2016 IL App (2d) 140928-U
No. 2-14-0928
Order filed December 12, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CF-2537
JAY B. HILDIBRAND,	)	Honorable Kathryn E. Creswell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of burglary, specifically that he had the requisite intent when he entered the store where he committed a theft: the jury could infer such intent from the evidence that he entered the store, hid items in his jacket, and exited within four minutes, escaping in a van that his girlfriend had strategically parked and drove away from the scene; (2) we modified the mittimus to make it reflect the trial court's oral sentencing pronouncements.

¶ 2 At around noon on Christmas Eve 2013, defendant, Jay B. Hildibrand, entered the Walgreens in Glen Ellyn on the corner of Roosevelt and Lambert Roads, took approximately 42 packages of batteries in addition to 4 bottles of Grey Goose vodka, exited the store without

paying for these items, and ran about one block north to the minivan in which his girlfriend was waiting. Based on these acts, defendant was charged with retail theft (720 ILCS 5/16-25(a)(1) (West 2012)) and burglary (720 ILCS 5/19-1(a) (West 2012)). With regard to the burglary charge, the State alleged that defendant entered the Walgreens with the intent to commit a theft therein. A jury found defendant guilty of burglary and retail theft[1], and he was sentenced to five years' imprisonment for burglary. Concerning the retail theft charge, the report of proceedings indicates that the court imposed a jail sentence of 364 days. However, the mittimus is somewhat confusing on this point. On appeal, defendant argues that the State failed to prove beyond a reasonable doubt that he entered the Walgreens with the intent to steal the batteries and vodka. Defendant also claims that the mittimus must be corrected to properly reflect the sentences that were entered. For the reasons that follow, we affirm as modified.

¶ 3 At trial, Dante Roberts testified that he was the shift supervisor at Walgreens on December 24, 2013. Roberts stated that the weather was mild and the parking lot was full, as "people [were] coming and going." Roberts was collecting shopping carts at around 11:50 a.m. when a customer alerted Roberts to the fact that defendant had put bottles of vodka in his coat and was leaving. Roberts described the coat, which was admitted into evidence, as a green polo coat or jacket. Roberts also saw that defendant was wearing underneath his coat a tan and white plaid shirt, as defendant's coat was not zipped all the way up "at first." Roberts examined the coat at trial and indicated that the coat had pockets and was reversible.

[1] The jury was instructed on burglary, theft, and the lesser-included offense of retail theft not in excess of $300. The jury found defendant guilty of burglary and retail theft not in excess of $300.

¶ 4 After defendant quickly walked past Roberts and out the store's automatic doors, Roberts ran after defendant, yelling "hey, you" and demanding that defendant return to the store. Defendant, whose coat was now "kind of bulky," replied, "why." At that point, defendant started running north on Lambert Road toward the back of Walgreens' parking lot. Roberts returned to the store and called 911.

¶ 5 Roberts testified that he never saw defendant enter the store or walking around inside of the store. Roberts also never saw defendant with anything in his hands. More specifically, Roberts never saw defendant with scissors or cutters that could be used to cut off sensors on merchandise; he never saw defendant with a bag or backpack; and he never saw defendant carrying any bags lined with tinfoil that could scramble any signal sent to the theft detection equipment at the store's exits.

¶ 6 Surveillance video admitted at trial shows a light-colored minivan in front of the store right before defendant enters the store at around 11:53 a.m. Defendant is wearing a polo-type shirt and a jacket. The jacket, which is unzipped, is quite large, and he has his hands in the pockets. Although some fellow shoppers on the video are wearing coats that are unzipped, several other customers are wearing zipped coats, scarves, hats, and gloves. Defendant is seen leaving the store at approximately 11:57 a.m. During the four minutes that defendant remains in Walgreens, approximately 38 customers enter or leave the store. In the minute before defendant enters the store, 13 people are seen entering, leaving, or milling around the entrance to the store.

¶ 7 James Wilken, a customer at Walgreens at around noon that day, testified that, when he heard a Walgreens employee yell, "hey, wait," he turned around, believing that the employee was talking to him. At that time, Wilken saw defendant, who was wearing a "strange" jacket, running away. Wilken elaborated that the jacket "wasn't a regular-looking jacket."

