2019 IL App (1st) 170331-U

No. 1-17-0331

Order filed March 6, 2019

Third 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. 16 CR 4345
	)	
KERRY ISBY,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for burglary is affirmed where the evidence established that he was found in the basement of a house without authority, holding multiple items belonging to the basement resident, and the door into the house was kicked in. Fines and fees order corrected.

¶ 2 Defendant Kerry Isby was charged by information with one count of residential burglary. Following a bench trial, he was convicted of the lesser-included offense of burglary and sentenced to eight years' imprisonment. On appeal, defendant argues that he was not proven guilty beyond a reasonable doubt because the State failed to show he unlawfully entered the

specific part of the house identified in the charging instrument. Defendant also argues he was wrongfully charged a $5 electronic citation fee that does not apply to felonies. We vacate the $5 electronic citation fee, and affirm the judgment of the circuit court in all other respects.

¶ 3 Defendant was charged by information with one count of residential burglary (720 ILCS 5/19-3 (West 2016)) for "knowingly and without authority" entering "the dwelling place of Toya Stevenson,[1] located 2020 West 68th Place, in Chicago, *** with the intent to commit therein a theft" on February 23, 2016.

¶ 4 At trial, Carey Hughes Jr. testified that on February 23, 2016, he lived in the basement of a single-family home at 2020 West 68th and had rented the first floor to a tenant, Stevenson, for more than a year. Hughes acknowledged that in 2013 he was convicted for possession of a stolen motor vehicle. At approximately 10:30 or 11 p.m. that night, Hughes returned home and walked through the gangway toward the basement to put away some tools. He explained that two doors lead from the gangway to the house. The first door is at the bottom of steps leading directly to the basement, while the second door is at the top of steps leading to a porch on the first floor. Another door connects the porch with the first-floor kitchen. The basement is also accessible from a stairway on the first floor inside the house, but Hughes entered the basement from outside the house, using the door that connects the gangway and basement.

¶ 5 While walking down the steps, Hughes noticed that the basement door, which he typically kept barred, was "[o]pen from inside" and undamaged. He pushed the door and saw defendant less than one foot away holding a bag of Hughes' tools, which Hughes kept in the basement, as well as a second person farther back in the basement. Hughes testified that he had

[1] While the charging instrument refers to the victim as "Toya Stevenson," she is referred to as "Latoya Stevenson" elsewhere in the record. The parties do not dispute that the two names identify the same person.

known defendant for "maybe a couple of years," and that defendant had been in his basement "[m]aybe a couple weeks before the break-in" to help load tools into Hughes' truck. Defendant did not have permission to enter Hughes' house or take his tools that night.

¶ 6 Hughes asked defendant what he was doing and told him to put the tools back. Defendant responded, "I told them we was gonna get caught." Hughes retrieved his cell phone from his truck and called the police. When he returned to the basement, defendant was gone, and "[e]verything was all torn up." Items were "thrown all over the floor everywhere" and "[k]nocked off the wall," and Hughes' leaf blowers, backpacks, saws, drills, hand tools, and other tools were missing. He also noticed that the door between the gangway and first floor was kicked in, as was the door between the porch and kitchen. Hughes testified that all the doors had been locked and undamaged when he left that morning. When police arrived, Hughes told them he recognized defendant. He called a friend, who rented a room to defendant, and learned that defendant's name was "Kerry." Stevenson was not home during the incident.

¶ 7 The next day, Hughes was driving on 69th Street when defendant ran up to Hughes' car door and attempted to open it, telling Hughes to get out and threatening to kill him. After Hughes called the police, he opened the door and defendant hit him in the face with "something hard," dazing him. When the police arrived, defendant was still present. Hughes identified defendant to the police and told them defendant had broken into his home and stolen his tools the night before. He then went to the police station and was shown a cordless screwdriver, which he identified as his. On cross-examination, Hughes stated that he worked at 1110 West 50th Place and lived at 2020 West 68th, and denied telling police that he lived at 1110 West 50th. On re-

direct examination, he further testified that he slept at the house at 2020 West 68th, where he also kept all of his personal property.

¶ 8 Chicago police officer Matthew Bryant testified that shortly after midnight on February 24, 2016, he went to 2020 West 68th with his partner after receiving a call reporting a burglary. He saw the door to the first floor was kicked in but did not see any other damage to the house, although Hughes told him things were missing from the basement. Bryant stated on cross-examination that his report listed 1110 West 50th as Hughes' residence. Bryant also testified that he only saw "tools and things like that" in the basement, and that he did not know of anything being taken from the first floor. On questioning by the court, Bryant stated he saw no furniture in the house. When he entered the first floor, "nothing was in the home" other than "a couple of bags, refrigerator," and "[a] couple miscellaneous items." On redirect examination, Bryant testified that he did not go into any rooms on the first floor.

