FOURTH DIVISION
December 5, 2013

No. 1-12-0596

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 C2 20357
	)	
ROBERT GODBOLD,	)	Honorable
	)	Timothy J. Chambers,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

O R D E R

¶ 1 *Held*: Evidence was sufficient to convict defendant of attempted residential burglary and possession of burglary tools; however, the trial court's refusal to instruct jury on attempted criminal trespass to a residence was reversible error. Reversed and remanded.

¶ 2 Following a jury trial, defendant Robert Godbold was convicted of attempted residential burglary and possession of burglary tools and sentenced to 15 years in prison as a Class X offender. On appeal, defendant contends that (1) the evidence was insufficient to prove defendant guilty of attempted residential burglary because the State failed to prove he intended

to commit a theft inside the victim's apartment; (2) the evidence was insufficient to prove defendant guilty of possession of burglary tools because the State did not link the tools found in defendant's backpack to his attempt to enter the victim's apartment; (3) the trial court erred when it refused to instruct the jury on the lesser-included offense of attempted criminal trespass to a residence; (4) his convictions for attempted residential burglary and possession of burglary tools violate the one act-one crime rule; (5) his sentence was excessive; and (6) his mittimus mistakenly reflects a conviction for residential burglary and an illegal sentence for possession of burglary tools. We reverse and remand.

¶ 3 The record reveals that defendant was charged with attempted residential burglary and possession of burglary tools. The charge for attempted residential burglary stated that defendant:

> "knowingly and without authority removed the screen, opened the window, threw in his backpack in [through] the window and leaned in the dwelling place of Edwin Lee located at 608 Davis #2, Evanston***with intent to commit therein a theft, with constituted a substantial step towards the commission of the offense of residential burglary***"

As to possession of burglary tools, the charge stated that defendant:

> "knowingly possessed, with intent to enter into a building, with intent to commit a theft therein, tools suitable for use in breaking into a building, to wit: two screwdrivers, two pairs of gloves, and two flashlights***"

¶ 4 During opening statements at trial, the State asserted that defendant had the requisite intent to commit attempted residential burglary and possession of burglary tools when he attempted to enter the apartment belonging to the victim, Edwin Lee, which he thought was "an

easy score." In contrast, defense counsel contended the evidence would show that defendant did not have the intent to commit a crime when he attempted to enter the apartment.

¶ 5 Edwin Lee testified that on June 12, 2010, he and his four roommates were in the process of moving into a second floor apartment at 608 Davis Street in Evanston. The apartment's back entrance area included a flat platform porch and two sets of windows that were not covered at the time. Items in the apartment included a refrigerator, stove, microwave, table, sofa, and a few boxes that were on the floor. At around 2:30 a.m., Lee and one of his roommates, Stephanie Kang, went to the apartment to unpack. Lee surveyed the apartment and determined that the back windows were closed and the screens were on and intact, and they turned on the lights in Kang's room and in a hallway leading to the kitchen. Around 2:50 a.m., as Lee and Kang unpacked in Kang's room, they heard a loud thud coming from the kitchen area. Lee went to investigate, whereupon he observed defendant's head leaning into the apartment and defendant's hands on the windowsill. The window had been opened and the screen removed. Lee also observed a backpack on the floor. During Lee and defendant's subsequent conversation about how and why defendant was trying to enter, defendant stated the screen popped open and the window slid open and asked if defendant's friend lived there. Defendant complied with Lee's request to replace the screen, and then Lee closed and locked the window. After defendant had put the screen back into place, "it was not screwed in or anything." Lee could never find the screws to screw in the screen, although another screen in the back entrance area was screwed in.

¶ 6 After closing the window, Lee called the police and returned to the kitchen, where he saw defendant outside. Defendant knocked on the window, asked for his backpack back, and said he would leave if his backpack was returned. When the police arrived, Lee gave the backpack to the officer.

¶ 7 Antonia Robbins was the responding police officer on June 12. When she arrived at Lee's apartment, she observed defendant standing at the top of the stairs leading to the back entrance. Defendant admitted to Robbins he had opened the window to Lee's apartment and had put his backpack inside. Defendant also stated he was from Chicago and did not know anyone in the area. Additionally, defendant told Robbins he believed the apartment was vacant and was looking for a place to sleep because he was homeless. When Robbins looked inside the window that defendant attempted to enter, she observed a couch, table, and various boxes with personal effects inside them. Robbins also noticed that the screen had been haphazardly replaced, the screws were missing, and the corner was not entirely pushed in.

¶ 8 Robbins looked inside the backpack, which contained papers and soap, along with two pairs of gloves, heads to an interchangeable screwdriver, two flashlights, and one all-purpose screwdriver and one flat-headed screwdriver. Based on her training and experience, she classified the items in the backpack as burglary tools because they are used to pry open doors or windows to gain entry. On cross-examination, Robbins acknowledged that the following items were also in the backpack: a few articles of clothing, vitamins, fliers for various homeless shelters, handwritten notes, and an application for Section 8 housing. The backpack also contained a prescription, job information, and a study guide for a commercial driver's license.

