

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR09-1190

MARCUS LAKEITH STEPHENS
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered APRIL 28, 2010

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[NO. CR-09-381]

HONORABLE WILLARD
PROCTOR, JR., JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Marcus Stephens was charged by felony information with aggravated residential burglary and first-degree criminal mischief. He was tried in a bench trial, was convicted of residential burglary and first-degree criminal mischief, and was sentenced to five years' probation, thirty hours of community service, and restitution. He brings this appeal from the judgment and commitment order entered on July 9, 2009, challenging only the sufficiency of the evidence to support the burglary conviction. He argues that the State presented no proof of intent to commit an imprisonable act, a required element of residential burglary. We disagree and affirm.

A person commits residential burglary if he enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment. Ark. Code Ann. § 5-39-

201(a)(1) (Repl. 2006). A person commits aggravated residential burglary if he commits residential burglary as defined in section 5-39-201 of a residential occupiable structure occupied by any person, and he is armed with a deadly weapon or represents by word or conduct that he is armed with a deadly weapon, or inflicts or attempts to inflict death or serious physical injury upon another person. Ark. Code Ann. § 5-39-204(1), (2) (Supp. 2009).

Larry Johnson, a witness for the State, testified that the following events took place when he visited Martisha Bell at her home the evening of April 8, 2008. Bell's cell phone rang while they were in her living room engaging in sexual relations, and she did not answer it. The couple were interrupted when "a guy came through the [front] door shooting," despite the fact that furniture was propped against it. Johnson thought the man was trying to get in and pulled his own gun immediately. Johnson observed the arm, head, and face of someone he had never seen before, with a chrome .380, "the same make and model as . . . my wife carries." Johnson testified that the man could not get through the door and shot once, "[not] like he was shooting at me. He shot in the house." Johnson, who had a permit to carry a concealed weapon, lacked a clear shot and did not return the fire. Bell panicked and disappeared, and Johnson telephoned police after making sure that children in the home were safe in their rooms. The intruder was outside, shouting and screaming "in a rage." Johnson went out when the police arrived, and he saw that all his tires were slashed and flat.

At trial Johnson identified the man as Stephens and could not recall telling police that

he had never seen Stephens the night of these events. When reminded, Johnson agreed he had said that he was on the couch watching a movie when he heard someone trying to get in the front door, that he saw just an arm, and that he heard two or more shots.

Officer William Farnam testified that he and another officer responded to a call about a home intrusion with shots fired. They observed Stephens walking from Bell's home toward the street, and in the bushes they found a silver Bryco .380 automatic handgun. Farnam talked to Stephens, who said that he had kicked in the door upon seeing a male inside the home and becoming angry and that he waited outside after Bell told him she had called the police. Farnam also interviewed Johnson, who said there had been banging on the door, the door opened, he observed a silver pistol, and one shot was fired. Farnam said Johnson stated that Bell jumped up and ran out after grabbing her children, that he called 911, and that he waited inside for officers.

Farnam placed Stephens under arrest and read him his *Miranda* rights. Stephens then told officers that the gun by the bushes was his. He also said that after observing Bell and Johnson having sex, he kicked in the door, observed Johnson reaching into his front pocket, and exited the residence. Stephens told officers that he fired two shots in the air once he was outside, attempting to scare the couple, and that he threw his gun in the bushes when he saw officers arrive. Officers found no shell casing or other evidence of a shot being fired inside, and Bell told officers that apparent signs of gunfire inside the residence were previously there. Detective Edmond Brooks testified about interviewing Stephens after re-Mirandizing him:

Stephens admitted being at the residence, getting his arm and shoulder all the way inside, possessing a handgun, firing twice in the air, and cutting Johnson's tires, and Stephens reiterated that Johnson was first to reach for a gun.

Stephens moved to dismiss all charges at the close of the State's testimony. He argued that the State had not made a prima facie case for aggravated residential burglary because it failed to prove 1) that he unlawfully entered Bell's home "with the purpose of committing therein any offense punishable by imprisonment while armed with a deadly weapon," and 2) that he represented by word or conduct that he was armed. The trial court denied the motions, and Stephens testified in his own behalf.

