

No. 1-12-2430

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|---------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the     |
|                                      | ) | Circuit Court of    |
| Plaintiff-Appellee,                  | ) | Cook County.        |
|                                      | ) |                     |
| v.                                   | ) | No. 10 CR 13378     |
|                                      | ) |                     |
| WILLIAM NATAL,                       | ) | Honorable           |
|                                      | ) | Carol A. Kipperman, |
| Defendant-Appellant.                 | ) | Judge Presiding.    |

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JUSTICE PIERCE delivered the judgment of the court.  
Presiding Justice Harris and Justice Liu concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* Defendant's conviction for attempted residential burglary was affirmed where the trial court did not err in refusing to give a proffered lesser-included offense jury instruction for attempted criminal trespass to a residence.
- ¶ 2 Following a jury trial, defendant William Natal was found guilty of attempted residential burglary and sentenced to 18 years in prison. On appeal, he contends the trial court erred in refusing to give the jury an instruction for the lesser-included offense of misdemeanor attempted criminal trespass to a residence. We affirm.

¶ 3 Defendant was charged by indictment with attempted residential burglary and possession of burglary tools. In its opening statement to the jury, the State argued that defendant attempted to break into the apartment of Norma Farias and "attempted to take what was not his." Defense counsel's opening statement referenced the State's burden of proving both that defendant took a substantial step toward trying to enter the apartment and that he did so with the intent to commit a theft within the apartment. "[W]hat you will not be presented with [by the State] is any evidence to prove why he may have been trying to get into that apartment that day. \*\*\* [N]ot one single witness is going to come in and tell you why he may have been trying to break into that apartment, because the fact of the matter is, we just don't know."

¶ 4 The State introduced the following testimony. On June 27, 2010, Norma Farias and her two children lived in the first-floor apartment at 2208 50<sup>th</sup> Avenue in Cicero. When Norma left for work at about 8 a.m., she locked the front door behind her. At that time there was no damage to the door. She did not know defendant and did not give him permission to enter her apartment. At about 10 a.m., Norma's cousin, Martin Farias, Jr., who lived on the third floor above her, had come down the stairs to the first floor when he saw a man, whom he identified at trial as defendant, standing by Norma's apartment door. Defendant was wearing gloves and was forcing what "looked like a knife or some type of weapon, a white object," into the door frame. He wore a black backpack on one shoulder. Martin summoned his father and the two men went to Norma's apartment. Defendant was gone. The frame of the apartment's front door had been forced, there were marks on the frame that showed forced entry, and a piece of wood was missing from the frame.

¶ 5 They went outside and saw defendant walking about half a block from the building. He

was still carrying the black backpack on his shoulder. Martin called to defendant, telling him to stop, but defendant began walking faster. Martin called the police on his cell phone. Defendant began to run and Martin ran after him. Defendant briefly hid in some bushes and then began to run again. He went behind a Burger King restaurant. Martin ran after him but lost sight of him in an alley behind the Burger King. Martin saw nearby residents pointing to a garbage dumpster in the alley. Police officers arrived and found defendant in the dumpster amid the refuse. A black backpack was wound around his waist. The officers ordered him out of the dumpster, placed him under arrest, and handcuffed him. In conducting a pat-down search, an officer found a piece of wood in defendant's pants pocket which contained pry marks around its edge from some type of tool. It was later found to be the wedge of wood missing from Norma's door frame. Defendant's backpack contained several items, including a pair of mismatched gloves. One of the arresting officers testified that burglars often use gloves to cover their fingerprints when trying to break into a place.

¶ 6 After the State rested, the defense moved the court for a directed verdict in defendant's favor. The motion was denied as to the charge of attempted residential burglary but allowed as to possession of burglary tools. The defense proffered a jury instruction on the lesser offense of criminal damage to property, which the court allowed. The defense also requested an instruction on attempted criminal trespass to a residence. The trial court refused to give that instruction on the basis that it was not a lesser-included offense of attempted residential burglary. The defense rested without presenting testimony.

¶ 7 In closing argument, defense counsel told the jury that they would have to decide what defendant was doing in the building that day and why. Defense counsel also told the jury that no

evidence was introduced at trial as to why defendant tried to enter the apartment or why he damaged the door frame. "[Y]ou have not been provided with sufficient evidence in this case to find [defendant] guilty of [attempted residential burglary] or to find beyond a reasonable doubt that he had that intent."

