

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).

2012 IL App (4th) 110126-U

Filed 8/6/12

NO. 4-11-0126

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
ANTHONY C. McCOY,	)	No. 10CF1058
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding

---

JUSTICE POPE delivered the judgment of the court.  
Presiding Justice Turner and Justice Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's conviction for possession of burglary tools is vacated.

¶ 2 In October 2010, a jury found defendant, Anthony C. McCoy, guilty of attempt (residential burglary) (720 ILCS 5/8-4(a), 19-3 (West 2008)) and possession of burglary tools (720 ILCS 5/19-2 (West 2008)). Defendant appeals, arguing his conviction for possession of burglary tools should be vacated as his convictions for both possession of burglary tools and attempt (residential burglary) violate the one-act, one-crime rule as both convictions were carved out of the same physical act. In the alternative, defendant argues he is entitled to a new trial based on the trial court's refusal to instruct the jury that a rag is not a tool when the jury sought specific clarification on that issue. We affirm defendant's attempt (residential burglary) conviction but remand for the trial court to vacate defendant's conviction for possession of

burglary tools.

¶ 3

## I. BACKGROUND

¶ 4

In July 2010, the State charged defendant with attempt (residential burglary) (720 ILCS 5/8-4(a), 19-3 (West 2008)) and possession of burglary tools (720 ILCS 5/19-2 (West 2008)). At defendant's trial, James Kupish testified he was at his home at 1133 North Monroe in Decatur when he heard his front door rattling on July 12, 2010, at approximately 5 p.m. He stated this was very unusual because the sliding glass door has wedges on both sides to stop the door from sliding either way. He saw a man, whom he identified as defendant, trying to slide the door to get in the house.

¶ 5

Kupish testified defendant then left the front sliding door and headed west down an alley by the home. Kupish went to his bedroom at the back of the house and saw defendant a few minutes later at the back door of his house trying to open it. He did not do anything to alert defendant he was in the house. After defendant tried to open both back doors on the house, Kupish called 9-1-1. Defendant spent about three minutes at the back porch door trying to open it. Kupish testified defendant had a red towel he put on the door handle in an attempt to get more leverage.

¶ 6

Defendant then went to the window directly east of the back porch door and tried to pry the window up with what looked like an orange-colored screwdriver. Kupish testified defendant had no authority to enter his home.

¶ 7

On cross-examination, Kupish testified defendant talked to Kupish's neighbor at some point, but he did not remember whether the conversation occurred before or after defendant tried to open the front door. According to Kupish, he had never seen the screwdriver defendant

was using before the incident in question. He also testified he had never seen a pry mark on the window or the red towel prior to the alleged attempted break-in.

¶ 8           Officer Josh Davis of the Decatur police department was on bike patrol on July 12, 2010, in the immediate vicinity of Kupish's home when he heard a dispatch on the radio of a burglary in progress. It took him approximately 10 seconds to arrive at Kupish's house. Davis jumped the fence into Kupish's backyard and observed defendant coming down the back steps of the home. Defendant matched the description given by the dispatch. Davis observed pry marks on a window and saw an orange-handled screwdriver on the side of the back porch. On cross-examination, Davis testified the "screwdriver" is actually more like a socket driver and the end of the tool is round. When he first saw defendant, defendant was 3 to 4 feet from the window with the pry marks.

¶ 9           Officer Steven Keith of the Decatur police department testified he was working as a patrol officer on the day in question when he was dispatched to Kupish's residence. When Keith arrived, Officers Davis and Scholl were present, and defendant was sitting on the ground. Keith recovered the screwdriver, which was located approximately 15 to 20 feet from the back door. Keith also collected a red hand towel at the base of the back door on the ground. He testified the red hand towel was "in a way formed to the shape of the round back door handle."

¶ 10           Defendant testified he went to 1133 North Monroe on July 12, 2010, because he wanted to ask the person who lived there about buying a car in the backyard of that house. He first knocked on a sliding glass door at the front of the house. A neighbor asked defendant what he was doing. Defendant told the neighbor he wanted to talk to the homeowner about buying the car. Defendant testified he then left and walked back through the alley to his own home and sat

on the front porch.

