2011 IL App (1st) 100025-U

SIXTH DIVISION
SEPTEMBER 23, 2011

No. 1-10-0025

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 C6 61970 (01)
	)	
MICHAEL BLOUIN,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Justices Garcia and McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Where the uncontroverted evidence at trial established that a warehouse was dilapidated, with broken windows and debris, that it had been abandoned for 5 years, that people were dumping items there, and that others had brought in mattresses and were living there, where the State asked no questions of the building's owner to establish ownership of

> the pallets or even knowledge of the pallets' presence inside the warehouse, and where there was no evidence of the value or condition of the pallets which might have supported a conclusion that they had an owner, we find that there was insufficient evidence to show that defendant had a specific intent to deprive an "owner" when he admittedly attempted to take 8 wooden pallets from the abandoned warehouse.

¶ 2 On October 29, 2008, defendant Michael Blouin entered a vacant warehouse that had been abandoned for 5 years. After police found him on the second floor, he was arrested. Following a bench trial on October 26, 2009, defendant was convicted of burglary for an unauthorized entry into a building with intent to commit the theft of eight wooden pallets. 720 ILCS 5/19-1 (West 2008). On November 19, 2009, the trial court sentenced defendant to 10 years.

¶ 3 On this direct appeal, defendant argues that (1) his burglary conviction should be reversed for insufficient evidence, (2) he is entitled to a new trial as a result of the ineffective assistance of his trial counsel, and (3) his sentence should be reduced to the minimum term of six years, and his mandatory supervised release term should be reduced from 3 to 2 years.

¶ 4 For the following reasons, we find that there was insufficient evidence to support his burglary conviction and reverse.

¶ 5 BACKGROUND

¶ 6 A vacant warehouse located on South Vincennes Avenue in Blue Island, Illinois, was donated to Works for Life International Ministries. A Works for Life representative described the donated building as dilapidated. The building had been vacant and abandoned for 5 years when, on October 29, 2008, an employee of a nearby business called police in the middle of the afternoon to report that men were up on the roof removing scrap metal. A police officer testified that, after he arrived, he found "a male-black subject" on the second floor. The police arrested defendant for burglary, as well as Roy Cheris, another man found inside the building. There was no evidence that defendant was connected to the men observed on the roof taking scrap metal or other items later discovered in the alley next to the building. After his arrest, defendant made a statement in which he stated that he was in the building “to get some pallets,” and that he had stacked up eight wooden pallets inside the building. However, there is no evidence in the record to determine whether the police observed the pallets before or after defendant’s arrest.

¶ 7 I. Pre-trial Proceedings

¶ 8 On November 24, 2008, the State brought an information against defendant charging two counts of burglary: (1) entering the building with the intent to commit a theft; and (2) remaining within the building with the intent commit a

theft.

¶ 9 Defense counsel filed one pretrial motion. On April 14, 2009, counsel filed a motion to suppress the statement defendant made to the police following his arrest. The defense sought suppression on the ground that the statement was involuntary. After a hearing on June 17, 2009, the trial court held that the statement was not involuntary and denied the motion.

¶ 10 II. Evidence at Trial

¶ 11 The State's evidence consisted of the testimony of three witnesses. Lawrence Kloos, who had observed the men on the roof; Justin Smith, an employee of Works For Life International Ministries; and the arresting officer, Officer Anthony Cirullo of the Blue Island Police Department.

¶ 12 Kloos testified that, on the afternoon of October 29, 2008, he had observed men on the roof of the bulding "throwing scrap metal off" and "taking parts of the building down and throwing them to the ground." He had called his "office and they called 911." Kloos testified that the building had been abandoned for approximately five years, that the windows were broken and the doors were wide open, and that during the past five years he had frequently observed people entering and exiting the building. He described the building as "dilapidated."

¶ 13 Smith testified that he was an employee of Works for Life, a religious organization with offices in Nevada, California, Massachusetts and Florida, and that the building in question was donated to Works for Life in 2008. Smith testified that Works for Life had not given anyone permission to enter the building on October 29, 2008, or to remove any materials from the building. However, Smith was also not aware of any steps taken to keep people out of the building. Smith testified that he worked in Massachusetts and that he had never actually been to the building, but he stated that the building appeared dilapidated and abandoned from a photograph. Smith testified that he had received no information concerning the use of the property when it was donated.