¶ 9 During a jury instruction conference, defense counsel requested an instruction for attempted criminal trespass to a residence based on defendant's statement to Robbins that he was looking for a place to sleep. The court refused the instruction, stating that defendant made multiple statements—one to Lee, one to Robbins, "and we don't know how many others." The court also stated that defendant's statement to Robbins was made only after he was detained. The court did not believe the statement was sufficient in and of itself to merit the requested instruction.

¶ 10 In closing, the State argued that defendant came to Lee's apartment intending to commit theft, having brought screwdrivers, flashlights, and gloves for that purpose. The State asserted that the refrigerator and boxes on the floor were immediately visible to defendant, and if defendant had been looking for a place to sleep, he would have gone to a homeless shelter. In contrast, defense counsel argued the evidence showed defendant intended to find a place to sleep, as shown by his statement and corroborated by the personal items in his backpack. Additionally, defense counsel suggested that the evidence showed the screen had never been screwed in.

¶ 11 Following deliberations, the jury found defendant guilty of attempted residential burglary and possession of burglary tools.

¶ 12 The court denied defendant's motion for a new trial, which contended, in part, that the court erred by refusing to instruct the jury on the lesser-included offense of attempted criminal trespass to a residence.

¶ 13 Based on his criminal background, defendant was sentenced to 15 years in prison as a Class X offender.

¶ 14 On appeal, defendant contends the State failed to prove beyond a reasonable doubt that he intended to commit theft, a necessary element of attempted residential burglary. Defendant argues the evidence shows he entered the apartment because he was homeless, thought the apartment was vacant, and was looking for a place to sleep. Further, defendant asserts his conduct after being discovered demonstrates his lack of intent to commit a crime. Rather than leave before the police arrived or attempt to conceal himself, defendant remained at the scene to retrieve his backpack.

¶ 15 When presented with a challenge to the sufficiency of the evidence, "the relevant 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." (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Our function is not to retry the defendant. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). It is the trier of fact's responsibility to determine the witnesses' credibility, assign weight to their testimony, resolve conflicts in the evidence, and draw reasonable inferences from the testimony, and we will not substitute our judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 132 (1999). We will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 16 To sustain a conviction for residential burglary, the State must prove the defendant knowingly and without authority entered someone else's dwelling with the intent to commit a theft therein. 720 ILCS 5/19-3(a) (West 2010). A person commits the offense of attempt when, with intent to commit a specific offense, he does any act that is a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (West 2010). Here, defendant only challenges that he intended to commit a theft inside Lee's apartment. Intent may be established through circumstantial evidence. *People v. Obrochta*, 149 Ill. App. 3d 944, 949 (1986). Further, the State may prove intent by inferences drawn from the defendant's conduct and from surrounding circumstances. *People v. McKinney*, 260 Ill. App. 3d 539, 544 (1994). Relevant considerations include the time, place, and manner of entry, the defendant's activity within the premises, and any alternative explanations offered for his presence. *People v. Richardson*, 104 Ill. 2d 8, 13 (1984). In the absence of inconsistent circumstances, proof of unlawful entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction for burglary. *McKinney*, 260 Ill. App. 3d at 544. Whether the

requisite intent existed is a question for the trier of fact. *People v. Maggette*, 195 Ill. 2d 336, 354 (2001).

¶ 17 Here, the evidence was sufficient for the jury to find that defendant intended to commit theft inside Lee's apartment. Although Lee and his roommates were still moving in, the apartment had a table, couch, and boxes with personal effects on the floor, all of which Robbins testified were visible from the window that defendant used to attempt to enter the apartment. The incident occurred around 3 a.m., when the area around the apartment was likely to be deserted. Additionally, defendant's backpack contained tools that Robbins classified as burglary tools. When questioned, defendant gave different explanations for his actions to Lee and Robbins. This was sufficient evidence for the jury to conclude that defendant intended to commit a theft. That defendant did not leave the scene does not change this result, given that his backpack with important personal belongings was still inside. See *People v. Ybarra*, 156 Ill. App. 3d 996, 1003 (1987) (defendant's mildly destructive manner in which he entered the victim's house and his nonviolent submission to others upon being discovered were not necessarily inconsistent with an intent to commit theft).

