

No. 1-12-2342

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed in Rule 23(e)(1).

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. |) | 12 CR 1045 |
| |) | |
| SHANNON BROWN, |) | The Honorable |
| |) | Maura Slattery Boyle |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Mason concurred in the judgment.

¶ 1 *Held:* The trial court erred in denying defendant's request for the jury to be instructed on theft as a lesser-included offense of burglary where the evidence would permit, albeit not require, the jury to acquit defendant of burglary and convict him of theft.

¶ 2 Following a jury trial, defendant Shannon Brown was convicted of burglary and sentenced to 13 years in prison. On appeal, defendant asserts that (1) the trial court erred by refusing his request to submit an instruction to the jury for the lesser-included offense of theft; (2) the trial court failed to substantially comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) before permitting defendant to proceed *pro se* during posttrial proceedings; and (3) the trial court failed to adequately inquire into defendant's *pro se*

allegation that trial counsel was ineffective for failing to investigate a potential exculpatory witness. We reverse and remand for a new trial, as the evidence presented would permit a jury to find that defendant committed theft rather than burglary.

¶ 3

I. BACKGROUND

¶ 4 Defendant was charged with one count of committing burglary when he “knowingly and without authority entered a building to wit: Shrine Night Club, the property of Lornell Grayson, located at 2109 S. Wabash, *** with the intent to commit therein a theft.” At trial, Grayson, who was a manager of the Shrine Nightclub (the Shrine), testified that around 5 p.m. on December 26, 2011, he received a phone call from manager Farah Tunks, who stated that the office laptop was missing. The Shrine, which had no set business hours, was closed to the general public at that time but was open to staff. In addition, the Shrine’s main entrance, known as the Shrine entrance, was locked. Although it was common for people to come inside asking for jobs, they would have had to be let inside by an employee. Tunks and Leonard Murphy, a sound engineer, were the only two people scheduled to be at the Shrine at that time but Grayson oversaw more than 70 employees, and other individuals were there setting up for a fashion show and music event that was to begin at 9 p.m.

¶ 5 Grayson testified that after receiving Tunk's phone call, he went to the Shrine, where he, Tunks, Murphy and Officer Albert Powe reviewed video surveillance in the office. In addition, the surveillance video showed “the gentleman retrieving a laptop from the office and trying to exit the building.” Grayson neither recognized the man, nor gave the man consent to be in the building, but identified defendant in court as that individual. After reviewing the video, Grayson deduced that defendant was trapped in

the vestibule area of one of the entrances. Specifically, defendant had entered through the Shrine entrance but attempted to exit through the Shrine's *coup d'etat* entrance. The *coup d'etat* door would automatically lock once a person exited the Shrine through that door and entered the vestibule area. A metal rolling shutter door on the other side of the vestibule was closed. As a result, someone who exited through the *coup d'etat* door, as defendant did, would have been trapped in the vestibule. As Grayson had predicted, he and Officer Powe found defendant with the laptop in the vestibule outside the *coup d'etat* entrance.

¶ 6 Officer Powe testified that the video showed a man, whom he identified as defendant, enter the Shrine, go into the restroom, peek out and look around. Defendant then went into an office before trying to exit the Shrine. During the video, Tunks was trying to secure the doors of the main entrance while defendant was coming out of the restroom. Officer Powe testified that defendant was found inside the vestibule with the laptop.

¶ 7 The surveillance video, which is included in our record on appeal, was admitted into evidence and twice played for the jury to show the events from the night in question. First, the video showed a woman walking toward the Shrine entrance as defendant came inside through the same entrance, but it did not appear that defendant was stopped or questioned. Defendant then entered a restroom, where he remained for approximately 30 seconds. While defendant was in the restroom, Tunks was shown pacing near the Shrine entrance as she talked on the phone. As Tunks turned her back, defendant left the restroom and walked down the hall past an office. While Tunks continued to pace, defendant returned to the restroom and waited for approximately five seconds. Once

Tunks had left the area, defendant went into an office and ultimately walked toward what was identified as the *coup d'etat* entrance.