¶ 14 Smith was not asked any questions concerning the pallets, or who owned them or whether the organization was aware that they were in the building.

¶ 15 Officer Cirullo testified that, in the middle of the afternoon on October 29, 2008, at approximately 3 p.m., the police received a dispatch that "[u]nknown subjects [were] taking scrap metal or unknown articles out of a building and throwing them into the east-side alley." The officer arrived at the building within a few minutes after receiving the dispatch. He testified that he was familiar with the building, as it was located within his beat assignment and he drove past it almost

every day for the last three years. However, he had never observed any owners of the building at the location. He had been to the building on an earlier occasion, after police were called because children were throwing rocks and breaking windows. Officer Cirullo testified that he entered the building and searched the first and second floors. When he entered the building, there was no lighting inside and the only light came from the broken windows. He testified that he used his flashlight to conduct his search of the premises. The officer observed that the building had been stripped "all over the place."

¶ 16 During his search, Officer Cirullo observed defendant on the second floor of the building, at which time he placed defendant into custody and placed him under arrest. The dispatch Officer Cirullo had received referred only to "unknown subjects," giving him no way to identify defendant as one of those subjects. The officer described his encounter with defendant as follows:

> "MR. VOLKMAN [Assistant State's Attorney]: And when you went into the second floor, what, if anything, did you – did you see?
>
> OFFICER CIRULLO: As we made our way up to the second floor, a male-black subject walked towards the stairs from like a side room
>
> MR. VOLKMAN: And do you see that individual in court today?

OFFICER CIRULLO: I do.

MR. VOLKMAN: And can you identify him by a piece of clothing?

OFFICER CIRULLO: The gentleman in the brown shirt (indicating).

THE COURT: Let the record show an in-court identification of the Defendant.

MR. VOLKMAN: And did you at this point – point place him into custody?

OFFICER CIRULLO: I do [sic]."

¶ 17 After Officer Cirullo placed defendant under arrest, he searched the outside of the building. When the prosecutor asked if the officer found items that had been "thrown to the ground, " the officer replied that he had, and he described those items as aluminum siding, light housings for fluorescent lamps, and scrap metal. The officer testified that he found these items in the east-side alley adjacent to the building. The officer stated that, if October 29 was the only day that the building had been stripped, it would not account for all the items which he observed in the alley.

¶ 18 Officer Cirullo testified that, after defendant was arrested, he was transported to the police station. On the following day, October 30, 2008, Officer

Cirullo and Detective Henehan questioned defendant. Officer Cirullo testified that, prior to the interview, Detective Henehan read defendant his Miranda rights and defendant indicated that he understood them. He further testified that during the interview defendant provided an oral statement, which was written by Detective Henehan at 12:32 p.m. Officer Cirullo then read the written statement without objection.

¶ 19 In full, the statement read:

> "On October 29, 2008, I saw a guy I know only as Jerry at the Speedway gas station on 119th Street and Marshfield. It was sometime between 1:00 and 2:30pm. He told me about an abandoned building in Blue Island, at [redacted] South Vincennes Avenue, where you can get some skids, wooden pallets, and turn it in for money at Rapid Pallet, on Vermont Street, in Blue Island. Jerry told me he goes in that building all the time for scrap.
>
> I went home, and changed clothes and went to the liquor store, at 115th and Laflin, in Chicago. There I met Roy Cheris (phonetic). Roy said, he needed to make some money, and I told him, I knew a place where we could get some pallets – pallets for money. Roy agreed to go with me in my

truck to go get – to go get some pallets out of the building on Vincennes, in Blue Island.

When we got there, we saw a white S-10 Chevy Blazer with a trailer – with a trailer leaving. It was driven by a female black. Roy – Roy and I then went into the building through the middle door on the south side of the building. I saw Jerry in the building and believe he was burning rubber off wire for the copper.

As Roy and I started collecting and stacking pallets, another subject came into the building and asked where Jay, Jerry, was at. I told – I told him that Jerry had gone toward the other side of the building. The subject then went to look for Jerry.

I heard Jerry and whoever else was – was with them on the second floor or roof. They were banging on something. We had about eight pallets stacked up when the police came in and arrested Roy and me inside the building.