¶ 18 To be sure, there was also evidence to support the defense theory that defendant did not intend to commit theft. Defendant admitted to Robbins that he had attempted to enter the apartment, but stated he did so because he was homeless, did not know anyone in the area, and was looking for a place to sleep. Defendant's backpack contained personal belongings consistent with someone who is homeless, including clothes, soap, pamphlets for homeless shelters, an application for subsidized housing, and job-related materials. However, where two conflicting hypotheses are supported by the evidence and the jury makes its decision among the two, it would be improper for us to disturb that determination. *People v. Szudy*, 262 Ill. App. 3d 695, 714-15 (1994). Viewing the evidence in the light most favorable to the State, the evidence that

defendant intended to commit theft was not so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of defendant's guilt.

¶ 19 Next, defendant contends the State failed to prove defendant guilty of possession of burglary tools because it presented no evidence linking the screwdrivers, gloves, or flashlights found in his backpack to his attempted entry. According to defendant, although the evidence showed that he attempted to enter the apartment through the kitchen window, there was no indication he used any of those items to do so, as the window screen was not screwed in, no screws were ever recovered, and the tools were found inside the backpack. Further, defendant contends that he had an innocent reason for trying to enter the apartment.

¶ 20 A person commits the offense of possession of burglary tools when he possesses any tool suitable for use in breaking into a building with intent to enter such place and with intent to commit a theft therein. 720 ILCS 5/19-2(a) (West 2010). To sustain a conviction, the State must prove that (1) the tools are adapted and designed for breaking and entering; (2) the defendant possessed them with knowledge of their character; and (3) the defendant intended to use them for breaking and entering. *People v. Waln*, 169 Ill. App. 3d 264, 270 (1988). The defendant's intent is the controlling factor when the tools in question could be used for innocent and illegal purposes. *People v. Whitfield*, 214 Ill. App. 3d 446, 456 (1991). Further, the required intent is a general intent to use the tools for a criminal purpose and may be inferred from the circumstances accompanying their possession. *Obrochta*, 149 Ill. App. at 952.

¶ 21 Here, the evidence was sufficient to prove that defendant intended to use the tools found in his backpack to enter Lee's apartment. Robbins testified that the tools found in defendant's backpack were burglary tools and could be used to pry open doors or windows to gain entry. The tools were found in defendant's backpack following his attempted entry into the apartment. At the same time, we recognize that the testimony about the window and any accompanying

screws raises conflicting inferences. When Lee arrived at the apartment, he found the screen on and intact. During their conversation, defendant told Lee that the screen had popped open. Lee also testified that the screen "was not screwed or anything" after defendant replaced it, and that he "never could find the screws to screw it in." No screws were recovered from the scene. Robbins testified that the screen was replaced haphazardly. It is unclear, based on Lee's and Robbins's testimony, whether the window had always been missing screws or whether the screws went missing after defendant's attempted entry. However, it was the jury's responsibility to resolve conflicts in the evidence and draw conclusions, and we will not substitute our judgment for the trier of fact on these matters. *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 21. Viewing the evidence in the light most favorable to the State, the finding that defendant intended to use the tools to attempt to enter defendant's apartment was not so improbable, unsatisfactory, or unreasonable that it raises a reasonable doubt of defendant's guilt.

¶ 22 Defendant next contends that the trial court erred when it refused to instruct the jury on attempted criminal trespass to a residence. Defendant argues that he met the requirements to warrant this instruction because attempted criminal trespass to a residence was a lesser-included offense of attempted residential burglary and there was sufficient evidence to support the instruction.

¶ 23 We agree with defendant that an instruction on attempted criminal trespass to a residence was warranted and the trial court's refusal to tender this instruction was reversible error. Instructions convey the legal rules applicable to the evidence presented at trial and thus guide the jury's deliberations toward a proper verdict. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). The task of a reviewing court is to determine whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense. *Id*. at 65-66. A defendant is entitled to have the jury instructed on a less serious offense than what he was

charged with if (1) the charging instrument describes the lesser offense, in that it at least contains a broad foundation or main outline of the lesser offense, and (2) the evidence at trial rationally supports a conviction on the lesser-included offense. *People v. Ceja*, 204 Ill. 2d 332, 360 (2003). We review a court's refusal to give a jury instruction for an abuse of discretion. *People v. Grimes*, 386 Ill. App. 3d 448, 451 (2008).

¶ 24 Here, the parties agree that attempted criminal trespass to residence is a lesser-included offense of attempted residential burglary. The charging instrument in this case stated that defendant:

> "knowingly and without authority removed the screen, opened the window, threw in his backpack in [through] the window and leaned in the dwelling place of Edwin Lee located at 608 Davis #2, Evanston***with intent to commit therein a theft, with constituted a substantial step towards the commission of the offense of residential burglary***"

Meanwhile, a person commits criminal trespass to a residence when, without authority, he knowingly enters or remains within any residence. 720 ILCS 5/19-4(a)(1) (West 2010). Because the charging instrument contains the key elements of attempted criminal trespass to a residence, in that defendant was alleged to have removed a screen, opened a window, and leaned in Lee's apartment without authority, attempted criminal trespass to a residence was a lesser-included offense of attempted residential burglary in this case.

