2016 IL App (2d) 140284-U
No. 2-14-0284
Order filed June 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FREDDIE SMITH, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 13-CF-1700 Honorable Robert G. Kleeman, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of burglary, as he possessed the stolen property under circumstances that permitted an inference of guilt; (2) the trial court did not err by instructing the jury on accountability, as the evidence allowed the inference that defendant participated in the burglary but did not personally commit it; (3) the trial court erred by refusing to instruct the jury on the lesser included offense of theft, as the evidence allowed the inference that defendant did not participate in the burglary but merely possessed and disposed of the proceeds; thus, we reversed defendant's conviction and remanded for a new trial.

¶ 2 Following a jury trial in the circuit court of Du Page County, defendant, Freddie Smith, was found guilty of burglary (720 ILCS 5/19-1 (West 2012)) and was sentenced as a Class X

offender (see 730 ILCS 5/5-4.5-95(b) (West 2012)) to nine years' imprisonment. On appeal, defendant argues that the trial court erred in refusing to instruct the jury on the lesser included offense of theft. Defendant also argues that the trial court erred in granting the State's request for an instruction on the principles of accountability. Finally, defendant argues that the State failed to prove his guilt beyond a reasonable doubt. We agree that the jury should have received an instruction on theft. We therefore reverse defendant's conviction and remand for a new trial.

¶ 3 At trial, Elaina Pasliewicz testified that, on August 30, 2013, at 1:30 p.m., she visited Springfield Park in Bloomingdale with her son. She left her car in the parking lot and took her son to the playground. Her purse was on the floor of her car, under the front passenger's seat. When she left the car, the windows were rolled up and the doors were locked. Pasliewicz and her son stayed at the park for about an hour. When they returned to the car at about 2:30 p.m. or 2:40 p.m., the front passenger window was broken and Pasliewicz's purse was missing. Pasliewicz called her husband and explained what happened. Her husband contacted the police. About two hours later, she was shown a purse that had been recovered by the police. Pasliewicz recognized the purse and its contents, which included cash, her driver's license, and her social security card. At trial she identified the purse as the one missing from her vehicle.

¶ 4 Dominick Corsiglia, an officer with the Bloomingdale police department, testified that, on August 30, 2013, at about 2 p.m., he was in uniform driving a marked squad car. While driving slowly through Springfield Park's parking area, Corsiglia observed two African-American males in the front seat of a Mercedes truck that had backed into a parking spot. Corsiglia thought it unusual to see a vehicle backed into a space in that lot. When Corsiglia made eye contact with the driver, the Mercedes pulled forward out of the space and exited the lot onto Springfield Drive. Corsiglia followed the vehicle, which made a left turn into the back of

the parking lot for an Ace Hardware store. Corsiglia also pulled into the lot. He testified that he observed a beige purse "come out" of the front passenger window of the Mercedes.

¶ 5 An Ace Hardware employee observing the events flagged Corsiglia down. From inside his squad car, Corsiglia instructed the employee to hold on to the purse. Corsiglia then activated his squad car's emergency lights and siren. The Mercedes quickly turned left from the Ace Hardware parking lot onto Springfield Drive. Corsiglia pursued the Mercedes onto Lake Street and requested assistance from other officers. The Mercedes traveled at 80 to 90 miles per hour for about 2½ miles before heavy traffic prevented it from proceeding further. At that point the Mercedes pulled over and the driver and passenger were arrested. The driver was identified as Andrew Simeon. Corsiglia identified defendant as the passenger. A fellow officer retrieved the purse from the Ace Hardware employee and delivered it to Corsiglia. The purse, which Corsiglia identified at trial, was the same one that Pasliewicz identified as having been stolen from her vehicle.

¶ 6 Defendant rested without presenting evidence. Defendant requested that the jury be instructed on the lesser included offense of theft. The trial court refused the request. Over defendant's objection, the trial court instructed the jury on the principles of accountability.

¶ 7 As noted, defendant argues on appeal both that the trial court erred in instructing the jury and that the State failed to present sufficient evidence to prove his guilt. We first consider the sufficiency of the evidence. A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When we review a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 8 Section 19-1(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/19-1(a) (West 2012)) provides, "A person commits burglary when without authority he or she knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle, railroad car, or any part thereof, with intent to commit therein a felony or theft." The State's case against defendant is built on evidence of defendant's recent possession of property stolen from Pasliewicz's vehicle. It cannot be gainsaid that, standing alone, the other evidence against defendant would be insufficient to establish that either defendant, or one for whose conduct defendant was responsible, burglarized the vehicle. However, "[e]vidence of a knowing, recent, exclusive, and unexplained possession of stolen property by an accused, either singly or jointly with others, may raise an inference of the accused's guilt of burglary." *People v. Sanders*, 77 Ill. App. 3d 115, 116 (1979). Here, that inference is the linchpin of the State's case against defendant. In assessing the sufficiency of the evidence against defendant, we must consider the strength of the inference in light of the surrounding circumstances. *People v. Housby*, 84 Ill. 2d 415, 424 (1981).

