2017 IL App (1st) 152422-U

No. 1-15-2422

Order filed December 13, 2017

Third Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 13 CR 20107 |
| | ) | |
| RICKEY RUSSELL, | ) | Honorable |
| | ) | Neil J. Linehan, |
| Defendant-Appellant. | ) | Judge presiding. |

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

**ORDER**

¶ 1 *Held*: The evidence was sufficient to prove defendant guilty of burglary beyond a reasonable doubt over his contention that the State did not prove that, when he entered the building, he had the intent to commit theft. Defendant did not demonstrate that he was prejudiced by his trial counsel's failure to file a motion to suppress his statement.

¶ 2 Following a bench trial, defendant Rickey Russell was found guilty of burglary (720 ILCS 5/19-1(a) (West 2012)) and, based on his background, sentenced to a Class X term of eight years in prison. On appeal, defendant contends that the State did not prove him guilty because

the State did not prove beyond a reasonable doubt that he entered the building with intent to commit a theft. He also contends that his trial counsel was ineffective because she did not file a motion to suppress his statement. For the reasons below, we affirm.

¶ 3 At trial, Michael Parks, a building engineer employed for Chicago Real Estate Resources, testified that, on October 7, 2013, the Chicago Real Estate Resources owned an 18-unit residential building located at 1404 West 83rd Street, in Chicago. The building was vacant and foreclosed. Parks' duties required him to maintain the foreclosed property. He went to the building "once or twice a week," had been there within seven days of October 7, 2013, and the last time he was there before this date, the building was secured with locks, pad locks, and chains.

¶ 4 On October 7, 2013, at about 10:40 a.m., when Parks approached the building, he heard "some banging" coming from the furthest door to the west. He had not authorized any work to be done on the building that day. He contacted the police and informed them about the noise. Police officers arrived and entered through the front door of the same part of the building where Parks heard the noise. Parks did not remember if the front door of the building was already open or if he opened it for the officers. He did not go into the building with the officers.

¶ 5 After the officers came out of the building with defendant, Parks inspected the building. The front door to the "first floor west apartment," was broken and "kicked into." Inside the unit, there were copper pipes hanging and water coming out of the pipes and "running all over." The "pipe" was "bent out of the wall - - like someone was pulling on it." When he visited the building before October 7, 2013, the door and pipe were not damaged. He never gave defendant permission to enter or remove any property or items from the building.

¶ 6 On cross-examination, Parks testified that he went to the building frequently to check on it because "[t]here were squatters in the building." He had been at the building "probably like a day or two before" October 7, 2013, and when he inspected it, he would "go in some units" but "not all."

¶ 7 Chicago police officer Otero testified that, at about 10:43 a.m. on October 7, 2013, he went to the building at 1404 West 83rd Street with his partners, Officers McEnerney and Kennedy. He was dressed in plainclothes and his badge was clearly visible around his neck. After McEnerney had a conversation with Parks, the officers entered the building. They wanted to "clear the building of anyone who wasn't allowed to be in there" because Parks was going to board it up.

¶ 8 When the officers entered the building, there was a short landing and staircase that led to the first floor apartment. The door to "Apartment 1-W" was "kicked open" and Otero "heard running water coming from the apartment." Inside the apartment, he saw defendant, who was covered in water and "reaching up with both hands, yanking on a copper pipe as water was rushing down on him." The water was "rushing all over" and pooling on the floor. There were copper pipes lying around the area by defendant and "some copper pipes bent up on the floor by his feet." Otero also observed "a lot of pieces of drywall missing" and testified "it was pretty tore up."

¶ 9 As the officers walked into the apartment, McEnerney stated, "Hey, whatcha doing?" Defendant "looked in [Otero's] direction," "[the officers] detained him, and [Otero] proceeded to walk him out of the apartment." As Otero walked defendant out, defendant stated: "I didn't think anybody cared about this building. I just need some *** 6 more dollars for a bag of blow." As

they were walking out, Otero did not state anything to defendant and defendant "volunteer[ed] that information."

¶ 10 On cross-examination, Otera testified that he only "dealt with Apartment 1-W" and there were workers in the building. He did not observe defendant carrying anything out of the building. He testified that the officers' reports after the incident did not include that they had observed additional copper piping piled on the floor.

¶ 11 Following argument, the trial court found defendant guilty of burglary in that he knowingly entered the building at 1404 West 83rd Street, in Chicago, the property of Chicago Real Estate, with the intent to commit a theft therein. It denied defendant's motion for a new trial and sentenced him, based on his criminal history, as a Class X offender, to eight years in prison.

¶ 12 Defendant's first contention on appeal is that the State did not prove beyond a reasonable doubt that, when he entered the building, he had intent to commit a theft. He asserts that the State did not present any evidence with respect to when or how defendant entered the building and that the State only showed that, at "some time" after he entered, he attempted to commit a theft of the piping in one of the apartment units.