When the police asked what I was doing, I told them we were – we were getting some pallets. The police then put Roy and me in police cars. I did not get permission from anyone to go into the building or to take any

> pallets from inside the building. I know that his was – was wrong to go into a building without permission and take something that does not belong to me.
>
> I am sorry for doing this. I – I have been treated well by the Blue Island Police and have given this statement on my own freewill [sic]. I read the statement before signing it."

Officer Cirullo further testified that, after giving the statement, defendant read the statement and was given the opportunity to make corrections, and that defendant made minor changes to the document and then signed each page.

¶ 20 After the statement was admitted into evidence, the State rested and the trial court denied defendant's motion for a directed verdict. Defendant then chose to testify in his own defense. Defendant testified that the warehouse had been abandoned for 7 years, that it was "riddled with filth and pipes and debris," that people had been "dumping" in the building, that others had been living there, and that there were mattresses in the building. On cross examination, defendant testified that he had entered the warehouse looking for water after his truck started "running hot," and that he decided to take the pallets only after he discovered them inside the building. Defendant testified that his friend Jerry lived in the building

with "a couple of more guys," and that Jerry spoke to defendant about stealing from the building every time defendant saw him.

¶ 21 At the very end of the cross examination, the following exchange occurred:

> THE PROSECUTOR: Now, do you remember telling the police that you had gone there to take pallets; correct –
>
> DEFENDANT: No, not –
>
> THE PROSECUTOR: – not, because your car – not because your truck – your sports truck stopped outside?
>
> DEFENDANT: Whatever – Whatever it was in that statement, that's what I said. I don't – I can't say 'yes,' and I can't say 'no.'
>
> THE PROSECUTOR: So everything in your statement is true, right?
>
> DEFENDANT: Yes, it is.

When the defendant agreed that everything in his statement was true, it is unclear whether he meant the statement that he had just given in court, or the statement within the written statement that he was "getting some pallets," or the entire written

statement. There was no evidence that defendant had removed any pallets from the building at the time he was arrested.

¶ 22 III. Conviction and Sentencing

¶ 23 At the close of the bench trial on October 26, 2009, the trial court found defendant guilty of burglary. On November 19, 2009, defendant filed a motion for a new trial, which was denied. During the aggravation phase of sentencing, the trial court considered defendant's two prior felony convictions for burglary in 1992 and in1997. Both prior convictions were for Class 2 offenses, and as a result defendant was sentenced as a Class X offender. In mitigation, defendant reiterated that the building was abandoned and had been donated to charity. He noted that he has a high school diploma, and that his Presentence Investigation Report detailed his employment history. He also observed that his prior criminal history consisted exclusively of non-violent property crimes. Defendant stated that he had employment waiting for him on his release. Defendant also informed the court that he was grieving the loss of his wife of 23 years, who had passed away in 2007. The trial court sentenced defendant to 10 years in the Illinois Department of Corrections, followed by three years of mandatory supervised release. On December 10, 2009, defendant filed a motion to reconsider his sentence, which was

denied on December 22, 2009. This direct appeal followed.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant argues that (1) the State failed to prove him guilty of burglary beyond a reasonable doubt, (2) he was denied the effective assistance of counsel, (3) the trial court abused its discretion when it sentenced him to 10 years in the Illinois Department of Corrections, and (4) the correct term of mandatory supervised release for his sentence is 2 rather than 3 years.

¶ 26 With respect to the first ground, defendant claims that the State failed to prove his guilt beyond a reasonable doubt because the State failed to show sufficient evidence that he entered the abandoned building with the intent to commit a theft. For the following reasons, we find the evidence insufficient on this point and reverse.

¶ 27 As a preliminary matter, we observe that it is not an option to reduce defendant's burglary conviction to a theft conviction, first, because theft is not a lesser included offense of burglary (*People v. Miller*, 238 Ill. 2d 161,173 (2010)) and, second, theft requires a taking and there was no evidence that defendant took or removed the pallets. *Miller*, 238 Ill. 2d at 172-73 (theft requires a taking while burglary does not).

¶ 28 I. Standard of Review

¶ 29 "When a defendant challenges the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. McGee*, 398 Ill. App. 3d 789, 793 (2010); *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). "[T]he critical inquiry *** must be *** to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318 (1979)).

