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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County,
)	
v.)	No. 13 CR 15840
)	
HERBERT WARNER,)	Honorable
)	Rosemary Grant-Higgins,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Pierce and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Court did not err in denying defendant, charged with burglary, jury instructions on criminal trespass to a vehicle.

¶ 2 A jury convicted defendant Herbert Warner of burglary. Warner contends the jury should have been instructed on the lesser-included offense of criminal trespass to a vehicle. We affirm. Warner denied that he even entered the parking lot where the van was parked, so no jury could find Warner guilty of criminal trespass to a vehicle yet acquit him of burglary.

¶ 3 Background

¶ 4 Warner was charged with burglary for entering without authority a Chevrolet van owned by Peter Wood Refinishing. At trial, Araceli Perez and Peter Nazario testified that they are married and own Peter's Wood Refinishing. Their firm owned four cars – a truck and three vans. When Perez and Nazario left the firm's shop on the afternoon of August 7, 2013, the cars were in the shop's fenced parking lot, the gate was visibly locked, and the car hoods and doors were closed. When they returned around 7 p.m., still daytime, they both saw one van's hood open and a man leaning under the hood into the engine compartment. Nazario saw the man's face – identifying him at trial as Warner – and saw his hands on the van's battery. Perez initially testified that the man was “loosening up the battery out of” the van, but clarified that she “saw him manipulating something in my” van. Nazario called out to Warner, who fled to the other side of the parking lot. Perez phoned the police as she went around the lot in her car. She saw the man's face as he climbed or jumped the fence; she identified him at trial as Warner.

¶ 5 Perez took a photograph of the man. When she saw a police patrol passing, she flagged it and showed the officers the photograph. Perez and Nazario (who searched for Warner) returned to the parking lot and looked under the van's hood. The wires connecting to the battery had been loosened. Several minutes later, officers showed Warner to Perez and Nazario, and they identified him as the man from the parking lot. Neither had seen Warner before that day.

¶ 6 Police officer Gustavo Dominguez testified that Perez showed him Warner's photograph and he searched the area until he found Warner. After Perez and Nazario identified Warner, he was arrested. Pliers were recovered from Warner's pocket. On the way to the police station, after reading Warner his *Miranda* rights, Officer Dominguez asked Warner why he was in the parking

lot. Warner replied that he wanted to take the battery from the van but “couldn’t be charged with it because he didn’t take it yet.”

¶ 7 Following the denial of his motion for a directed verdict, Warner testified that he was in the area of Peter’s Wood Refinishing to look at a vintage car for sale. He had arrived by bicycle and carried pliers to fix his bicycle. He never entered the locked parking lot but stood near the fence when Perez and Nazario arrived. As Warner walked towards Nazario to ask about the vintage car, Nazario drew a pistol and pointed it at him. Warner fled, and was hiding from Nazario when the police found him. After his arrest, Warner told the police that a man with a gun chased him. He denied telling the police that he entered the parking lot or intended to take the battery from the van. On cross-examination, Warner admitted that he does not drive and did not have a license, but maintained that he wanted to buy the vintage car to restore it. He also admitted that he had a cellphone but did not call 911.

¶ 8 In rebuttal, Nazario testified that he did not point a gun or any other object at Warner, nor was he armed that day. Officer Dominguez testified that Warner did not mention after being stopped that someone with a gun was chasing him.

¶ 9 Warner requested jury instructions on the lesser-included offense of criminal trespass to a vehicle. Counsel argued that “there’s evidence on both sides *** as so whether there was anything taken from the vehicle, whether anything was damaged from the vehicle, whether there was ever any intent.” The court noted Warner’s testimony that he never entered the lot or approached the van, and asked what was his slight evidence for trespass. Counsel replied that Perez and Nazario testified to Warner’s entry to the van. The State argued that Warner presented

an all-or-nothing defense and presented no evidence of mere trespass, so that the lesser-included instructions were not justified. The trial court denied Warner's requested trespass instructions, noting his testimony that he was never inside the lot.

¶ 10 The jury was instructed on burglary alone. Warner was found guilty of burglary.

¶ 11 In his post-trial motion, Warner claimed the trial court should have given his requested jury instructions on the lesser-included offense of criminal trespass to a vehicle. The court denied the motion, and sentenced Warner to four years' imprisonment.

¶ 12 Analysis

¶ 13 Warner contends that the trial court erred in denying him jury instructions on the lesser-included offense of criminal trespass to a vehicle. A person commits burglary by, without authority, entering or remaining within a motor vehicle or any part thereof "with *intent* to commit therein a felony or theft." (Emphasis added.) 720 ILCS 5/19-1(a) (West 2014). A person commits criminal trespass to a vehicle by, without authority, entering any part of a vehicle. 720 ILCS 5/21-2(a) (West 2014).

¶ 14 A defendant is entitled to a lesser-included offense instruction if there is some trial evidence that, if believed by the jury, would allow the jury to convict him or her of the lesser offense yet acquit him or her of the greater. *People v. McDonald*, 2016 IL 118882, ¶ 25. When the trial court reviews all the evidence and determines that there is insufficient evidence to justify a particular jury instruction, we review that decision for an abuse of discretion. *Id.*, ¶ 42.

¶ 15 The State's evidence was that Warner was under the hood of the van disconnecting the wires of the battery in preparation for stealing the battery. The testimony of Perez and Nazario

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placed Warner inside the locked parking lot, reaching into the engine compartment of the van and disconnecting the battery. Nazario confirmed that the van was operative earlier that day. This evidence sufficed to infer Warner's intent to steal the battery as he entered the van, and was corroborated by Officer Dominguez's testimony that Warner admitted his presence in the parking lot and intent to steal the battery. Against this evidence, Warner denied that he was ever in the parking lot, and thus maintained that he never entered the van, and denied making the admission. On such evidence, no jury could find Warner guilty of trespass to a vehicle yet acquit him of burglary. A jury that believed Warner would have acquitted him of both trespass and burglary. Conversely, a jury that believed the State witnesses would have ample evidence that Warner's intent in trespassing in the van was to steal the battery, and thus to convict of burglary.

¶ 16 Affirmed.