¶ 13 When we review the sufficiency of the evidence on appeal, the 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is the responsibility of the fact finder, the trial court here, to "resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts." *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 9. As a reviewing court, we will not substitute our "judgment for that of the fact finder on questions involving the weight of the

evidence or the credibility of the witnesses" (*Murphy*, 2017 IL App (1st) 142092, ¶ 9) and will only reverse a conviction if the "evidence is so insubstantial that no rational trier of fact could find each element of the charged offense beyond a reasonable doubt" (*People v. Rudd*, 2012 IL App (5th) 100528, ¶ 11).

¶ 14 To prove defendant guilty of burglary, as charged here, the State had to prove that (1) he knowingly entered a building without authority and (2) he entered with intent to commit a theft. 720 ILCS 5/19-1(a) (West 2012); see *Murphy*, 2017 IL App (1at) 142092, ¶ 10. Defendant only challenges the element of intent: whether the State proved that, at the time he entered the building, he had intent to commit a theft.

¶ 15 Intent may be proven by circumstantial evidence. *People v. Ybarra*, 272 Ill. App. 3d 1008, 1010-11 (1995). "Intent is a state of mind which can be inferred from surrounding circumstances" *(People v. Richardson*, 104 Ill. 2d 8, 12 (1984)) and defendant's conduct (*Murphy*, 2017 IL App (1st) 142092, ¶ 10). "[T]he 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 his presence." *Richardson*, 104 Ill. 2d at 13. " 'Like other inferences, this one is grounded in human experience, which justifies the assumption that the unlawful entry was not purposeless, and, in the absence of other proof, indicates theft as the most likely purpose.' " *Murphy*, 2017 IL App (1st) 142092, ¶ 10 (quoting *People v. Johnson*, 28 Ill. 2d 441, 443 (1963)). The determination of whether a defendant had the requisite intent for burglary is a question for the fact finder "and will not be disturbed on review unless the evidence is so improbable that there exists reasonable doubt as to the defendant's guilt." *Ybarra*, 272 Ill. App. 3d at 1011.

¶ 16 Viewing the evidence as a whole and in the light most favorable to the State, we conclude that the circumstantial evidence was sufficient to prove that defendant did not have authority to enter the building and he had intent to commit theft when he entered it.

¶ 17 Defendant was present in a foreclosed 18-unit apartment building that he did not have authority to enter and which had been secured by padlocks, locks, and chains a few days before he was found inside. The front door of the apartment unit where defendant was found had been "kicked into" and broken, supporting the inference that he forced entry into the unit. Inside that unit, defendant was "yanking on a copper pipe," water was rushing out, and copper pipes were on the floor by his feet, which supports the inference that he intended to permanently take pipes out of the building. Considering this circumstantial evidence as a whole, including defendant's activity within the building, the court could have reasonably inferred that, when defendant entered the building, he intended to commit theft therein.

¶ 18 Furthermore, defendant's statement also supports his conviction. Defendant stated to the police that he "didn't think anybody cared about this building" and he "just need[ed] some *** 6 more dollars for a bag of blow." Thus, in addition to the circumstantial evidence described above, the trial court could have reasonably inferred from this statement that defendant entered the building with intent to commit theft of the piping so he could later sell it.

¶ 19 Defendant asserts that the State did not prove that he intended to commit theft at the time he entered the building because it did not present any evidence regarding when or how he entered the building. We are unpersuaded by defendant's argument.

¶ 20 As previously discussed, intent is proven by circumstantial evidence, and even without direct evidence of exactly when he entered the building or how he entered the front door of the

building, the circumstantial evidence was sufficient to support his conviction for burglary. Further, in *People v. Murphy*, 2017 IL App (1st) 142092, ¶¶ 11, 15, this court affirmed the defendant's burglary conviction where the State did not present evidence to show how and when the defendant entered the University of Illinois at Chicago (UIC) building. It concluded that the defendant's (1) presence in a restricted access building on a Sunday morning and (2) conduct inside the building of opening doors and examining and moving boxes was sufficient to find him guilty of burglary. *Murphy*, 2017 IL App (1st) 142092, ¶ 15. Similarly, here, (1) defendant was present in a foreclosed apartment building, he did not have authority to enter, and the front door of the unit he was found in had been "kicked into" and broken, and (2) defendant was found inside the unit "yanking on a copper pipe," water was rushing out, and copper pipes were on the floor by his feet. Thus, based on this circumstantial evidence, as this court concluded in *Murphy*, we cannot find that this is a case where the evidence is so unreasonable or unsatisfactory that a reasonable doubt of defendant's guilt remains. See *Murphy*, 2017 IL App (1st) 142092, ¶ 15. Accordingly, we are unpersuaded by defendant's argument that we should reverse his conviction because the State did not prove when or how he entered the building.

¶ 21 Defendant asserts that Parks admitted that squatters were inside the building when defendant was found inside. He argues that, because the State did not show when he entered the building, he could have been inside for an "undetermined amount of time" before he attempted to steal the pipes and therefore "his intent upon entering – like that of the squatters – could have been totally divorced from any intent to commit a theft." However, the trial court was not required to "seek out all possible explanations consistent" with defendant's "innocence and elevate them to reasonable doubt." See *Murphy*, 2017 IL App (1st) 142092, ¶ 11. Based on the

circumstantial evidence previously discussed, the trial court could have reasonably concluded that there was no other scenario, *i.e.* that his initial intent upon entering the building was to "squat," that was as likely as the conclusion that defendant entered the 18-unit apartment building with the intent to commit theft of the piping. See *Richardson*, 104 Ill. 2d at 12-13 ("the jury could properly rely on any reasonable inference to conclude that no other scenario was as likely as the straightforward conclusion that the defendant entered the [building] with the intent to commit a theft.").

¶ 22 Defendant's second contention is that his trial counsel provided ineffective assistance of counsel when she did not move to suppress the statement he made to the police as they were walking him out of the apartment unit. He asserts that the testimony at trial showed that he responded to a question that was posed to him while he was in custody and that his confession was not volunteered. Defendant claims that the court "relied heavily" on his statement when it found him guilty of burglary. Defendant argues that, had his trial counsel filed a motion to suppress, the motion would have been meritorious and there was a reasonable probability that the trial outcome would have been different. He requests that we reverse his conviction and remand for a new trial to give him the opportunity to file a motion to suppress his statement.

¶ 23 We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under the *Strickland* standard, to establish a claim for ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. To establish prejudice when a claim is based on counsel's failure to file a motion to suppress, "the defendant must demonstrate

that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *People v. Henderson*, 2013 IL 114040, ¶ 15. Our review on this issue is *de novo*. *People v. Campbell*, 2014 IL App (1st) 112926, ¶ 38. Because a defendant must satisfy both prongs (*Strickland*, 466 U.S. at 697), we may resolve an ineffective assistance of counsel claim based only on the prejudice prong (*People v. Patterson*, 2014 IL 115102, ¶ 81).

¶ 24 Proceeding directly to the prejudice prong, we conclude that defendant has not demonstrated that, had his trial counsel filed a motion to suppress and the statement been suppressed, a reasonable probability exists the trial outcome would have been different. The circumstantial evidence showed that defendant was present in a foreclosed 18-unit apartment building, in which he did not have authority to enter, the front door of the unit he was found in was "kicked into" and broken, defendant was "yanking on a copper pipe," water was rushing out, and there were copper pipes on the floor next to his feet. As previously discussed, this circumstantial evidence was sufficient to prove defendant guilty of burglary. Thus, given the overwhelming evidence, defendant has not demonstrated that had his statement been suppressed there was a reasonable probability that the trial outcome would have been different. See *People v. Campbell*, 2014 IL App (1st) 112926, ¶ 49 (where the court found that, based on the evidence, even without defendant's confession, the defendant's guilt was established beyond a reasonable doubt, and it concluded that no prejudice resulted from trial counsel's failure to litigate a motion to suppress statement). Accordingly, defendant has not established the prejudice prong under the *Strickland* test and therefore has failed to establish a claim for ineffective assistance of counsel.

¶ 25 Defendant asserts that defendant's statement was the "primary" evidence the court relied on to explain why he was in the building. We disagree. Although the court referenced the statement several times, from our review of the trial court's ruling as a whole, we cannot find that the court primarily relied on defendant's statement rather than on the other circumstantial evidence to find him guilty of burglary or that he had the requisite intent for burglary. For example, when the court issued its ruling, it also summarized the circumstantial evidence, described defendant's conduct compared to the behavior of squatters, concluded it understood defendant's argument, and then stated:

> "[I]t seems pretty clear to me based on what he was doing when he was caught by the police literally with his hands yanking on those pieces of copper tubing and the fact that he made the statement, which to me seems like a pretty reasonable and honest statement made by the defendant, but it still is a burglary."

Thus, the trial court found defendant's guilt "pretty clear" based on his conduct, and it referenced defendant's statement as an additional factor after it had summarized the other evidence. Further, in the court's ruling on defendant's motion for a new trial, it never referenced defendant's statement. It stated:

> "[T]here's no question that when that police officer entered into that unit, that the defendant was tearing out that copper pipe. And, uh, there was still water pressure in that building at that time and he was drenched and the officer said that the, uh, puddling [*sic*] was going out - - it was actually leaving the room. He couldn't even tell what kind of - - it was the bathroom or not because of the state it was in. And the pipes were all torn

> down. And there were pipes stacked by the front door. So there's no question that the State met their burden of proof beyond a reasonable doubt."

Thus, we disagree with defendant that the trial court primarily or heavily relied on defendant's statement when it found him guilty of burglary.

¶ 26 For the reasons stated above, we affirm defendant's conviction.

¶ 27 Affirmed.