¶ 9 Chicago police officer Brian Burg testified that on February 24, 2016, at approximately 11 p.m., he and his partner responded to a call reporting an assault in progress on 69th Street. At the scene, Burg spoke with Hughes and arrested defendant. Burg recovered a screwdriver from defendant, which Hughes identified as his property that had been taken during a burglary the day before.

¶ 10 The State entered into evidence a photograph of the exterior of the house at 2020 West 68th, and rested. Defense counsel moved for a directed finding, arguing that defendant was "charged with victimizing Toya Stevenson," who did not testify, and that Hughes, who did testify, "was not a victim according to the charging instrument." The trial court denied defendant's motion, and defendant rested without presenting any evidence.

¶ 11 During closing arguments, defense counsel attacked Hughes' credibility and claimed there were issues with "confronting accusers" because Stevenson was identified in the charging instrument but did not testify, and the State failed to show defendant took any of Stevenson's property. In rebuttal, the State replied that Hughes credibly testified that he observed defendant inside his residence, holding Hughes' tools.

¶ 12 The trial court found defendant guilty of burglary, a lesser-included offense of residential burglary. The court explained that the State had not shown the house was a dwelling place beyond a reasonable doubt, but that "there is strong circumstantial evidence to show that Mr. Isby did not have permission to enter the building: The door was kicked in, he had tools not belonging to himself, and he then left with those tools which were subsequently missing." The court found that although Stevenson had not testified, it was "not fatal to the state's case because Mr. Hughes owns the property and he has a greater possessory interest than the defendant." The court also found the State did not need to show Stevenson's property was taken, but only needed to show the defendant "entered into the building with the intent to commit therein a theft."

¶ 13 Defendant filed a motion for new trial, alleging that Hughes was not the owner of the house at 2020 West 68th. Following an evidentiary hearing, the trial court denied defendant's motion. The court imposed a sentence of eight years' imprisonment on defendant, who was subject to Class X sentencing based on his criminal history. Defendant brought a motion to reconsider sentence, which the trial court denied.

¶ 14 On appeal, defendant argues the State failed to prove that he entered the specific part of the house identified in the charging instrument. He notes that he was charged with "knowingly and without authority" entering "the dwelling place of Toya Stevenson, located 2020 West 68th

Place," but Hughes testified that Stevenson rented the first floor of the house and he only saw defendant inside the basement. According to defendant, no evidence showed he entered Stevenson's dwelling place, and the discrepancy between the charging instrument's allegations and the evidence presented at trial must result in a reversal of his conviction. The State responds that although the charging instrument alleged defendant burglarized Stevenson's home, the burglary charge was not confined to a specific part of that home. Moreover, the State asserts it did not have to prove that defendant entered that specific part, or that Stevenson owned or resided within the home.

¶ 15 "The due process clause of the fourteenth amendment to the United States Constitution requires that a person may not be convicted in state court 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime *with which he is charged*.' " (Emphasis added.) *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). "A defendant may, however, be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument [citation], and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense [citation]." *People v. Kolton*, 219 Ill. 2d 353, 360 (2006). The standard of review on a challenge to the sufficiency of the evidence 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.) *People v. Cooper*, 194 Ill. 2d 419, 430-31 (2000) (quoting *Jackson v. Virginia*, 433 U.S. 307, 319 (1979)). When a defendant challenges the sufficiency of the evidence, it is not the reviewing court's function to retry the defendant. *People v. Schmalz*, 194 Ill. 2d 75, 80 (2000).

The reviewing court "must allow all reasonable inferences from the record in favor of the prosecution" (*People v. Givens*, 237 Ill. 2d 311, 334 (2010)), and will not reverse a conviction unless the evidence is "so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt" (*People v. Bradford*, 2016 IL 118674, ¶ 12).

¶ 16 In challenging the sufficiency of the evidence against him, defendant essentially argues a fatal variance existed between the charging instrument and the evidence at trial, and so he was found guilty of an uncharged crime.

