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2012 IL App (3d) 110840-U

Order filed July 11, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-11-0840
v.	)	Circuit No. 10-CF-93
	)	
DAVID AARON NEBLOCK,	)	Honorable
	)	Gordon L. Lustfeldt,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Schmidt and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: On a charge of home invasion, the trial court did not abuse its discretion by refusing to instruct the jury on the lesser included offense of misdemeanor criminal trespass to a residence because the misdemeanor offense was not raised by the evidence.

¶ 2 Defendant, David Aaron Neblock, was charged with felony home invasion (720 ILCS 5/12-11(a)(2) (West 2010)). Following a jury trial, defendant was found guilty of the lesser included offense of criminal trespass to a residence, a Class 4 felony (720 ILCS 5/19-4(a)(2)

(West 2010)). Defendant was sentenced to 30 months of probation, which included 30 days of periodic imprisonment and other specified conditions of probation. Defendant appealed, arguing that the trial court erred in refusing defendant's request for a jury instruction on the lesser included offense of criminal trespass to a residence, a Class A misdemeanor (720 ILCS 5/19-4(a)(1) (West 2010)). We affirm.

¶ 3 FACTS

¶ 4 Defendant was indicted with the charge of home invasion (720 ILCS 5/12-11(a)(2) (West 2010)) as a Class X felony. Under section 12-11(a)(2) of the Criminal Code of 1961:

> "A person *** commits home invasion when without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present or he or she knowingly enters the dwelling place of another and remains in such dwelling place until he or she knows or has reason to know that one or more persons is present *** and
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> ***
>
> *** [i]ntentionally causes any injury *** to any person or persons within such dwelling place[.]" 720 ILCS 5/12-11(a)(2) (West 2010).

The indictment alleged that defendant knowingly and without authority entered the dwelling place of Katherine Zumwalt, knowing her to be present, and injured Eric Hults by striking and biting him.

¶ 5 Prior to trial, defendant requested that the jury be instructed on both the felony and misdemeanor lesser included offenses of criminal trespass to a residence (720 ILCS ILCS 5/19-4(a)(1), (a)(2) (West 2010)). A person commits the misdemeanor offense of criminal trespass to

a residence "when, without authority, he knowingly enters or remains within any residence[.]" 720 ILCS 5/19-4(a)(1), (b)(1) (West 2010). A person commits the felony offense of criminal trespass to a residence "when, without authority, he or she knowingly enters the residence of another and knows or has reason to know that one or more persons is present or *** remains in the residence after he or she knows or has reason to know that one or more persons is present." 720 ILCS 5/19-4(a)(2), (b)(2) (West 2010). The trial court denied defendant's request for instruction regarding the misdemeanor offense but additionally instructed the jury on the lesser included offense of felony criminal trespass to residence. During jury deliberations, the jury asked the court, "What does has reason to know mean?" The trial court responded that the jury had the evidence and instructions before it and requested that the jury continue to deliberate. The jury found defendant guilty of felony criminal trespass to a residence.

¶ 6 During the jury trial, Hults testified that he dated Zumwalt from January 26, 2010, until July or August of 2010. On the evening of February 27, 2010, Zumwalt picked up Hults from his home, and they drove to her house. Zumwalt parked her car in the garage. Hults and Zumwalt spent the evening eating pizza and watching television. They went to bed between midnight and 1 a.m. An hour later, defendant was in Zumwalt's bedroom standing over Hults' side of the bed. Zumwalt asked defendant what he was doing in her home and how he entered. Defendant looked at Hults and said, "You're f***ing my girlfriend. I'm gonna kill you, mother f***er[.]" Defendant punched Hults in the face twice while Hults was still lying down. Hults got out of bed, struck defendant in the head, put him in a "choke hold," and “chok[ed] him out." Defendant bit Hults twice and "tried swingin" at Hults. Defendant began to walk backward down the hallway and said, "I'll fight 'ya." Hults and defendant continued to throw punches and shove each

other, making their way out of the residence. Outside the residence, Hults and defendant "exchanged some words" until police arrived.

¶ 7 Zumwalt testified that she had dated defendant for six years until February of 2009. Zumwalt and defendant continued to see each other after their breakup. From 2008 to 2010, defendant often visited Zumwalt in her home and would stay overnight. Defendant would wake Zumwalt after he got off work at 2 a.m. by knocking on her door. Zumwalt had not seen defendant since the month prior to this incident, when she cut off contact with defendant because she began dating Hults. On February 27, 2010, Zumwalt worked until 9 p.m., and then she picked up Hults and went to her home. Zumwalt had locked the doors before she and Hults went to bed. Zumwalt awoke to find defendant standing next to Hults' side of the bed. She had not heard any knocking, yelling, or her name being called out prior to waking. Defendant said, "You're f***ing my girlfriend. I'll kill you," and punched Hults twice in the face while Hults was still lying in bed. Zumwalt went downstairs to call police. Zumwalt had no contact with defendant that day and did not invite defendant into her home or give him permission to enter her home that evening.

