio that Wilburn was a suspect. Further, multiple officers testified that they used ear pieces to hear dispatches and that Clay would have been unable to hear that Wilburn had been apprehended. Clay's testimony was not "inherently contradictory, equivocal, or the result of coercion." *Moore,* 27 N.E.3d at 756.

[36] Moreover, substantial circumstantial evidence pointed to Wilburn as the perpetrator of the robbery. The perpetrator wore a hooded black jacket, and Wilburn's DNA was found on a discarded hooded black jacket found nearby. Wilburn was found only a few blocks away from the liquor store with rolled coins, cash, and a brown paper bag in his pants leg. Markings on the brown paper bag matched markings found on the store's brown paper bags. Infrared photography showed that Wilburn's pants and boots were similar to the pants and boots worn by the perpetrator.

[37] Wilburn's argument is merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. *See Powell*, 151 N.E.3d at 262. The evidence was sufficient to sustain the identification of Wilburn as the perpetrator of the robbery.

Conclusion

[38] The trial court did not abuse its discretion when it admitted Sergeant Dolby's testimony as skilled witness opinion testimony. Further, the evidence is sufficient to identify Wilburn as the perpetrator of the robbery, but the evidence is insufficient to sustain his conviction for burglary. Accordingly, we reverse Wilburn's burglary conviction and remand for the trial court to enter judgment of conviction for robbery, a Level 3 felony, and resentence Wilburn in accordance with this opinion.

[39] Affirmed in part, reversed in part, and remanded.

Mathias, J., and Weissmann, J., concur.