¶ 8 Wilken exited the store and was driving down the street when he saw defendant getting into a minivan that was parked in the driveway of a townhome that was one block north of Walgreens. The minivan pulled out right in front of Wilken and drove off. Wilken called 911, telling the police what he had seen and giving them the minivan's license plate number.

¶ 9 The parties stipulated that, if Officer Pacyga were called to testify, he would state that he received a dispatch regarding the incident at Walgreens. Based on the information he received, he began patrolling the area, looking for a gold-colored minivan with the given license plate number. Soon thereafter, Pacyga saw the described minivan speeding and changing lanes without signaling. Defendant, who was seated in the front passenger seat, was smoking, not wearing a jacket, turning around repeatedly to look at Pacyga's squad car, and otherwise moving around in his seat. Pacyga eventually pulled the minivan over, Roberts was brought to the scene, and Roberts identified defendant as the shoplifter.

¶ 10 Officer Terri Nemchock testified that she received a dispatch about the incident at Walgreens on December 24, 2013, which the officer described as a cold day. Nemchock described the area around Walgreens, noting that directly north of the store was a small side street off of which the local YMCA was located. Nemchock stated that a residential area was located north of this YMCA. This residential area consisted of single-family homes and townhomes. Nemchock testified that these residences all have driveways that can be accessed from Lambert Road.

¶ 11 Nemchock assisted the other officers at the scene of defendant's arrest. Nemchock stated that defendant's girlfriend had been driving the minivan and gave Nemchock consent to search the vehicle. In the minivan, Nemchock found four bottles of Grey Goose vodka and a white plastic bag containing 42 packages of batteries. Nemchock stated that the batteries appeared to

be new. That is, the packaging was not frayed, tattered, or worn. The vodka was found underneath the jacket defendant had been wearing in Walgreens, and the batteries were found next to the jacket. Nemchock also found six bottles of Grey Goose and Absolut vodka underneath the bench seat in the back of the minivan. Nemchock stated that, in her experience, alcohol is frequently stolen because it can be easily resold for cash.

¶ 12 Nemchock testified that, after defendant was arrested, the police inventoried his personal property. Included in this property was $24. Nemchock believed that defendant did not have any credit cards on him.

¶ 13 Officer Craig Holsted, who assisted Pacyga and Nemchock at the scene, had a conversation with defendant while defendant was seated in Holsted's squad car. Holsted asked defendant where the batteries in the minivan had come from. Defendant told Holsted that he had bought them at a flea market and was planning to resell them at another flea market. Defendant was unable to provide a receipt for the batteries.

¶ 14 David Zak, the assistant store manager at Walgreens, indicated that there is a car lot to the north of Walgreens. In the back of the car lot are townhomes where a "bunch of people" live. Pictures of the area around Walgreens that were admitted at trial confirm that there is a car lot across the street from Walgreens.

¶ 15 Zak testified that he was working at the store on December 24, 2013, when the police dropped off a basket of batteries and four bottles of Grey Goose vodka. Zak, using the store's smart inventory management system (SIMS) and an on-hand count, advised the police that the four bottles of vodka "matched perfectly" the discrepancy between what the SIMS indicated Walgreens had in stock and what the on-hand count of Walgreens' inventory revealed. With regard to the basket of batteries, which consisted of Duracell, Energizer, and Walgreens-brand

batteries, Zak stated that they did not quite match the variance between what the SIMS reflected was in the store's inventory and what the on-hand count revealed. Zak explained that this discrepancy was not surprising, given that, for example, employees might scan a package of AAA batteries as a package of AA batteries. Zak also indicated that neither the batteries nor the vodka have any theft-detection stickers or sensors on them.

¶ 16 Admitted at trial was evidence concerning the value of the merchandise taken from Walgreens. The total cost of the batteries and vodka was $484.35. The cost of the vodka alone was $137.96.

¶ 17 Also admitted at trial were two phone conversations defendant had with his girlfriend while he was in jail. In one conversation, defendant asks his girlfriend why she turned over his jacket to the police. In the other, after defendant's girlfriend asks him if it was worth it, defendant replies that he "should have ran."

¶ 18 The State rested, and defendant moved for a directed verdict, arguing that the State did not establish that he entered Walgreens with the intent to commit a theft. The trial court denied the motion.