¶ 17 To vitiate a trial, a variance between a charging instrument and the proof at trial "must be material and be of such character as may mislead the accused in making his defense." (Internal quotation marks omitted.) *People v. Collins*, 214 Ill. 2d 206, 219 (2005). When a variance is challenged for the first time on appeal, the charging instrument will be deemed "sufficient if it apprised the accused of the precise offense and charged with sufficient specificity so as to allow defendant to prepare his defense and to allow him to plead a resulting conviction as a bar to any future prosecutions arising out of the same conduct." *People v. Williams*, 299 Ill. App. 3d 143, 151 (1998) (citing *People v. Santiago*, 279 Ill. App. 3d 749, 752 (1996)). "[A]n indictment for a particular offense serves as an indictment for all lesser included offenses even if they are not specifically spelled out." *People v. Gill*, 264 Ill. App. 3d 451, 456 (1992). " '[I]mmaterial matters, or matters which may be omitted from an indictment without rendering it insufficient or doing damage to the material averments, may be regarded as surplusage.' " *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 67 (quoting *People v. Figgers*, 23 Ill. 2d 516, 519 (1962)).

¶ 18 Applying these principles, it is clear the alleged variance between the allegations and proof is not fatal to defendant's conviction. Section 19-3(a) of the Criminal Code of 2012 (Code)

(720 ILCS 5/19-3(a) (West 2016)) provides that "[a] person commits residential burglary when he or she knowingly and without authority enters *** the dwelling place of another, or any part thereof, with the intent to commit therein a felony or theft." Section 19-3(a) also states that the offense of residential burglary "includes the offense of burglary as defined in Section 19-1." *Id.* Section 19-1(a) of the Code (720 ILCS 5/19-1(a) (West 2016)) provides that "[a] person commits burglary when without authority he or she knowingly enters *** a building *** or any part thereof, with intent to commit therein a felony or theft." Ownership is not an element of burglary. *People v. Rothermel*, 88 Ill. 2d 541, 545 (1982). The focus of the crime is not that the house entered into belonged to a specific person, "but rather that the defendant broke and entered into a building not his own with the intent to commit a felony or theft." *Id.*

¶ 19 Although defendant was charged with residential burglary, the trial court found him guilty of the lesser-included offense of burglary, which did not require a showing that he entered a dwelling place. 720 ILCS 5/19-1(a) (West 2016). To establish burglary, the State only had to show defendant knowingly and without authority entered a building, "or any part thereof, with intent to commit therein a felony or theft." *Id.* Thus, the charging instrument would still sufficiently allege the elements of burglary with the allegation regarding "the dwelling place of Toya Stevenson" omitted. As to the lesser-included offense of burglary, the allegation regarding Stevenson's dwelling place is surplusage, and the variance between the charging instrument and proof at trial is not fatal. *Lattimore*, 2011 IL App (1st) 093238, ¶ 67.

¶ 20 At trial, Hughes testified that he kept his tools in the basement of the building at 2020 West 68th. Although Hughes kept the door leading from the gangway to the basement barred from the inside, the basement could also be accessed from the first floor, through a stairway

inside the house. On the night of February 23, 2016, Hughes approached the basement from the gangway to find the door open and undamaged, and saw defendant inside holding his tools. Defendant said, "I told them we was gonna get caught." Hughes left to call the police, and when he returned, defendant was gone and multiple tools were missing. Hughes and Officer Bryant both testified that the door leading to the first floor was kicked in, and Hughes stated the first-floor doors had been undamaged earlier that morning. Additionally, Officer Burg testified that the next day, he arrested defendant and found a screwdriver on his person. Hughes identified this screwdriver as his property that had been taken during the burglary the day before. This evidence supported a finding that defendant, knowingly and without authority, entered the building at 2020 West 68th with the intent to commit a theft. Thus, the proof at trial conformed to the essential allegations of burglary, the lesser-included offense of residential burglary alleged in the charging instrument. Viewed in the light most favorable to the prosecution, this evidence was not "so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt." *Bradford*, 2016 IL 118674, ¶ 12.

¶ 21 Defendant next argues, and the State concedes, that the trial court wrongfully charged him a $5 electronic citation fee (705 ILCS 105/27.3e (West 2016)), which does not apply to felonies. Defendant failed to challenge this fee in a postsentencing motion and therefore forfeited the issue. *People v. Smith*, 2018 IL App (1st) 151402, ¶ 4. Nonetheless, the State does not raise the issue of forfeiture and has therefore forfeited it. *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. We review the propriety of a trial court's imposition of fines and fees *de novo*. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22. This court has held the $5 electronic citation fee does not apply to felonies and is, therefore, inapplicable to defendant's conviction for

burglary. *Smith*, 2018 IL App (1st) 151402, ¶ 12. As such, the $5 electronic citation fee must be vacated. We direct the clerk of the circuit court to modify the fines, fees, and costs order accordingly. *People v. Avery*, 2012 IL App (1st) 110298, ¶ 51 (noting that remand is unnecessary for correcting fines and fees).

¶ 22 For the foregoing reasons, we affirm defendant's conviction of burglary and vacate the $5 electronic citation fee.

¶ 23 Affirmed in part and vacated in part; fines and fees order corrected.