¶ 8 The jury returned a verdict of guilty of attempted residential burglary. Defendant's written motion for a new trial alleged, *inter alia*, that the trial court erred in refusing to give a jury instruction for attempted criminal trespass to a residence. The court denied the motion. Because of defendant's criminal history, he was sentenced as a Class X offender to 18 years in prison.

¶ 9 On appeal, defendant's sole assignment of error is that the trial court erred when it refused to instruct the jury on attempted criminal trespass to a residence. Initially, we note that the parties agree that misdemeanor attempted criminal trespass to a residence is a lesser included offense of attempted residential burglary in this case and that the trial court erred in finding otherwise. We agree.

¶ 10 Generally, a defendant may not be convicted of an offense with which he has not been charged. *People v. Hamilton*, 179 Ill. 2d 319, 323 (1997). However, a defendant may be convicted of an uncharged offense (1) if it is a lesser-included offense of a crime expressly charged in the charging instrument, and (2) the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense. *People v. Kolton*, 219 Ill. 2d 353, 360 (2006), citing *People v. Novak*, 163 Ill. 2d 93, 108 (1994). Whether a charged offense encompasses another as a lesser-included offense is a question of law which we review *de novo*. *Kolton*, 219 Ill. 2d at 361. The decision of whether to give a lesser-included

offense instruction to a jury is a matter resting within the sound discretion of the trial court. *People v. Castillo*, 188 Ill. 2d 536, 540 (1999). An instruction is justified on a lesser offense where there is some evidence to support the giving of the instruction. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998).

¶ 11 We utilize the charging instrument approach as the appropriate method to determine the first step, *i.e.*, whether the lesser offense of misdemeanor attempted criminal trespass to a residence is included in the charged offense of attempted residential burglary for purposes of jury instructions. *Kolton*, 219 Ill. 2d at 361. We look initially to the relevant statutory definition of attempted criminal trespass to a residence. *Id.* at 368-69. A person commits misdemeanor attempted criminal trespass to a residence when he performs an act constituting a substantial step toward an unauthorized entry into a residence. 720 ILCS 5/8-4(a), 19-4(a)(1) (West 2010). We then look to the offense in the charging instrument to determine whether the facts alleged there contain a broad foundation or main outline of the uncharged offense. The indictment alleged that defendant committed the offense of attempted residential burglary in that he "knowingly and without authority broke the door frame of the dwelling place of Norma Farias located at 2208 50<sup>th</sup> Ave., Apartment One, Cicero, Ill. with intent to commit therein a theft, which constituted a substantial step towards the commission of the offense of residential burglary." 720 ILCS 5/8-4, 19-3(a) (West 2010). The indictment count charging attempted residential burglary clearly contained a broad foundation or main outline of the offense of misdemeanor attempted criminal trespass to a residence and therefore, the trial court erred in finding that attempted criminal trespass to a residence was not a lesser-included offense of attempted residential burglary in this case. *People v. Austin*, 216 Ill. App. 3d 913 (1991).

¶ 12 In this case, the trial court refused to exercise its discretion under the mistaken belief that attempted criminal trespass to a residence was not a lesser-included offense of attempted residential burglary in this case. We are aware that “ ‘(t)here is error when a trial court refuses to exercise discretion in the erroneous belief that it has no discretion \* \* \*.’ ” *People v. Autman*, 58 Ill.2d 171, 176 (1974) (quoting *People v. Queen*, 56 Ill.2d 560, 565 (1974)). Nevertheless, we do not believe the error committed here warrants reversal where the trial court's finding was harmless because the evidence adduced at trial did not support giving the lesser-included offense instruction.

¶ 13 The second step of our analysis is to examine the evidence adduced at trial and decide whether that evidence would permit a jury to rationally find the defendant guilty of the lesser offense, yet acquit him of the greater offense. *Hamilton*, 179 Ill. 2d at 324. In doing so, we "must examine the evidence presented and determine whether the evidence would permit a jury to rationally find the defendant guilty of the lesser-included offense, but acquit the defendant of the greater offense." *People v. Ceja*, 204 Ill. 2d 332, 360 (2003).