¶ 19 Subsequently, the jury found defendant guilty of burglary and retail theft not in excess of $300. Defendant filed a posttrial motion, arguing that the evidence was insufficient to prove him guilty of burglary beyond a reasonable doubt. More specifically, defendant claimed that the State did not establish that he had the intent to commit a theft when he entered the store. The trial court denied the motion, noting that defendant entered Walgreens with his jacket unzipped and fled to a car waiting for him not in the parking lot but in a remote location.

¶ 20 At the sentencing hearing, the court, after sentencing defendant to 5 years' imprisonment for burglary, stated that it "neglected to mention the misdemeanor. On the Class A theft,

conviction to enter, 364 days." The court then noted that "[i]t's concurrent." The mittimus reflects that a five-year sentence was imposed on the burglary conviction and that "conviction entered on ct[.] 1." The mittimus then provides, "364 days DuPage [*sic*] jail concurrent with count 2." This timely appeal followed.

¶ 21 On appeal, defendant contends that the State failed to prove him guilty of burglary beyond a reasonable doubt. More specifically, he claims that the State failed to prove that he entered the Walgreens with the intent to commit a theft therein. He also contends that the mittimus must be corrected to reflect that a concurrent 364-day jail sentence was imposed on the retail theft conviction. We address each argument in turn.

¶ 22 The first issue we consider is whether defendant was proved guilty of burglary beyond a reasonable doubt. When the sufficiency of the evidence is challenged on appeal, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. In assessing the sufficiency of the evidence, it is not our function to retry the defendant or to substitute our judgment for that of the jury. *People v. Sanchez*, 2013 IL App (2d) 120445, ¶ 18. Rather, it is within the province of the jury "to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence." *People v. Graham*, 392 Ill. App. 3d 1001, 1009 (2009). We will reverse a defendant's conviction only if "the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *Id.*

¶ 23 As relevant here, section 19-1(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/19-1(a) (West 2012)) provides that "[a] person commits burglary when without authority he or she knowingly enters *** with intent to commit therein a felony or theft." A person may commit a

burglary by entering a building that is open to the public if the entry is inconsistent with the purposes for which the building is open. *People v. Durham*, 252 Ill. App. 3d 88, 91 (1993); *People v. Boose*, 139 Ill. App. 3d 471, 473 (1985). For example, entering a store with the intent to commit a theft is outside of the scope of the purposes for which authority to enter a store is granted. See *People v. Rudd*, 2012 IL App (5th) 100528, ¶ 13; *Boose*, 139 Ill. App. 3d at 473.

¶ 24 Defendant claims that the State failed to prove beyond a reasonable doubt that he had the intent to commit a theft when he entered Walgreens. Intent may be proved by circumstantial evidence and inferences drawn therefrom. *Rudd*, 2012 IL App (5th) 100528, ¶ 14. "Circumstantial evidence is 'proof of facts and circumstances from which the trier of fact may infer other connected facts which reasonably and usually follow according to common experience.' " *People v. McPeak*, 399 Ill. App. 3d 799, 801 (2010) (quoting *People v. Stokes*, 95 Ill. App. 3d 62, 68 (1981)). In a burglary case, the relevant surrounding circumstances include the time, place, and manner of entry into the premises; the defendant's activity within the premises; and any alternative explanations offered for the defendant's presence. *People v. Richardson*, 104 Ill. 2d 8, 13 (1984).

¶ 25 An inference of intent does not require the jury to look at all possible explanations consistent with the defendant's innocence or to be satisfied that each link in the chain of circumstances was proved beyond a reasonable doubt. See *People v. Smith*, 2014 IL App (1st) 123094, ¶ 13. Rather, a defendant's intent is proved beyond a reasonable doubt if all the evidence, when considered as a whole, persuades the jury that the defendant possessed the necessary intent. See *id.*