¶ 30 "[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt." *People v. Rowell,* 229 Ill. 2d 82, 98 (2008); *McGee*, 398 Ill. App. 3d at 793. A reviewing court will not retry the defendant or substitute its judgment for that of the trier of fact. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009).

¶ 31 II. Elements of Burglary

¶ 32 Defendant was convicted of burglary for entering a building without authority with intent to commit a theft. 720 ILCS 5/19-1(a) (West 2008). The State must prove both (1) that defendant knowingly entered a building without authority, and (2) that, at the moment of his entry, the defendant intended to commit a theft in the building. *McGee*, 398 Ill. App. 3d at 793. The statute states in relevant part that:

> "[a] person commits burglary when without authority he knowingly enters or without authority remains within a building *** with intent to commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2008).

"A burglary is complete upon entering with the requisite intent, irrespective of whether the intended felony or theft is accomplished." *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). Thus, a taking is not required to commit burglary. *Miller*, 238 Ill. 2d at 172-73. Although unlawful entry is "the essence of the crime," *(People v. Davis*, 3 Ill. App. 3d 738, 739 (1972)), there is no burglary unless the defendant possessed the specific intent to commit a theft at the time of his entry into the premises. See *People v. Soznowski*, 22 Ill. 2d 540, 542-44 (1961).

¶ 33 A. Unauthorized Entry

¶ 34 To establish the first element of unauthorized entry, the State must prove that there was an entry, that it was "without authority," and that it was "knowingly." 720 ILCS 5/19-1(a) (West 2008). An actual entry is not at issue in this case, since a police officer testified at trial that he found defendant inside the building, and defendant admitted entering the building when he testified at trial. The evidence at trial also established that his entry was unauthorized since first, a representative of the building's owner testified at trial that no one had received permission to enter the building on the date in question; and second, in defendant's statement to the police, the defendant acknowledged that he was in the building "without permission."

¶ 35 We do not address whether the State established the "knowingly" part of the first element, since we find below that the State failed to present sufficient evidence of the second element, namely, the intent to commit a theft.

¶ 36 B. Intent to Commit a Theft

¶ 37 To prove burglary, the State must prove that defendant entered with the specific intent to commit a theft. 720 ILCS 5/19-1(a) (West 2008); *People v. Beasley*, 41 Ill. App. 3d 550, 552 (1976) (proof of specific intent required to support a burglary conviction). The elements of theft are (1) obtaining

unauthorized control over the property of another; and (2) the intent to permanently deprive the owner of the use or benefit of the property. See *People v. Kolton*, 219 Ill. 2d 353, 366 (2006). The statue states in relevant part that:

> "(a) A person commits theft when he knowingly:
>
> (1) Obtains or exerts unauthorized control over property of the owner." 720 ILCS 5/16-1(a)(1) (West 2008).

Defendant claims that the State failed to carry its burden of proving beyond a reasonable doubt that he had the specific intent to deprive an "owner" of the pallets, as the statutes require. 720 ILCS 5/16-1(a)(1) (West 2008); 720 ILCS 5/19-1(a) (West 2008). Defendant states that he reasonably believed that the pallets were abandoned and therefore ownerless.

¶ 38 We agree that the State failed to prove that defendant had a specific intent to deprive an owner. First, no questions about the pallets were posed to the owner's representative at trial. The representative was asked questions only to establish ownership of the building, but not of the pallets. There was no description of the pallets or their condition which might have lent credence to the conclusion that they were owned. For example, in *People v. Cowan*, 49 Ill. App. 3d 367, 369 (1977), the appellate court held that there was insufficient evidence to establish

that an allegedly stolen shirt belonged to a warehouse where the State failed to elicit any testimony about the shirt's condition, such as that it "looked unused or that it was pinned and folded in a *sealed* bag") (emphasis in original). Similarly, in the case at bar, the lack of any testimony about the condition or value of the pallets does nothing to undermine a reasonable belief that the pallets were abandoned and ownerless.

¶ 39 Second, on the particular facts before us, ownership of the pallets cannot be presumed from their mere presence in the building. The owner's representative testified that he had never been to the building. Thus he had no idea what items were inside it. He testified that he had not even been informed of the building's use.

