2019 IL App (1st) 171162-U
No. 1-17-1162
Order filed August 26, 2019

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 16 CR 5919
v.	)	
	)	Honorable William H. Hooks,
DWAYNE SANDRESS,	)	Judge presiding.
	)	
Defendant-Appellant.	)	

JUSTICE GRIFFIN delivered the judgment of the court.
Justices Pierce and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for theft over his contention that the State failed to prove beyond a reasonable doubt that he intended to deprive the owner of his property. Defendant forfeited the affirmative defense of mistake of fact by not raising it at trial.

¶ 2 Following a bench trial, defendant was convicted of theft (720 ILCS 5/16-1(a)(1)(A) (West 2016)) and sentenced to three years' imprisonment. On appeal, he contends the evidence was insufficient to prove him guilty beyond a reasonable doubt and the State filed to disprove his "mistake of fact" affirmative defense. For the following reasons, we affirm.

¶ 3 Defendant was arrested on April 4, 2016, after police found him crouching near a storage container with tools in the courtyard of Windward Roofing and Construction. Defendant was subsequently charged with burglary and theft. In his answer to the State's motion for pretrial discovery, defendant stated he would rely upon the State's inability to prove him guilty beyond a reasonable doubt. He did not list any affirmative defenses.

¶ 4 At trial, Chicago police officer Michael Devine testified that, on April 4, 2016 at approximately 11 p.m., he was on duty working with Officers James Zega and Nokowski.[1] The officers were near the 2900 block of West Taylor Street. There, Devine noticed extension cords lying on the sidewalk outside of a business. Upon investigating the cords, Devine observed defendant, crouching beside a storage container with his hands on top of several bags, drills, and extension and compression cords in an open courtyard located behind Windward. He was about 30 yards away from the extension cords Devine first noticed on the sidewalk.

¶ 5 The officers detained defendant and asked him who owned the items and where he obtained them. Defendant initially stated the items belonged to him. He then stated that he found the items in an alley, and finally stated he found them in a yard.

¶ 6 Devine took defendant into custody and inventoried the tools. Following defendant's arrest, which took place about 11:30 p.m., Devine attempted to call Windward several times to determine whether the tools belonged to the company. However, he was unable to contact anyone from the company. The following day, the "investigatory bureau" of the Chicago Police Department took over the investigation of the case.

[1] Officer Nokowski's first name is not contained in the record.

¶ 7 On cross-examination, Devine testified he first believed the storage container that defendant was crouching next to was a dumpster. Devine recalled informing Detective Kaldis from the detective unit that he observed an individual hiding "alongside the dumpster." Devine did not walk around the entire property after detaining defendant. He did not notice any signs of forced entry.

¶ 8 Nicholas Lopez-Campos testified he worked for Windward on April 4, 2016, from 6 a.m. until 6 p.m. At the end of his work day, he brought his van back to the Windward warehouse. He stored tools, such as extension cords, drills, and nail guns, inside the van. When he left his van on April 4, 2016, he left his tools inside and shut the doors. Lopez-Campos arrived at work the following day at 6 a.m. When he arrived at his work van, the doors were open and some of his tools were on the ground. Lopez-Campos noticed his drills, extension cord, and compression hose were missing. Those items were usually stored in a tool box and a small, yellow and black Dewalt bag. He had last seen the tools and bag on the previous day inside his van. The warehouse manager photographed the tools on the ground and the open doors to the van. Lopez-Campos took the van so he could work and the warehouse manager filed a report regarding the missing items.

¶ 9 On April 6, 2016, Lopez-Campos went to a police station and identified the tools and Dewalt bag that had been missing from his van. He had not given anyone permission to go into his van. He did not know defendant and never gave him permission to go into his van and take his tools.

¶ 10 On cross-examination, Lopez-Campos testified that he was working on roofing at an off-site location on April 4, 2016. Two other people were working with him and drove in the van

with him. Lopez-Campos arrived at Windward before anyone else the following morning. He was the first person to see his van, and he notified the warehouse manager of what he observed. Lopez-Campos left Windward prior to the police arriving.

¶ 11 Rick Crowder testified he was employed by Windward, located on South Sacramento Boulevard, as a supply manager. As part of his duties, he purchased equipment material and ordered inventory for Windward. On its property, Windward kept vans, asphalt "kellos," trucks, gravel, a converter, and "a little bit of everything." Crowder worked on April 4, 2016 from 11 a.m. until 10:30 p.m. He was the last person to leave the property. Upon leaving, Crowder ensured the gates were secured, the vans were properly stored, and the alarm was set.