¶ 26 Viewing the circumstantial evidence in the State's favor, as we must, we cannot say that a rational trier of fact could not have found that defendant entered the store with the intent to

commit a theft. The evidence showed that defendant went into Walgreens during business hours. At the time, the store was quite busy, with people entering and exiting continuously. Indeed, the surveillance video showed that 38 people entered and left the store while defendant was there. When he entered, his "strange" jacket, which was large and had pockets, was unzipped. Although, as defendant notes, a few customers on the surveillance video entered the Walgreens with their coats unzipped, several other customers entered bundled in zipped coats, scarves, hats, and gloves. And, although Roberts testified that it was mild outside, Officer Nemchock said that it was cold. Defendant spent four minutes in the store before Roberts saw him exiting the store with his zipped jacket looking "bulky." When defendant left, Roberts, who had been alerted to the fact that defendant put vodka inside of his jacket, ran outside and demanded that defendant return to the store. After asking "why," defendant ran off toward the minivan in which his girlfriend was waiting. That minivan was parked in a driveway of a townhome in a remote area, away from the commercial area surrounding Walgreens. When the police stopped the minivan after defendant fled, they found the vodka taken from Walgreens, in addition to several other bottles of vodka. According to Nemchock, shoplifters frequently steal alcohol, because it can be easily sold for cash. While defendant was in jail, he spoke to his girlfriend, asking her why she turned over his jacket to the police and telling her that, instead of running to the minivan and driving away, he should have kept running. From all of this evidence, the jury could reasonably infer that defendant purposefully went to Walgreens when he knew that it would be busy and employees would be preoccupied with the many customers in the store; that defendant wore the jacket he did because he could easily conceal vodka bottles and batteries inside it; that he entered with his jacket unzipped not because he was warm but because doing so would expedite his plan to steal batteries and vodka; and that, before defendant entered the store, defendant and his

girlfriend concocted the plan for defendant to steal items from Walgreens, with defendant's girlfriend serving as the getaway driver.

¶ 27 Defendant cites *Boose* and *Durham* to support his claim that he lacked the requisite intent to steal prior to entering Walgreens. In *Boose*, the defendant, who was intoxicated, entered a department store during regular business hours. *Boose*, 139 Ill. App. 3d at 472. He wandered around the store for several hours, stopping in a restaurant and looking at Christmas decorations. *Id.* Sometime later, the defendant realized that the store had closed. *Id.* He went to sleep in a storeroom to avoid being found and suspected of wrongdoing. *Id.* The following morning, security guards discovered him. *Id.* at 471, 473. At that time, the defendant was wearing clothing with the store's price tags and anti-theft devices still attached, and he had unpurchased merchandise in his pockets. *Id.* at 471-72. Based on this evidence, the defendant was convicted of burglary and retail theft, and he appealed. *Id.* at 471. The reviewing court reversed the defendant's burglary conviction, concluding that the evidence did not support a finding that the defendant entered the store with the intent to commit a theft. *Id.* at 473-74. The court noted that almost 24 hours passed between when the defendant entered the store and when he was discovered by security and that, during that time, the defendant wandered around the store for several hours without incident before discovering that the store had closed. *Id.* at 473.

¶ 28 Here, unlike in *Boose*, only four minutes elapsed from the time defendant entered the Walgreens until the time he left the store with the stolen merchandise. Moreover, in contrast to *Boose*, no evidence was presented that defendant entered the store for any legitimate purpose. Rather, although defendant hypothesizes that he could have gone to Walgreens for any of a number of innocuous reasons, such as to purchase "that last-minute can of whipped cream for

Christmas Eve pudding," nothing in the record suggests as much. Given these circumstances, we find *Boose* distinguishable.

¶ 29 Similarly, we are not persuaded that *Durham* requires reversal of defendant's conviction. In *Durham*, the defendant and another man entered a department store. *Durham*, 252 Ill. App. 3d at 89. The defendant proceeded to the men's sportswear section while the other man went to the men's suit department. *Id.* A few minutes later, a customer noticed one of the men leave the store with several suits, and she notified store personnel. *Id.* at 89-90. During this time, the defendant remained in the store browsing. *Id.* at 90. When the defendant left the store, he was not observed carrying anything. *Id.* A store employee followed defendant out of the store and chased him. *Id.* At the time of the defendant's arrest, he had no wallet, cash, checks, or credit cards on him. *Id.* The following day, a suit bearing tags from the store was found in the yard of a house the defendant passed during the chase. *Id.* The defendant was accused of stealing a suit from the store and was subsequently convicted of burglary and retail theft. *Id.* at 91. The reviewing court reversed the defendant's burglary conviction, explaining:

> "In the case before us, defendant carried nothing into the store that would indicate an intent to commit theft. His conduct in the store, according to the witnesses who saw him, was that of a shopper browsing through various racks and displays of men's clothing. He did not communicate with the man he entered with, and he did nothing to create a diversion which might distract those in charge while his alleged companion took away the suits. There was no evidence of a scheme or plan to steal formulated prior to entry." *Id.* at 92.