¶ 40 Defendant's unrefuted testimony was that people had been "dumping" items and debris in that building for years. Empty pallets could certainly fall into the category of debris. Defendant's testimony about "dumping" was consistent with the testimony of every single State witness who had testified that the building was abandoned and dilipadated. The State presented three witnesses: an employee of a nearby business, a representative of the building's owner, and the beat cop who passed the building almost every day for three years. All three State witnesses

testified that the building was abandoned and dilapidated. The employee of a nearby business testified that he had observed people entering and exiting the building frequently during the past five years.

¶ 41 Assuming the credibility of all three state witnesses, we cannot find sufficient evidence to undermine a reasonable belief by defendant that the pallets were simply 'dumped' or abandoned in the building. The pallets could have even been brought there by one of the many people, such as defendant's friend Jerry, who had also brought mattresses and were living there.

¶ 42 Defendant's written statement did not provide evidence to the contrary. Defendant's written statement that he took something that did "not belong to" him established that he was not the owner, but it did not provide evidence that he intended to deprive someone else. Even in his statement, he asserted that the building and its contents were "abandoned." Defendant's statement, transcribed by a police officer and provided the day after his arrest, was: "I know that his was – was wrong to go into a building without permission and take something that does not belong to me." Certainly after an arrest and a day in jail, anyone would come to rue a prior action as wrong and a mistake. However defendant's use of the present tense "know" does not provide any evidence that, prior to his arrest, he

believed either that there was a specific owner or that he intended to deprive that owner. At best, the timing of the regret expressed in his written statement is ambiguous, and is not enough to counter the testimony of every witness who swore to the abandoned and dilapidated condition of the warehouse during the preceding five years. *Cf. People v. Karraker*, 261 Ill. App. 3d 942, 950, 957 (1994) (defendant's uncorroborated statement that the allegedly stolen camera equipment "belonged to a professional photographer in Chicago" was insufficient to establish an owner).

¶ 43 There is no credibility dispute here. We are crediting completely the testimony of every witness who testified for the State, as well as the written statement of defendant which it introduced. As the State observed in its appellate brief, "there were no inconsistencies in the evidence." However, we still find that there was insufficient evidence to disprove defendant's subjective and reasonable belief that the pallets were abandoned and thus ownerless.

¶ 44 We find instructive the case of *People v. Taylor*, 207 Ill. App. 3d 206 (1991), where defendant testified that he had found some scrap aluminum in a grassy area of property belonging to a feed store. He testified that he believed that the aluminum was abandoned and started dragging it away to sell for scrap.

Similar to the case in bar, the defendant in *Taylor* acknowledged that he had not asked the feed store owner for permission to take the aluminum. *Taylor*, 207 Ill. App. 3d at 207.

¶ 45 The defendant in *Taylor* argued on appeal that the State did not prove him guilty beyond a reasonable doubt since it failed to prove that he possessed aluminum belonging to an owner, and that there was no evidence that an owner was "even missing any aluminum, let alone any specific evidence identifying the aluminum as belonging to it." *Id*. The appellate court agreed. *Id*. at 208. Similarly, in the case at bar, there was no specific evidence identifying the pallets as belonging to the building's owner.

¶ 46 In addition, defendant's failure to attempt to conceal himself or to evade police is evidence of his lack of a criminal intent. *People v. Boguszwewski*, 220 Ill. App. 3d 85, 87-88 (1991); *People v. Beasley*, 41 Ill. App. 3d 550, 553 (1976). In *Boguszwewski*, the defendant called out a greeting to the security guard that had discovered her in the building, drawing his attention to her presence. *Boguszwewski*, 220 Ill. App. 3d at 86. In *Beasley*, the defendant drove to the municipal water works building where he was arrested in broad daylight, in a vehicle with defendant’s name printed on the side. *Beasley*, 41 Ill. App. 3d at 553.

Similarly, in the case at bar, defendant walked toward the officer and answered without hesitation that he was there "getting some pallets." It is unlikely that he would have forthrightly informed the police of his plan to remove the pallets if he subjectively believed that the pallets had an owner. As discussed above, we find that this subjective belief was also objectively reasonable. Thus, we find that the State provided insufficient evidence of a specific intent to deprive an owner.

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, we find that there was insufficient evidence to support defendant's burglary conviction and we reverse.

¶ 49 Reversed and remanded.