¶ 9 Although the inference described in *Sanders* had a long history in Illinois, the *Housby* court noted that "no court opinion has yet pointed out why it is more likely that the possessor is the burglar instead of one who received stolen property or simply joined the burglar after the crime had been committed." *Id.* at 422-23. The *Housby* court held that a conviction based on

the inference is permissible if "(i) there was a rational connection between [the defendant's] recent possession of property stolen in the burglary and his participation in the burglary; (ii) [the defendant's] guilt of burglary is more likely than not to flow from his recent, unexplained and exclusive possession of burglary proceeds; and (iii) there was evidence corroborating [the defendant's] guilt." *Id.* at 424.

¶ 10 In *Housby* the defendant helped an acquaintance, Raymond King, sell a riding lawnmower to Leroy Koch. Hours earlier, the lawnmower had been stolen in a burglary. The defendant and King delivered the lawnmower to Koch, who gave them a check payable to the Green Front Tavern, which was owned by James Wasilewski. Koch testified that, a few days earlier, he had asked Wasilewski to get him a lawnmower at a good price. The defendant testified that, on the night of the burglary, King asked for help moving a lawnmower that King had just purchased. King wanted to sell the lawnmower to his brother, but the defendant suggested selling it to Wasilewski. The defendant had heard that Wasilewski was in the market for a lawnmower. The defendant provided a panel van (which he evidently did not own) to move the lawnmower. He testified that he did not know in advance whether the lawnmower would fit in the van but he had assumed that it would. That the defendant was available to help move a riding lawnmower, had access to a panel van that he did not own, was correct in his assumption that a riding lawnmower would fit in the van, and knew of a potential buyer could conceivably have been purely serendipitous. The *Housby* court concluded, however, that it was more likely than not that the burglary was planned in advance and that the defendant participated in the burglary. *Id.* at 430.

¶ 11 In *People v. Burrows*, 183 Ill. App. 3d 949 (1989), the defendant's burglary conviction was affirmed where property stolen during the burglary was recovered from the defendant's

family home. The State presented evidence that the defendant had been playing cards at the home of Rick and Patti Hossler, who lived two doors away from the burglarized premises, and that Patti Hossler's daughter, Amy Strunk, overheard a discussion about whether the premises in question were occupied. Strunk fell asleep. When she awoke, she saw boxes that she could not identify in the kitchen of the Hossler home. The defendant and the other participants in the card game were also present. The *Burrows* court concluded that the evidence satisfied the requirements of *Housby*. In an attempt to explain the presence of the stolen property in his family home, the defendant offered his parents' testimony that the property was a gift from Rick Hossler. The *Burrows* court noted, however, that the defendant's explanation "did not account for the appearance of the stolen goods in his possession with others in the Hossler home." *Id.* at 954. The *Burrows* court concluded that it was thus "more likely than not that defendant's guilt flows from his connection with the possession of the stolen goods." *Id.* Furthermore, his presence during the discussion of whether the burglarized premises were occupied corroborated his guilt.

¶ 12 Here, the evidence of guilt is as strong as the evidence on which the convictions in *Housby* and *Burrows* were based. Defendant and Simeon were in possession of the stolen purse at a time and place close to the time when, and place where, the burglary occurred. Accordingly, there is a rational connection between defendant's recent possession of the property stolen in the burglary and his participation in the burglary. Moreover, the circumstances suggest that defendant's guilt of burglary is more likely than not to flow from his possession of the purse stolen from Pasliewicz's car. It is likely that whoever committed the burglary would immediately have gone through the purse looking for valuables. However, cash was found in the

purse when the police recovered it, which suggests that defendant and Simeon committed the burglary, but did not have time to look for valuables.

¶ 13 There was also evidence corroborating defendant's guilt. Defendant remained with Simeon when Simeon drove off after making eye contact with Corsiglia. More importantly, Corsiglia observed the stolen purse "come out" of the passenger-side window. The natural inference is that defendant, who was riding in the front passenger seat, had participated in the burglary and was attempting to escape detection.