¶ 11 Defendant testified he saw two police officers stop near his home. He decided to go back to 1133 North Monroe. He knocked on the front door, and when no one answered, he went to the back door and knocked. He heard the police knocking on the front door as he was leaving the back porch. Defendant testified the police came through the gate into the backyard and he stopped and dropped the red towel in his hand. He told the police officers he was trying to buy a car from the guy who lived at the house. The officer told him the homeowner had reported a burglary in progress. He asked the police officer whether it looked like he was "doing a burglary," and the officer said it did not. Defendant testified he did not try to break into the house or pry open a window and the orange screwdriver had not been in his possession. He testified it looked like someone had been working on the air conditioner in the backyard.

¶ 12 On cross-examination, defendant said he saw no sign or any other indication the car was for sale, and he did not know the man who lived at the house and had never talked to the man about buying the car.

¶ 13 During its closing argument, the State explained the possession of burglary tools charge against defendant was premised on the orange-handled screwdriver.

¶ 14 During jury deliberations, the jury submitted the following question to the trial court: "Is the red cloth considered a tool of burglary?" The State asked the court to simply direct the jury's attention to the instructions it had already received and suggest the answer was provided in the instructions. Defense counsel stated:

"Your Honor, I think my argument would be that we should answer that in the common use of the word, a rag can not be

considered a tool, but I understand that they do have jury instructions on this particular issue that they need to consider."

The court indicated the jury was requesting it to make a finding of fact. As such, the court responded to the question by instructing the jurors to refer to the instructions already provided.

¶ 15 The jury found defendant guilty of both attempt (residential burglary) and possession of burglary tools.

¶ 16 In December 2010, the trial court sentenced defendant to nine years' imprisonment for attempt (residential burglary) and a concurrent term of three years' imprisonment for possession of burglary tools.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Defendant first argues his conviction for possession of burglary tools violates the one-act, one-crime rule and should be vacated because it was based on the same physical act as his conviction for attempt (residential burglary). According to defendant:

"Although possession of burglary tools is not a lesser included offense of attempt residential burglary, the facts of this case dictate that the attempt residential burglary and possession of burglary tools are based on precisely the same physical act, and Mr. McCoy's three-year sentence for possession of burglary tools must be vacated as violating the one[-]act, one[-]crime rule."

¶ 20 Defendant relies on *People v. Blahuta*, 131 Ill. App. 2d 200, 264 N.E.2d 819 (1970), as support for his argument his conviction for possession of burglary tools should be

vacated. In *Blahuta*, the defendant was interrupted while trying to break into a grocery store with a crow bar. The defendant left the crowbar at the crime scene. *Blahuta*, 131 Ill. App. 2d at 202, 264 N.E.2d at 820. He was convicted of both attempted burglary and possession of burglary tools. *Blahuta*, 131 Ill. App. 2d at 201, 264 N.E.2d at 820. The appellate court vacated defendant's conviction for possession of burglary tools stating, "[i]n the instant case there is nothing in the record which shows that the acts which constituted the crime of attempted burglary were independently motivated or otherwise separable from the conduct which constituted the offense of possession of burglary tools." *Blahuta*, 131 Ill. App. 2d at 205-06, 264 N.E.2d at 822.

¶ 21 In the case *sub judice*, the State concedes defendant's conviction for the offense of possession of burglary tools should be vacated. According to the State:

"In this case, the only evidence that defendant possessed the orange[-]handled screwdriver was Kupish's testimony that he saw defendant using the screwdriver to attempt to pry open a window. The screwdriver was then found on the ground at the scene of the attempted burglary. There was nothing else in the record that separated the act of possessing the screwdriver and committing attempted burglary."

Based on the facts of this case, we accept the State's concession and vacate defendant's conviction for possession of burglary tools.

¶ 22 Because we have vacated defendant's conviction for possession of burglary tools, we need not address defendant's alternative argument that the trial court improperly refused to instruct the jury that a rag is not a tool.

¶ 23

### III. CONCLUSION

¶ 24 For the reasons stated, we affirm defendant's attempt (residential burglary) conviction but remand for the trial court to vacate defendant's possession of burglary tools conviction.

¶ 25 Affirmed in part and remanded with directions.