Stephens explained that he had a twelve-year relationship with Bell, his fiancée and the mother of his three children. He said that the couple "shared" two residences, but the South Harrison residence was rented in her name. He testified that Bell and the children had spent family time with him at the other residence on April 8, 2008, and he stayed behind when she took the children to South Harrison that evening. He said that Bell telephoned him and said she would call back after the last child went to sleep, but she had not phoned an hour later and he decided to drive over. He said there was a strange truck in the backyard where he normally parked. Through front-door windows he could see Bell having sex with a man (Johnson) whom Stephens did not know, so he called her on his cell phone. He watched her pick up her phone, set it back down, and appear to indicate to Johnson that he should get up. Johnson grabbed Bell by the neck and forced her back on the couch.

Stephens pounded the door open, knowing there had been previous problems with getting their keys jammed.

Stephens admitted trying “to bust in” with the intention to “put it in their face.” He testified that he ran back to his car for his gun because by the time he stuck his head past the barricaded door, Johnson had pulled a weapon. Stephens testified that he fired two shots in the air out of fear and distress, and to let Johnson “know that I had a gun . . . as well.” He then got a Boy Scout knife from his car, ran to the backyard, and flattened the truck’s four tires. He waited for police to arrive because “pretty much everybody” had called them. He told the officer that his children and a man with a gun were inside.

The defense rested, and Stephens renewed his motions to dismiss, again arguing that the State failed to make a prima facie case of aggravated residential burglary. He recounted his own testimony that he fired two shots in the air, as well as testimony that only one shot was heard and no shell casings were found. The motions were denied. Following further argument by counsel, the trial court pronounced appellant guilty of residential burglary and criminal mischief.

On appeal Stephens again points to the statutory element of residential burglary that the perpetrator intended to commit an imprisonable act other than the illegal entry. Because he was found guilty of residential burglary rather than aggravated residential burglary, he asserts that the “fact finder concluded that appellant did not have a gun or represent that he had a gun when he entered the residence.” He cites no statements or specific findings in the

record, however, to support his argument.

Because specific intent and illegal entry are separate elements of the crime of burglary, specific criminal intent cannot be presumed from a mere showing of illegal entry of the occupiable structure. *Norton v. State*, 271 Ark. 451, 609 S.W.2d 1 (1980). In *Booker v. State*, our supreme court further explained:

The crime of burglary can be complete even though the intention to commit a crime after unlawfully entering the structure is not consummated. However, the facts must show circumstances of such probative force as to reasonably warrant the inference of the purpose on the part of the accused to commit an offense punishable by imprisonment, other than the entry itself. Purpose can be established by circumstantial evidence, but that evidence must be such that the requisite purpose can be reasonably inferred, and the evidence must be consistent with the guilt of the accused and inconsistent with any other reasonable conclusion.

335 Ark. 316, 321–22, 984 S.W.2d 16, 19–20 (1998) (citations omitted).

Stephens relies upon such cases as *Norton, supra*, and *Wortham v. State*, 5 Ark. App. 161, 634 S.W.2d 141 (1982), where burglary convictions were reversed because the requisite criminal intent was not found from the “mere presence” of the defendants in places they were not supposed to be. Those cases are, however, distinguishable from the one before us. The evidence in *Norton* revealed only that the defendant was standing inside a doorway of an office building he had illegally entered and from which nothing was taken. The *Wortham* court found it not unreasonable to assume that the defendant had no criminal purpose when he entered a house where he did not belong, despite the fact that he ran when a young girl screamed: it was daytime and loud music was playing, and nothing indicated that he was armed, improperly approached anyone, or touched anything in the household.

When reviewing a challenge to the sufficiency, we will affirm the conviction if there is substantial evidence to support it. *Lewis v. State*, 2009 Ark. App. 504. We view the evidence in the light most favorable to the verdict and consider only evidence that supports it. *Id.* Credibility determinations are made by the trier of fact, which may choose to believe the State's version of events rather than that of the defendant. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). Under these standards, the evidence shows that an angry Stephens attempted to "bust in" Bell's front door to "put it in [the couple's] face," pushing his arm and body partially through the door and shooting his handgun into the residence. This is circumstantial evidence from which the trier of fact could reasonably have inferred that Stephens committed an offense punishable by imprisonment other than the entry itself; further, the evidence is consistent with his guilt and inconsistent with any other reasonable conclusion.

Affirmed.

VAUGHT, C.J., and GLOVER, J., agree.