¶ 12 On April 5, 2016, Crowder learned there had been a break-in at Windward the previous night and went into work at 10 a.m. Crowder identified a photograph of how Windward's "backyard" looked on April 5, 2016. The photograph depicted a seven-foot stepladder, green tarp, and cleaner in the backyard across from the storage container. When Crowder left Windward on April 4, 2016, the ladder had been on a masonry vehicle.

¶ 13 On April 6, 2016, Crowder spoke with Detective Kaldis and identified various tools, including cordless drills, tool backs, extension cords, and an air hose, which had originally been in a Windward van. Crowder compiled a list of items that he had ordered as supply manager and that were in the van with their corresponding monetary values. The total value of the items was $1,777.20. He knew their value because he had purchased tools as part of his job for 17 years.

¶ 14 On cross-examination, Crowder testified that the lot where Windward stored its vans was fenced in by a 12-foot high fence. The fences had barbed wire across the top. Windward had approximately 19 vehicles. On April 4, 2016, when Crowder left Windward, he exited through

the building, not the lot where the vans were parked. Windward used the serial numbers on the tools to keep track of which employee was using a specific tool. The tools in the instant case belonged to Lopez-Campos, but were on one of Windward's vans. Crowder acknowledged he did not see the van that had been broken into on April 5, 2016. He was shown photographs of the van and various items because the van was needed at a jobsite and had been driven away prior to his arrival at Windward.

¶ 15 The State introduced into evidence an itemized list of the value of the recovered tools and photographs of the van, the tools on the ground, the recovered tools and bag, the Windward yard, and the storage container.

¶ 16 The defense did not present evidence. In closing, defense counsel argued the State failed to prove defendant was guilty of burglary of the Windward van and theft of the tools. Counsel argued there was no evidence showing defendant was inside the lot where the vans were stored, which had 12-foot fences and barbed wire. There were no signs of entry or exit from the lot. Counsel posited that it was possible defendant found the tools and "was claiming finders keepers at first." Based on the evidence presented, it was "just as likely that [defendant] found lost or misplaced property" as it was that he committed burglary or theft.

¶ 17 The court found defendant not guilty of burglary and guilty of theft. It stated "defendant was in a position and was attempting to exert unauthorized control over the property" that was between $500 and $10,000 in value. In finding defendant guilty of theft, the court relied on the defendant's conflicting versions of the owner of the tools and where he found them.

¶ 18 Defendant thereafter filed a motion for new trial. At the motion hearing, defense counsel argued the court's findings on the respective charges were inconsistent. Counsel argued that

because the evidence was insufficient to establish defendant entered into the van to take the tools, there was likewise insufficient evidence to show defendant knew the tools belonged to Lopez-Campos. Counsel stated, "This might have actually been *** a situation of a lost, or misplaced, or abandoned property that he may have recovered outside of that fenced-in lot." Counsel noted Officer Devine testified that he believed defendant was next to a dumpster when they observed him. Thus, counsel argued there was a reasonable inference that the tools had been abandoned or lost.

¶ 19 The court denied defendant's motion. It subsequently sentenced him to three years' imprisonment.

¶ 20 On appeal, defendant argues the evidence was insufficient to sustain his theft conviction because the State failed to (1) prove he had the requisite mental state to sustain his conviction for theft, and (2) disprove his "mistake of fact" affirmative defense.

¶ 21 When reviewing a challenge to the sufficiency of the evidence, we inquire " '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 omitted.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In so doing, we draw all reasonable inferences in favor of the State (*Davison*, 233 Ill. 2d at 43), and we do not retry the defendant (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)). We will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 22 As charged in the instant case, a person commits theft when he knowingly "[o]btains or exerts unauthorized control over property of the owner" and "[i]ntends to deprive the owner permanently of the use or benefit of the property." 720 ILCS 5/16-1(a)(1)(A) (West 2016). Defendant challenges only the element of intent. While direct evidence of intent "is rarely available," the intent to commit theft "may be inferred from the facts and circumstances surrounding the alleged theft, including the act of the theft itself." *People v. Oglesby*, 2016 IL App (1st) 141477, ¶ 166. Whether the defendant possessed the requisite intent is a question for the trier of fact, and "reviewing courts will not disturb that finding unless it clearly appears there is reasonable doubt." *People v. Viramontes*, 2017 IL App (1st) 142085, ¶ 52.

¶ 23 Viewing the evidence in the light most favorable to the State, we find the evidence sufficient to show that defendant intended to permanently deprive Lopez-Campos of his construction tools. Lopez-Campos testified that at the end of his work day on April 4, 2016, he brought his van back to the Windward warehouse. He stored tools, such as extension cords, drills, and nail guns, inside the van. When he left his van on April 4, 2016, he left his tools inside and shut the doors. Lopez-Campos arrived at work the following day at 6 a.m. and discovered that the doors to his work van were open and some of his tools were on the ground. Officer Devine observed defendant on April 4, 2016 at 11 p.m., crouching beside a storage container with his hands over bags containing constructions tools and equipment. Defendant gave various, conflicting accounts of who the tools belonged to and where he allegedly found them. The time of night, coupled with defendant's contradictory statements, and his conduct of crouching next to a construction company's storage container, taken altogether, give rise to an inference of defendant's intent to deprive the owner of his property. See *Oglesby*, 2016 Il App (1st) 141477, ¶

166. Based on this record, we cannot say that "the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Givens*, 237 Ill. 2d at 334.

¶ 24 In reaching this conclusion, we reject defendant's contention that the State failed to prove the requisite intent because, based on Devine's testimony that he initially believed the storage container was a dumpster, the evidence showed defendant merely found the construction tools next to a dumpster. It is the responsibility of the trier of fact, here, the trial court, to draw reasonable inferences from the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Defense counsel argued before the trial court that the evidence showed it was "just as likely that [defendant] found lost or misplaced property" as it was that he committed theft. The trial court necessarily rejected this theory by finding defendant guilty of theft. In doing so, "a trier of fact is not required to disregard the inferences that normally flow from the evidence or to seek out all possible explanations consistent with a defendant's innocence and elevate them to reasonable doubt." *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 11.

¶ 25 Defendant additionally argues that the State failed to disprove his mistake of fact affirmative defense. He contends that Devine's testimony that he initially thought the container was a dumpster, along with defense counsel's closing argument that defendant was "claiming finders keepers," "essentially" set forth a mistake of fact defense that defendant lacked the requisite mental state to commit theft because the tools appeared to be abandoned property. The State argues that defendant failed to raise that defense at trial and has therefore forfeited it on appeal. We agree with the State.

¶ 26 Property is abandoned when the owner, intending to relinquish all rights to the property, leaves it free to be appropriated by any other person. *Paset v. Old Orchard Bank & Trust Co.*, 62

Ill. App. 3d 534, 537 (1978). A finder is entitled to keep abandoned property. *Id.* Thus, if defendant believed the construction tools were abandoned, then he lacked the requisite intent to commit theft. See *People v. Baum,* 219 Ill. App. 3d 199, 201-02 (1991). A defense based on mistake of fact is an affirmative defense. 720 ILCS 5/4-8(a), (d) (West 2016). In order to raise an affirmative defense, a defendant is required to present some evidence on the issue of the alleged defense unless the State's evidence raises the issue. 720 ILCS 5/3-2(a) (West 2016). Once an affirmative defense has been raised, the State has the burden to prove the defendant guilty beyond a reasonable doubt as to that issue, together with all other elements of the offense. 720 ILCS 5/3-2(b) (West 2016).

¶ 27 Here, we find defendant forfeited the affirmative defense because he failed to raise it before the trial court. In response to the State's pretrial motion for discovery, defendant answered he would rely upon the State's failure to prove him guilty beyond a reasonable doubt. He did not list any affirmative defenses in his answer, nor did defense counsel assert an affirmative defense during trial. See Ill. S. Ct. R. 413(d) (eff. July 1, 1982) ("Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defense which he intends to make at a hearing or trial.").

¶ 28 Defendant nevertheless asserts his statements that he found the tools, along with Devine's testimony that he initially believed the container was a dumpster, implicitly raised a mistake of fact defense based on a belief that the property was abandoned. In setting forth this argument, defendant acknowledges this court's decision in *People v. Bardsley*, 2017 IL App (2d) 150209, finding the "mere presence in the State's evidence of facts sufficient to permit a defendant to raise a defense is not by itself sufficient to trigger the requirement that the State disprove the

defense." However, he claims *Bardsley* was wrongly decided because it "has only been cited twice in unpublished decisions."

¶ 29 We decline defendant's invitation to depart from our reasoning in *Bardsley*. While defendant correctly argues that only "slight evidence" is required to allow consideration of an affirmative defense by a trier of fact, defendant was required to actually raise the defense for consideration by the trial court. In this case, defendant failed to raise the affirmative defense of mistake of fact. Stated differently, defense counsel's closing argument that defendant was merely "claiming finders keepers" was insufficient to alert the State that it would be required to disprove a mistake of fact defense. *Id.* at ¶ 23 (noting "the main reason a defendant must specifically raise an affirmative defense is to alert the State to what it must rebut."). Accordingly, we find that he forfeited this claim on appeal.

¶ 30 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 31 Affirmed.