¶ 8 Defendant testified that he dated Zumwalt since 2002. Defendant stayed at Zumwalt's home once per week. It was "common practice" on the nights defendant worked to go to Zumwalt's home after getting off work at 2 a.m. Sometimes defendant would call Zumwalt before going to her home and sometimes he would just walk into her home if the door was unlocked. Prior to the incident in this case, defendant had last seen Zumwalt when she spent the night at his house on February 10, 2010.

¶ 9 According to defendant's testimony, on February 27, 2010, defendant decided to stop by

Zumwalt's home on his way home from work at 2 a.m. He did not call Zumwalt beforehand. There were no cars in the driveway, and the living room light was on. Usually, if the living room light was on, Zumwalt was asleep on the couch. Defendant parked in the driveway, went to the front door, and knocked on the storm door four times. There was no response. Defendant knocked on the window three times, but the window broke. Defendant cut his left thumb on the broken glass. Defendant returned to his vehicle to look for his cellular phone but could not find it. Defendant testified:

> "Rationally, I'm thinking 'I just broke this–this woman's–window. I don't have a phone. *** I don't know why she isn't comin' and responding to the door. I'm bleeding severely. Uh, do I leave the house that I've been to multiple times and drive myself to the hospital, or do I try to–try to wake up [Zumwalt]?"

¶ 10 Defendant testified that he called Zumwalt's name several times before climbing through the broken window. Defendant went to Zumwalt's bedroom to "wake her up." As defendant approached the bedroom he saw Zumwalt sitting up in bed, and she asked him "what are you doin' in here?" Defendant said that he broke the window and needed medical attention. When defendant saw Hults sit up in bed, defendant asked him what he was "doing[] f***ing [his] girlfriend?" Hults charged at defendant and placed him in a choke hold. Defendant tried to punch Hults. Defendant started getting faint from the choke hold so he bit Hults twice. Hults and defendant pushed each other. Hults kicked defendant into the hallway door. Defendant moved backward down the hallway as he tried to regain control over his breathing and compose himself. Defendant and Hults made their way out of the house and waited for police to arrive.

¶ 11 Defendant was found guilty of the lesser included offense of criminal trespass to

residence and not guilty of home invasion as originally charged. Defendant was sentenced to 30 months of probation. He appealed.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant argues that the trial court erred in refusing his request for a jury instruction on the lesser included Class A misdemeanor offense of criminal trespass to a residence. In determining the propriety of a trial court's action in instructing the jury, we review the court's actions for an abuse of discretion. *People v. Garcia*, 188 Ill. 2d 265 (1999).

¶ 14 When deciding whether to tender a lesser included offense instruction, it is appropriate to give weight to the views of the prosecution and the defendant, as well as society's interest in avoiding unjustified exoneration of wrongdoers and punishing an accused only to the extent of the crime. *People v. Carter*, 208 Ill. 2d 309 (2003). A defendant is entitled to a lesser included offense instruction only if the evidence would permit a jury to rationally find him guilty of the lesser offense yet acquit defendant of the greater offense. *People v. Hamilton*, 179 Ill. 2d 319 (1997). However, if the evidence indicates that defendant is either guilty of the more severe offense or not guilty of any offense, an instruction on the lesser included offense is unnecessary and properly refused. *People v. Gwinn*, 366 Ill. App. 3d 501 (2006).

¶ 15 Here, the trial court did not abuse its discretion by refusing to instruct the jury on misdemeanor criminal trespass to a residence. The misdemeanor form of criminal trespass does not require that the defendant know someone is in the residence when he enters, while the felony form does require the defendant to have that knowledge. The evidence at trial indicated that defendant knew or had reason to know that Zumwalt was present in her home when he entered her residence. Defendant testified that he saw a light on in the living room, which indicated that

Zumwalt would be sleeping on the couch. Defendant stated that when he knocked, he did not know why Zumwalt was not answering the door. He also testified that he went into the home to "try to wake up [Zumwalt]" instead of leaving her with a broken window. He specifically testified that he went to Zumwalt's bedroom to try to wake her up. At no point did defendant indicate that he had reason to believe that Zumwalt would not be home at 2 a.m. Additionally, when defendant discovered Zumwalt and Hults in the residence, he remained in the residence and got into a physical altercation with Hults.

¶ 16 Therefore, the evidence indicates that defendant knew or had reason to believe that Zumwalt was in her home when he entered through the window, making an instruction on misdemeanor criminal trespass to residence unnecessary. If the jury found defendant guilty of misdemeanor criminal trespass to residence, it could not also acquit defendant of the greater felony offense of criminal trespass to residence, because there was no indication in the evidence that defendant had reason to believe that Zumwalt was not home. Accordingly, the trial court properly refused defendant's request for a jury instruction on misdemeanor criminal trespass to residence.

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, we affirm the judgment of the circuit court of Kankakee County.

¶ 19 Affirmed.