

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-574

JANUARY TERM, 2005

	}	APPEALED FROM:
	}	
State of Vermont	}	District Court of Vermont, Unit No. 2,
	}	Rutland Circuit
v.	}	
	}	
Robert Winchell	}	DOCKET NO. 1265-9-01 Rdcr
	}	
	}	Trial Judge: Nancy Corsones
	}	

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a judgment of conviction, following a bench trial, of kidnapping, burglary, and simple assault. He contends the evidence was insufficient to prove beyond a reasonable doubt that he entered the victim' s apartment with the intent to commit a simple assault, an essential element of the burglary charge. We affirm.

The charges against defendant arose out of an incident that occurred in the late morning or early afternoon of September 22, 2001. Laura White, defendant' s former girlfriend, and Shawn Bushey, her current boyfriend, were staying at the apartment of a friend in the Town of Poultney when a girl came to the door looking for the owner of the apartment. White told the girl that the owner was out and gave her the owner' s telephone number. About fifteen minutes later, defendant telephoned the apartment and asked White if she thought it was " weird" how he had learned the telephone number, implying that he had sent the girl to obtain it.

White spoke with defendant on the telephone for thirty to forty-five minutes. She testified that he tried to persuade her to move with him to the south, and that- to get him off the phone- she ultimately told him that she would call him back later that night. Defendant' s friend, James Bushman, who overheard defendant on the phone with White, recalled that defendant was screaming and yelling during the call. Fifteen to twenty minutes after the call ended, White heard a knock on the apartment door and looked through the peephole, but the person outside had a finger over the hole and was standing to the side. White suspected that it was defendant and was scared, so she turned off the apartment lights, went into the bedroom with Bushey, and closed the door. On her way into the bedroom, she picked up her keys with a pepper spray attachment.

From the bedroom, Bushey heard pounding on the apartment door, and eventually heard the door " bust in" and someone enter yelling. Bushey later observed that the door frame had been ripped off. Within moments of the forced entry, the bedroom door opened and defendant stepped in and turned on the light. According to White, defendant immediately came toward her with his hands out " like he was going to grab [her]." Bushey testified that defendant " came at [White] like he was going to choke her." Although White instantly used the pepper spray, defendant continued to charge, pushing White to the bed and choking her. Bushey intervened and defendant turned on him, resulting in a short wrestling match. Defendant freed himself or was pushed into the hall, where he grabbed a vacuum cleaner and threw it at White; it struck Bushey above his left eye, leaving him momentarily stunned. Defendant then placed an arm around White' s neck and dragged her out of the apartment to a waiting car. A friend of defendant' s drove them to defendant' s truck, and defendant then drove with White to a supermarket to purchase cigarettes, and eventually let her out near her home.

At the conclusion of the evidence, defendant moved for judgment of acquittal under V.R.Cr.P. 29, asserting that the

evidence was insufficient to prove beyond a reasonable doubt that defendant had entered the apartment with the specific intent to commit an assault, and therefore was insufficient to support the burglary charge. See 13 V.S.A. § 1201(a) (" A person is guilty of burglary if he enters any building or structure . . . with the intent to commit a felony, petit larceny, simple assault or unlawful mischief."); State v. Savo, 139 Vt. 644, 646 (1981) (intent to commit underlying offense at time of entry must be proven beyond a reasonable doubt). The court denied the motion, and ultimately rendered a verdict of guilty on all charges. This appeal followed.

Our inquiry on review of a denial of a V.R.Cr.P. 29 motion is " whether the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt." State v. Prior, 174 Vt. 49, 53 (2002) (internal quotations omitted). The evidence summarized above is more than sufficient to meet this standard. The evidence showed, or supported a reasonable inference, that defendant surreptitiously obtained the telephone number for the apartment where White was staying, engaged in an angry telephone call with her, appeared at the apartment shortly thereafter, violently crashed through the locked door, and attacked White the moment he discovered her hiding in the bedroom. Viewed in its entirety, these facts amply support an inference that defendant harbored the specific intent to assault White at the time of entry. Defendant' s suggestions that his only intent was to reconcile with White, or that he did not form the intent to attack until provoked by the pepper spray, are belied by the evidence of defendant' s forcible entry and the testimony that he assaulted White the moment he saw her, undeterred by the pepper spray. Nor does the fact that defendant failed to harm White after forcibly removing her from the apartment negate the evidence that he entered with the intent to assault. Nor finally, did the trial court improperly refer- as defendant asserts- to the " tone of some prior violence between the parties." White had testified that she had seen defendant angry before, and had seen the consequences of that anger; she did not improperly refer to any prior restraining orders, which the court had previously excluded. Accordingly, we conclude that the evidence was sufficient to support the burglary conviction.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned