2019 IL App (1st) 161427-U

No. 1-16-1427

January 22, 2019

First Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 15 CR 6435
	)	
GREGORY WILLIAMS,	)	Honorable
	)	William T. O'Brien,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for burglary is reduced to theft where the State did not prove beyond a reasonable doubt that he entered a restaurant with the intent to commit a theft but the evidence did establish the elements of the lesser-included offense of theft. Defendant's sentence is reduced to time served.

¶ 2 Following a bench trial, defendant Gregory Williams was convicted of burglary (720 ILCS 5/19-1(a) (West 2014)), and sentenced, based on his criminal background, as a Class X offender to 10 years in prison. On appeal, defendant contends the evidence was insufficient to

sustain his conviction because the State failed to prove beyond a reasonable doubt that he entered the restaurant with the intent to commit a theft. We agree and reduce defendant's burglary conviction to theft and also reduce his sentence to time served.

¶ 3 Defendant was charged with one count of burglary for knowingly and without authority entering a restaurant at 3819 North Broadway Street in Chicago with the intent to commit a theft. At trial, defendant acted as his own attorney, with an assistant Cook County public defender as standby counsel.

¶ 4 At trial, Seth Daniel Fulkerson testified that at about 6:30 p.m. on April 8, 2015, he was working as the assistant manager of SpritzBurger, a full-service restaurant at 3819 North Broadway Street in Chicago. The building was also used by the restaurant's parent company, which operated a catering service.

¶ 5 Fulkerson saw defendant standing in the middle of the dining room. He overheard defendant asking a server where the bathrooms were located. The server told defendant the restrooms were downstairs. The restaurant was not busy and Fulkerson testified that defendant was not a customer. Fulkerson testified the bathrooms were accessed from the dining room by a stairway. No one accompanied defendant down the stairs to show him where the restroom was located.

¶ 6 About 10 or 15 minutes later, Fulkerson went downstairs because he had not seen defendant.[1] At the bottom of the stairs, the bathrooms were to the right. To the left, a hallway led to a storage area and a liquor room, among other areas.

[1] Fulkerson acknowledged telling police that defendant was in the basement for five minutes before Fulkerson went downstairs.

¶ 7 Fulkerson checked the bathroom but did not locate defendant. He then began to look elsewhere in the basement, describing the area as "maze-like" and containing "various hallways and various storerooms." Fulkerson ultimately approached the liquor room, which was behind a wooden partition with a padlock latch. Fulkerson testified that the partition was intact. Fulkerson turned on the lights in the liquor room and saw defendant on the other side of a shelving unit. Fulkerson asked defendant what he was doing and told him he could not remain there and needed to leave. Defendant responded that he was looking for the bathroom. Fulkerson again told defendant he must leave. Defendant said he needed to pull up his pants. Fulkerson testified there was no toilet in that area of the basement.

¶ 8 Fulkerson testified that defendant was "hunched over and fidgeting with something" and that he "heaved a large backpack onto his back as he came around from behind the shelves." Fulkerson described the backpack as "[v]ery full, chock-full." Fulkerson escorted defendant out of the basement and told defendant his backpack would be searched before he left. Fulkerson and defendant went up the stairs to the dining room and defendant "walked very quickly, beelined it for the front door of the restaurant." Fulkerson described defendant's movements as a "very brisk walk." Fulkerson arrived at the doorway before defendant, and defendant told Fulkerson to move or he would be stabbed.

¶ 9 The restaurant's general manager and other employees approached, and defendant was taken to the kitchen where the backpack was opened. The backpack contained 15 bottles of liquor used by the catering company, including a bottle that was made in-house. Fulkerson identified photographs that depicted, *inter alia*, the stairwell leading to the basement, the

basement hallway, the broken partition to the liquor room, the liquor room itself and the liquor bottles recovered from the backpack. Those photos were entered into evidence.

¶ 10 On cross-examination, Fulkerson said that when defendant was standing behind the shelves in the liquor area, he could not see defendant from the waist down. Fulkerson did not search the backpack or know what was inside. On redirect examination, Fulkerson said defendant did not relieve himself in the liquor room.

¶ 11 The defense called Chicago police officer Richard Rolon who responded to the restaurant's call and prepared an arrest report as to defendant. Rolon spoke to Fulkerson, who said defendant tried to take several bottles of liquor. Rolon testified he could not recall if Fulkerson told him that defendant had a bag when he entered the restaurant.

¶ 12 Rolon was shown his arrest report and stated that according to the report, the bag contained 15 bottles of liquor with a total retail value of $330. Rolon did not recall if any personal items belonging to defendant were recovered from the bag. No burglary tools or weapons were recovered from the scene.

¶ 13 In finding the evidence sufficient to establish burglary, the trial court recounted Fulkerson's account of defendant's activities in the restaurant and noted that defendant did not dispute the accuracy of the photographs entered into evidence. The court stated that defendant entered the restaurant and went into the basement. The court noted:

> "I don't know if he used the [bathroom] or not, or this was a ruse in order to commit a crime. But he was found after a significant period of time in an area where he shouldn't have been. And he had on his person property of this establishment."

¶ 14 After trial, the assistant public defender undertook defendant's representation and filed a motion for a new trial, asserting the State did not prove defendant's intent to commit a theft upon entering the restaurant. The trial court denied that motion.

¶ 15 At sentencing, the trial court found defendant was subject to mandatory Class X sentencing based on his prior convictions. Defendant was sentenced to 10 years in prison. Defense counsel filed a motion to reconsider sentence, which the trial court denied.

¶ 16 On appeal, defendant contends the State did not prove his guilt of the elements of burglary beyond a reasonable doubt. Specifically, he contends the State failed to prove that he formed the intent to commit a theft before he entered the restaurant, as is necessary to establish the offense of burglary. He argues no evidence was presented that he knew the restaurant served liquor, that he was aware the liquor was stored in the basement or that he went inside the restaurant intending to steal it.

¶ 17 The State responds that a rational trier of fact could have found defendant entered the establishment intending to commit a theft because he entered the restaurant "equipped with a large bag," did not ask to be seated and went downstairs after being pointed toward the basement restrooms. The State asserts that defendant's request to use the restroom was a ruse as shown by the length of time defendant remained in the basement and the fact that he was discovered in another area of the basement away from the restrooms with a backpack containing liquor bottles. Alternatively, the State argues that if we do not find defendant had the requisite intent upon entering the restaurant, this court can reduce defendant's burglary conviction to theft.

¶ 18 When reviewing a challenge to the sufficiency of the evidence, a criminal conviction will not be overturned unless the evidence is so improbable or unsatisfactory that it creates a

reasonable doubt as to the defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The relevant inquiry 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. *Givens*, 237 Ill. 2d at 334.

¶ 19 Here, defendant solely challenges the State's proof of his intent. In Illinois, the State may charge a defendant with burglary two different ways. The State may allege, as occurred here, that the defendant knowingly entered a building unlawfully with the intent to commit a felony or theft. 720 ILCS 5/19-1(a) (West 2014). Alternatively, the State may allege that the defendant entered the building lawfully but then knowingly remained unlawfully with the intent to commit a felony or theft. *People v. Rudd*, 2012 IL App (5th) 100528, ¶ 12. Under either theory, the State must show both that: (1) the defendant entered or remained unlawfully; and (2) he did so with the requisite intent. A burglary is complete upon entering with the requisite intent, irrespective of whether the intended felony or theft is accomplished. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). Here, the defendant is charged with entering unlawfully, "A criminal intent formulated after lawful entry will not satisfy the statute." *People v. Weaver*, 41 Ill. 2d 434, 439 (1968).

¶ 20 A defendant's intent, like every other element of the offense, must be proved beyond a reasonable doubt. *Rudd*, 2012 IL App (5th) 100528, ¶ 14. Because the intent necessary to commit burglary is rarely susceptible of being proved directly, such intent may be proven through circumstantial evidence. *People v. Carbajal*, 2013 IL App (2d) 111018, ¶ 43; see also *People v. Richardson*, 104 Ill. 2d 8, 13 (1984) (noting that is often the only way to prove a defendant's intent to commit a theft or other crime). Whether a defendant had the requisite intent

for burglary is a question for the trier of fact. *People v. Smith*, 2014 IL App (1st) 123094, ¶ 13; *People v. Ybarra*, 272 Ill. App. 3d 1008, 1011 (1995).

¶ 21 The defendant's intent may be inferred from his conduct and the surrounding circumstances. *People v. Maggette*, 195 Ill. 2d 336, 353 (2001). Relevant considerations when determining a defendant's intent include the time, place and manner of entry into the premises, the defendant's activity within the premises, and any alternative explanations for his presence. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 40. Inferences that are based on a defendant's conduct are "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." *People v. Johnson*, 28 Ill. 2d 441, 443 (1963); *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 10. Criminal intent that is formulated after lawful entry does not satisfy the intent element for burglary. *People v. Powell*, 224 Ill. App 3d 127, 138 (1991).

¶ 22 Even when viewed in the light most favorable to the prosecution, the evidence presented to the trial court did not establish that defendant entered the restaurant with the intent to commit a theft. In considering the proof of defendant's intent to commit a theft, we note that defendant entered the restaurant during its regular business hours and asked an employee if he could use the restroom. Fulkerson testified defendant was given permission to use the restroom.

¶ 23 The State represents, in its brief to this court, that defendant "went into [the] restaurant equipped with a large backpack." However, a review of the record establishes the State presented no such evidence at trial. Fulkerson, the sole witness offered by the prosecution, testified that he saw defendant standing in the middle of the dining room. Fulkerson was not asked if defendant

was carrying a backpack, and he offered no testimony from which such a conclusion can be drawn.

¶ 24 Immediately after defendant was pointed toward the location of the restroom, defendant went downstairs. When defendant did not emerge from the basement after 10 or 15 minutes, Fulkerson went downstairs and discovered defendant in a liquor storage area with a backpack containing liquor bottles. Defendant told Fulkerson he could not find the restroom. No facts were presented to support a conclusion that defendant entered the restaurant with the intent to commit a theft while inside. Therefore, the evidence was not sufficient to support defendant's conviction for burglary.

¶ 25 The State next contends defendant's burglary conviction should be reduced to theft pursuant to Illinois Supreme Court Rule 615(b)(3) (eff. Jan. 1, 1967)), which allows this court to reduce the degree of a defendant's conviction. The State argues a theft conviction can be entered in this case even though defendant did not leave the building with any property belonging to the restaurant.

¶ 26 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 conviction on an uncharged offense can be entered if it is a lesser-included offense of a crime expressly charged in the charging instrument and if the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense. *People v. Kennebrew*, 2013 IL 113998, ¶ 27 (citing *People v. Kolton*, 219 Ill. 2d 353, 359-60 (2006)). A lesser-included offense is one that is "established by proof of the same or less than all of the facts or a less culpable

mental state (or both), than that which is required to establish the commission of the offense charged." 720 ILCS 5/2-9(a) (West 2014).

¶ 27 Applying the charging-instrument approach, theft, as it is charged in this case, is a lesser-included offense of burglary. Here, the information alleged that defendant committed the offense of burglary in that he "knowingly and without authority entered a building *** [the restaurant at 3819 North Broadway] with the intent to commit therein a theft." Theft is committed when a person knowingly obtains or exerts unauthorized control over property of the owner and intends to deprive the owner permanently of its use or benefit. 720 ILCS 5/16-1(a)(1)(A) (West 2014). A theft is complete even if the defendant's possession of the property is brief and the defendant is detected before the goods are carried away. *People v. Graydon*, 38 Ill. App 3d 792, 794 (1976) ("[t]he taking of articles with intent to steal, however brief defendant's control over them, may constitute theft.") In this case, by alleging that defendant entered the restaurant with the intent to commit a theft, the charge implied that defendant intended to obtain unauthorized control over the restaurant's property. Accordingly, defendant's burglary conviction is reduced to theft.

¶ 28 Where this court exercises its power to reduce the degree of an offense, it may also reduce the sentence imposed by the trial court. Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967); *People v. Bean*, 63 Ill. App. 3d 264, 283 (1978). The trial court sentenced defendant as a Class X offender due to his prior convictions. That sentencing scheme was triggered because the offense of burglary in this case was a Class 2 felony. See 720 ILCS 5/19(b) (West 2014); see also 730 ILCS 5/5-4.5-95(b) (West 2014) (a defendant is subject to Class X sentencing when convicted of a Class 1 or Class 2 felony with two prior Class 2 or greater felony convictions).

¶ 29 The State argues that if defendant's conviction is reduced to theft, the case should be remanded to the trial court for a new sentencing hearing on that offense. Defendant responds that the maximum sentence for misdemeanor theft is one year in prison, which he has already served.

¶ 30 Whether a theft is punished as a felony or a misdemeanor is determined by the value of the property involved in the offense. 720 ILCS 5/16-1(b) (West 2014); see also *People v. Jackson*, 99 Ill. 2d 476, 478 (1984). Where property is not taken from a person, the theft of property not exceeding $500 in value is a Class A misdemeanor, which is punished by a determinate sentence of less than one year. 720 ILCS 5/16-1(b)(1) (West 2014); 730 ILCS 5/5-4.5-55 (West 2014).

¶ 31 Based on the testimony at trial, the property at issue included 15 liquor bottles with a total retail value of $330, which would constitute misdemeanor theft under the statute cited above. Accordingly, because defendant has already completed a sentence of one year in prison, we exercise our authority under Supreme Court Rule 615(b)(4) to reduce defendant's sentence to 365 days, with that time to be considered served.

¶ 32 Judgment of guilty affirmed; burglary conviction reduced to misdemeanor theft; sentence reduced to time served.