¶ 14 The State does not dispute that the evidence is insufficient to establish whether defendant *personally* broke into Pasliewicz's vehicle. We agree with the State, however, that even if it was Simeon who broke into the vehicle, the jury could find beyond a reasonable doubt that defendant was guilty under accountability principles. As relevant here, a person is legally accountable for another's conduct when "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 2012). In *People v. Jaimes*, 2014 IL App (2d) 121368, ¶ 38, we observed as follows:

> "While mere presence at the scene of a crime, alone, does not render a person accountable, it is a factor that may be considered with other circumstances when the trier of fact determines accountability. [Citation.] Other factors that may be considered are the maintenance of a close affiliation with the companion after the commission of the crime, flight from the scene, and the failure to report the crime. [Citation.] Active participation in the offense is not a requirement for guilt under a theory of accountability. [Citation.] A jury can infer a defendant's accountability from his approving presence at the scene of the crime and from evidence of conduct showing a design on the defendant's

> part to aid in the offense. [Citation.] Further, to obtain a conviction based on accountability, the State must prove that the principal actually committed the offense. [Citation.]"

¶ 15 First, we reject defendant's argument that the State did not disprove that someone other than defendant and Simeon broke into Pasliewicz's vehicle. Based on the evidence outlined above, the trier of fact was not required to elevate that remote possibility to a reasonable doubt. Assuming, *arguendo*, that it was Simeon who actually broke into Pasliewicz's vehicle, the evidence that defendant remained with Simeon throughout his flight from police and rendered aid to Simeon by disposing of Pasliewicz's purse was sufficient to permit the trier of fact to conclude that defendant was an accomplice to the burglary.

¶ 16 We turn now to defendant's arguments concerning the jury instructions. Having concluded that the State's accountability theory was a viable basis for defendant's conviction, we necessarily reject defendant's argument that the trial court erred in instructing the jury on that theory. As explained below, however, we agree with defendant that the trial court erred in denying his request to instruct the jury on the lesser included offense of theft.

¶ 17 It is well established that, "in an appropriate case, a defendant is entitled to have the jury instructed on a less serious offense if that offense is included in the charged offense." *People v. Hamilton*, 179 Ill. 2d 319, 323 (1995). As explained in *Hamilton*, "The purpose of an instruction on a lesser offense is to provide 'an important third option to a jury which, believing that the defendant is guilty of something but uncertain whether the charged offense has been proved, might otherwise convict rather than acquit the defendant of the greater offense.' " *Id.* at 323-24 (quoting *People v. Bryant*, 113 Ill. 2d 497, 502 (1986)). A defendant is entitled to have the jury instructed on a lesser included offense where the evidence "would permit a jury to rationally find

the defendant guilty of the lesser offense yet acquit the defendant of the greater offense." *Id.* at 324.

¶ 18 We note authority that "where *** the evidence is sufficient for a conviction on the greater offense, it is not reversible error to instruct only as to that offense." *People v. Fonville*, 158 Ill. App. 3d 676, 685 (1987). However, there is also authority that, where the evidence warrants an instruction on an uncharged lesser included offense, the refusal of a defendant's request for the instruction is reversible error unless the evidence *overwhelmingly* supports a conviction of the charged offense. See *People v. Scott*, 256 Ill. App. 3d 844, 852-53 (1993). We believe that *Scott* reflects the better approach. Were reviewing courts to limit relief for such instructional errors to cases where the evidence is insufficient to sustain a conviction of the greater offense—such that reversal would be required irrespective of the instructional error—the defendant's right to a lesser-included-offense instruction would be meaningless.

¶ 19 The State concedes that, in this case, theft was a lesser included offense. The State argues, however, that the evidence did not permit a rational finding by the jury that defendant was guilty of theft, but not of burglary. We disagree. The evidence of defendant's guilt, either as a principal or under an accountability theory, is sufficient to sustain the burglary conviction, but is not overwhelming. There is no direct evidence that defendant was present when the crime was actually committed. As discussed, based on the evidence that defendant fled with Simeon and attempted to dispose of the purse, a rational jury could infer that defendant and Simeon committed the burglary together. However, other inferences are possible. As a passenger in the vehicle that Simeon was driving, defendant might not have had any choice but to flee along with Simeon. Furthermore, even if defendant did not participate in the burglary itself, he might have decided to dispose of the purse so as to avoid being found in possession of stolen property.

Defendant is correct that, in that case, the jury could rationally find him guilty of theft. See 720 ILCS 5/16-1(a)(4)(C) (West 2012). Defendant was entitled to have the jury consider that option as an alternative to a verdict of not guilty or guilty of burglary.

¶ 20 For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed and the cause is remanded for a new trial.

¶ 21 Reversed and remanded.