¶ 8 Following the State's evidence, defendant moved for a directed verdict, arguing that the evidence did not show he intended to commit a theft at the time he entered the building. The court denied the motion and defendant rested without presenting any evidence. Defense counsel also requested that the jury be presented with an instruction for the lesser-included offense of theft, arguing that the jury could find defendant did not enter without authority. The trial court denied the request, however, finding it was clear from Grayson's testimony that the only authorized individuals in the Shrine were Tunks and Murphy. In closing, the State argued that defendant clearly entered without authority because the Shrine was closed to the public, defendant was not an employee and he did not have permission to be inside. The State also argued that the jury could infer that defendant intended to take the laptop when he entered the building. In addition, defense counsel argued, in pertinent part, that defendant entered through the front door, without the use of tools, that the Shrine lacked set hours and that no one stopped defendant to say he could not be there. Defense counsel further argued that Grayson acknowledged people would sometimes come inside to ask for a job. The jury subsequently found defendant guilty of burglary.

¶ 9

II. ANALYSIS

¶ 10 On appeal, defendant asserts that the trial court improperly denied his request for the jury to be instructed on the lesser-included offense of theft. Specifically, defendant argues that the evidence presented would permit a jury to find that defendant did not intend to commit theft when he entered the Shrine, and instead, formed such intent only

after entering the building. We note that although defendant's argument differs somewhat from the argument he provided before the trial court in support of his request for a theft instruction, the State has not argued forfeiture on appeal. *People v. Beachem*, 229 Ill. 2d 237, 241 n.2 (2008) (a defendant's forfeiture is in the nature of an affirmative defense which the State may waive or forfeit).

¶ 11 To analyze whether a jury may be instructed on an uncharged lesser-included offense, Illinois has adopted the “charging instrument approach” as set forth in *People v. Novak*, 163 Ill. 2d 93, 112-13 (1994). Under this approach, an offense constitutes a lesser-included offense if described in the charging instrument. *People v. Hamilton*, 179 Ill. 2d 319, 324 (1997). “A lesser offense will be ‘included’ in the charged offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred.” *People v. Kolton*, 219 Ill. 2d 353, 367 (2006). Once a lesser-included offense has been identified, however, the jury may only be instructed on the offense if the evidence “would permit a jury to rationally find the defendant guilty of the lesser offense yet acquit the defendant of the greater offense.” *Hamilton*, 179 Ill. 2d at 324.

¶ 12 A lesser-included offense instruction is warranted where the greater offense charged requires the jury to find a disputed factual element that is not necessary for a conviction as to the lesser offense. *People v. Garcia*, 188 Ill. 2d 265, 284 (1999). Although the evidentiary requirement for an instruction on a lesser-included offense is usually satisfied by conflicting testimony, the requirement can be satisfied where the lesser offense may be fairly inferred from the evidence presented. *People*

v. Garcia, 188 Ill. 2d 265, 284 (1999). In addition, as the jury was instructed below, "circumstantial evidence is proof of facts or circumstances that give rise to reasonable inferences of other facts that tend to establish the guilt or innocence of a defendant." *People v. Dent*, 230 Ill. App. 3d 238, 243 (1992). Furthermore, a defendant's intent is usually proven by circumstantial evidence. See *People v. Branch*, 2014 IL App (1st) 120932, ¶ 10. Additionally, it is well settled that only slight evidence of the lesser-included offense is required. *Id.* at 701. This is because a lesser offense instruction provides an important third option to a jury which is uncertain whether the State has proved the charged offense but nonetheless believes the defendant is guilty of something. *Hamilton*, 179 Ill. 2d at 323-24. Otherwise, the jury may choose to convict rather than acquit the defendant. *Id.* Although we generally review the trial court's refusal of a proposed jury instruction for an abuse of discretion (*People v. Slack*, 2014 IL App (5th) 120216, ¶ 32), the question of whether a defendant has met the evidentiary minimum for a certain jury instruction, presents a question of law which we review *de novo* (*People v. Washington*, 2012 IL 110283, ¶ 19).

¶ 13 The State does not dispute that the lesser-included offense of theft was described in the charging instrument but contends that the evidence presented would not have permitted a rational jury to find defendant guilty of the lesser-included offense of theft. See *Hamilton*, 179 Ill. 2d at 325 ("By alleging in the indictment that defendant entered *** with the intent to commit a theft, the charging instrument necessarily infers that defendant intended to obtain unauthorized control over and deprive another of property."). We find the evidence presented would support such a finding, notwithstanding that the evidence was also sufficient to sustain a conviction for burglary.