¶ 14 Both the charged offense and the uncharged offense contained the elements that the individual performed an act constituting a substantial step toward an entry into a residence and that such entry was unauthorized. The difference between the two offenses is that the uncharged offense did not require the offender to possess the intent to commit a theft inside the residence as it did in the charged offense. The State contends defendant was not entitled to the instruction because no evidence was presented with respect to the intent element that would permit the jury to acquit him of the greater offense but find him guilty of the lesser offense.

¶ 15 The evidentiary requirement--in this case, intent to commit theft--is usually satisfied for

purposes of giving the lesser-included instruction by the presentation of conflicting testimony on that element. Where the testimony is not conflicting, the evidentiary requirement may be satisfied if the conclusion as to the lesser offense may fairly be inferred from the evidence presented. *Novak*, 163 Ill. 2d at 108. The State asserts there was no conflicting testimony as to defendant's intent; and, given the totality of the trial evidence, including defendant's use of a knife and mismatched gloves to attempt to pry open the door and his flight from the building, it could not be inferred that defendant merely intended to trespass into the apartment, not commit a theft. Defendant asserts, however, that there was no evidence that defendant intended to commit a theft in the apartment. He claims that the question of why defendant wanted to enter the Farias apartment was "entirely a matter of speculation."

¶ 16 While no direct evidence was introduced that defendant intended to commit theft inside Farias' apartment, proof of unlawful entry onto premises containing personal property that could be the subject of theft gives rise to an inference that will sustain a burglary conviction. *People v. McKinney*, 260 Ill. App. 3d 539, 544 (1994); *People v. Mackins*, 222 Ill. App. 3d 1063, 1067 (1991), citing *People v. Johnson*, 28 Ill. 2d 441, 443 (1963). Such an inference is also proper in an attempted burglary case if there is proof of an attempted unlawful breaking and entry, and there are no inconsistent circumstances. *In re P.A.G.*, 193 Ill. App. 3d 601, 603 (1990). Moreover, intent may be established through circumstantial evidence. *People v. Burney*, 2011 IL App (4<sup>th</sup>) 100343, ¶ 29. The State may prove intent from the totality of the circumstances, including the defendant's conduct. *People v. Cabrera*, 116 Ill. 2d 474, 492 (1987). Relevant considerations include the time, place, and manner of entry, the defendant's activity within the premises, and any alternative explanations offered for his presence on the premises. *People v.*

*Richardson*, 104 Ill. 2d 8, 13 (1984). Here, circumstantial evidence of intent to commit theft included defendant's attempted entry by force, using a knife and a pair of gloves in trying to force the door of an apartment, and his flight upon being discovered, going so far as to hide in a garbage dumpster to avoid being apprehended.

¶ 17 We agree with the State that there was evidence, albeit circumstantial, of defendant's intent to commit a theft, and no conflicting evidence providing an alternative explanation, *i.e.*, that his intent in attempting to enter Farias' apartment was something other than to commit a theft. In the end, whether he actually committed theft is irrelevant as the jury could infer the intent to commit theft element from the surrounding circumstances. See *People v. Maggette*, 195 Ill. 2d 336, 354 (2001) ("criminal intent is a state of mind that not only can be inferred from the surrounding circumstances [citation] but usually is so proved. [Citation.]"). No evidence was presented that would have permitted the jury to acquit defendant of attempted residential burglary but find him guilty of attempted criminal trespass to a residence. *People v. Perez*, 108 Ill. 2d 70, 81 (1985) ("an included-offense instruction is required only in cases where the jury could have rationally found the defendant guilty of the lesser offense and not guilty of the greater offense.") In so finding, we categorically reject defendant's argument that defense counsel's opening statement or closing argument wherein she commented on the lack of evidence regarding defendant's intent to do anything other than "tried to enter the apartment or why he damaged the door frame" constituted evidence that could contradict the State's circumstantial evidence on the subject. Counsel in closing argument may properly comment upon the evidence or lack thereof, but closing argument is not evidence. *People v. Wooley*, 178 Ill.2d 175, 209 (1997). Consequently, no reversible error occurred when the trial court refused to give

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defendant's proffered lesser-included offense jury instruction. Accordingly, we affirm defendant's conviction for attempted residential burglary.

¶ 18 Affirmed.