¶ 30 Here, in contrast to *Durham*, a reasonable inference to draw based on the surveillance video and the location of the minivan is that defendant was dropped off in front of the Walgreens

by his girlfriend. Unlike the defendant in *Durham*, defendant entered the Walgreens wearing a large, unzipped jacket that had pockets that could easily conceal bottles of vodka and packs of batteries. When defendant walked into the store, he did not browse around for any extended period of time. Rather, in four minutes, defendant concealed the items in his jacket and escaped in the van, with his girlfriend still driving. Found in the minivan were the bottles of vodka taken from Walgreens, in addition to several other bottles of vodka. This suggests that defendant and his girlfriend had been stealing alcohol from stores other than Walgreens. Although, like the defendant in *Durham*, defendant here did not create a diversion while he took the items from Walgreens, defendant did not need to do so. The number of people patronizing the store created a sufficient diversion for defendant.

¶ 31 Defendant asserts that the evidence did not establish that his theft was a preconceived plan rather than a spur-of-the-moment decision based on an opportunity that presented itself after he entered the store. Defendant furthers this argument by noting that he had money in his pocket to buy a number of items for sale at Walgreens. He also cites the fact that he did not possess any burglary tools, such as scissors or "security jamming or intercepting devices such as foil-lined bags." Moreover, he claims that, if he had a plan to commit the theft, he would not have had his girlfriend park so far away from Walgreens. We disagree.

¶ 32 First, we find inconsequential the fact that defendant had money in his pocket. Although defendant had $24 on him when he was arrested, which could have been used to purchase many things found for sale at Walgreens, no evidence suggested that defendant entered Walgreens to purchase anything at all. Moreover, although a defendant's possession of burglary tools certainly would suggest that he entered a store with the intent to commit a theft therein (see, *e.g.*, *People v. Weaver*, 41 Ill. 2d 434, 439 (1968)), we certainly cannot conclude that the mere fact

that a defendant does not have burglary tools necessarily means that the defendant did not have the intent to commit a theft. This is especially true in a case like this one, where the evidence revealed that such devices would have been unnecessary, as there were no anti-theft sensors or stickers on the items defendant stole. Finally, a reasonable inference to draw from the evidence is that defendant's girlfriend waited far away from the Walgreens to allow defendant to escape easily. Indeed, given how crowded the Walgreens was, it would have been difficult for defendant to exit the parking lot if his girlfriend had waited there. And, given that the Walgreens was at the intersection of two major roads, having defendant's girlfriend waiting in the driveway of a townhome a block away would have further facilitated defendant in escaping without detection.

¶ 33 The second issue we consider is whether the mittimus must be corrected to reflect that the court imposed a concurrent 364-day jail sentence on the retail theft conviction. The State concedes error on this point.

¶ 34 A mittimus may be corrected at any time to properly reflect the trial court's judgment. *People v Blakney*, 366 Ill. App. 3d 925, 930 (2006), *vacated on other grounds*, 223 Ill. 2d 641 (2007); *People v. Whitfield*, 366 Ill. App. 3d 448, 451 (2006), *rev'd on other grounds*, 228 Ill. 2d 502 (2007). When a court's oral pronouncement of a sentence conflicts with the written sentencing order, the written order must be corrected to reflect the court's oral pronouncement. *People v. Peeples*, 155 Ill. 2d 422, 496 (1993). We review *de novo* whether a defendant's mittimus must be corrected. See *People v. Jones*, 397 Ill. App. 3d 651, 654 (2009).

¶ 35 Here, to the extent that there is confusion as to what the mittimus reflects, we, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), correct the

mittimus to reflect that a 5-year prison sentence was imposed on the burglary conviction and that a concurrent term of 364 days in jail was imposed on the misdemeanor retail theft conviction.

¶ 36 For these reasons, the judgment of the circuit court of Du Page County is affirmed as modified. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 37 Affirmed as modified.