¶ 14 "A person commits burglary when without authority he or she knowingly enters or without authority remains within a building *** with intent to commit therein a felony or theft." 720 ILCS 5/19-1 (West 2012). In addition, an individual commits theft when he, in pertinent part, knowingly "[o]btains or exerts unauthorized control over property of the owner *** [and] [i]ntends to deprive the owner permanently of the use or benefit of the property." 720 ILCS 5/16-1 (West 2012). Thus, unlike burglary, theft does not require that the defendant's intent form at any given time or, that he enter or remain in the building without authority.

¶ 15 Here, we agree that the evidence presented, particularly the surveillance video, would permit, albeit not require, a jury to acquit defendant of burglary but find him guilty of theft. See *People v. Monroe*, 294 Ill. App. 3d 697, 700 (1998). Specifically, the evidence, and permissible inferences there from, would permit a jury to find that defendant did not form the intent to commit theft until after he entered the Shrine. The video surveillance showed that defendant immediately went into the restroom upon entering. Thus, contrary to the State's contention, a jury could infer from this evidence that defendant initially entered the building to use the restroom. We also note Grayson's testimony that individuals sometimes came inside looking for work. Accordingly, while the jury was entitled to infer that defendant formed the intent to commit theft before entering the Shrine, the evidence provided would also permit a jury to find that he formed that intent only after he entered. See *Hamilton*, 179 Ill. 2d at 328 (finding there was evidence presented to acquit defendant of burglary and convict him of theft based on the element of intent).

¶ 16 For the first time on appeal, the State suggests the evidence shows defendant *remained* within the Shrine without authority and with the intent to commit theft. The charging instrument, however, did not allege that defendant remained as an alternative to proving that he entered the Shrine under unlawful circumstances. *People v. Gilmore*, 63 Ill. 2d 23, 28 (1976) (“due process requires that an indictment or information must apprise the defendant of the precise offense charged with sufficient specificity to enable him to prepare his defense.”) Similarly, the jury was not instructed that it could find defendant guilty of burglary for remaining on the premises and the parties presented no arguments on that point. See *People v. Millsap*, 189 Ill. 2d 155, 161, 163-64 (2000) (finding that the court should not submit new theories to the jury after it has commenced deliberations because a defendant’s attorney must be given an opportunity to defend against the State’s theory); *cf. People v. Boone*, 217 Ill. App. 3d 532-33 (1991) (where the jury was instructed on the theory that defendant remained, rather than entered, with the intent to commit theft, the conviction could not be sustained based on defendant’s entry). Accordingly, the State cannot change its theory of the case at this juncture. See also *People v. Crespo*, 203 Ill. 2d 335, 343-44 (2001) (finding that “to apportion the crimes among the various stab wounds for the first time on appeal would be profoundly unfair” and that the State cannot change its theory of the case on appeal).

¶ 17 Moreover, while defendant has seemingly abandoned on appeal his prior assertion that the jury could find he did not enter without authority, we reject the State’s contention that no evidence would permit that determination. The State cites Grayson’s testimony that neither he nor anyone else gave defendant permission to be in the Shrine. Grayson, who was not present when the events at issue occurred, also testified that the Shrine

entrance was locked at that time. Thus, a jury could choose to infer that if the door had been locked, an employee would have had to give defendant authority to enter, particularly because there was no suggestion that burglary tools were used in this case. See *People v. Divincenzo*, 183 Ill. 2d 239, 252 (1998) (the jury must evaluate the credibility of witnesses and make inferences based on the evidence presented).

Additionally, Grayson testified that other individuals were in the Shrine preparing for the fashion show when he arrived. Accordingly, they too could have let defendant inside. Furthermore, the State disregards that the video suggests defendant's presence was known by at least one unidentified woman who exited as he entered the building, but defendant was never approached or told to leave. This conflicting testimony meets the slight evidence necessary to support defendant's request that the jury be instructed on the lesser-included offense of theft.

¶ 18 Accordingly, the trial court erred in denying defendant's request. The State nonetheless contends that any error was harmless because the evidence of the charged offense was overwhelming. See *People v. Velarde*, 137 Ill. App. 3d 496, 492 (1985). We disagree, given that the only evidence that defendant entered with the intent to commit theft is based on inference, and that the only evidence he entered without authority came from one witness who was not present at the time of the offense and did not explain how defendant could have gained unauthorized entry into the locked building.

¶ 19 For the foregoing reasons, we reverse and remand for a new trial. In light of our determination, we need not consider defendant's additional claims, as such alleged errors may not repeat themselves on remand.

¶ 20 Reversed and remanded.