¶ 25 The parties disagree on the second step of the analysis—essentially, whether the jury could have found defendant attempted to enter Lee's apartment without the intent to commit a theft, but rather because he was looking for a place to sleep. A defendant is entitled to a lesser-included offense instruction only if an examination of the evidence reveals that it would permit a jury to rationally find the defendant guilty of the lesser offense yet acquit the defendant of the

greater offense. *People v. Smith*, 402 Ill. App. 3d 538, 545 (2010). Even slight (*Id.*) or very slight evidence (*People v. Jones*, 175 Ill. 2d 126, 132 (1997)) supporting the defendant's theory of the case may warrant an instruction on a lesser-included offense. In deciding whether to give the instruction, the court's role is to determine whether there is some evidence to support it, and not to weigh the evidence. *Id*.

¶ 26 Here, the issue is whether defendant met the low threshold needed to warrant an instruction on attempted criminal trespass to a residence. Upon being discovered, defendant asked Lee whether his friend lived at the apartment. However, defendant later told Robbins that he thought the apartment was vacant, did not know anyone in the area, and was homeless and looking for a place to sleep. Defendant's backpack contained clothes, soap, vitamins, clothing, a prescription, job-related materials, and information about homeless shelters. A defendant is entitled to present his theory of defense even if the trial court believes the evidence offered in support of that defense is inconsistent or of doubtful credibility. *People v. Monroe*, 294 Ill. App. 3d 697, 701 (1998). Indeed, the evidence supporting the instruction can be conflicting and far from conclusive. See *People v. Blan*, 392 Ill. App. 3d 453, 458-59 (2009) (defendant's confession, although not corroborated, was sufficient to warrant instruction on lesser-included offense); *In re Matthew M.*, 335 Ill. App. 3d 276, 284-85 (2002) (evidence would have supported a conviction for criminal trespass, rather than residential burglary, where the State did not introduce direct evidence of intent, no stolen items were recovered from the defendant's immediate possession, and the defendant made a statement to police that supported his theory); *Monroe*, 294 Ill. App. 3d at 701 (instruction on lesser-included offense was warranted even where there was conflicting testimony regarding the defendant's intent).

¶ 27 Although the evidence was conflicting, defendant's statement to Robbins and the personal items in his backpack supported an instruction on attempted criminal trespass to a

residence. The purpose of an instruction on a lesser offense is to provide "an important third option to a jury which, believing that the defendant is guilty of something but uncertain whether the charged offense has been proved, might otherwise convict rather than acquit the defendant of the greater offense." *People v. Hamilton*, 179 Ill. 2d 319, 323-24 (1997) (quoting *People v. Bryant*, 113 Ill. 2d 497, 502 (1986)). If the jury was not convinced beyond a reasonable doubt that defendant entered the apartment intending to commit theft, and instead believed defendant's statement that he was merely looking for a place to sleep, given the option, the jury could have found defendant guilty of attempted criminal trespass to a residence and acquitted defendant of attempted residential burglary. The trial court erred by refusing to give the instruction, and as a result, we reverse and remand for a new trial. See *Hamilton*, 179 Ill. 2d at 328.

¶ 28 In doing so, we distinguish two cases cited by the State, *People v. Gwinn*, 366 Ill. App. 3d 501 (2006), and *People v. Austin*, 216 Ill. App. 3d 913 (1991). In both cases, the trial court properly refused the defendant's requested instruction because it was inconsistent with the defendant's theory of defense. The defendant in *Gwinn*, charged with home invasion, was not entitled to an instruction on criminal trespass to a residence because his consistent defense at trial was that he was never at the victim's residence at the time of the incident. *Gwinn*, 366 Ill. App. 3d at 519-20. Similarly, in *Austin*, where the defendant was charged with residential burglary, the defendant was not entitled to a jury instruction on criminal trespass to a residence because his only defense at trial was misidentification, which would have placed him outside of the victim's residence altogether. *Austin*, 216 Ill. App. 3d at 917. Here, the defendant's consistent theory at trial was that he was looking for a place to sleep, and so did not intend to commit theft, which is consistent with an instruction for attempted criminal trespass to a residence.

¶ 29 Because we held above that the State presented sufficient evidence to establish defendant's guilt, we conclude that retrial on remand would not risk subjecting defendant to double jeopardy. See *People v. Taylor*, 76 Ill. 2d 289, 309 (1979). We also note that the finding that the evidence was sufficient to convict defendant of attempted residential burglary and possession of burglary tools is not binding upon retrial. See *Jones*, 175 Ill. 2d at 134.

¶ 30 Because the issue may come up on retrial, we address defendant's contention that his convictions for attempted residential burglary and possession of burglary tools violate the one act-one crime rule because the convictions arose out of a single physical act. The State agrees with defendant.

¶ 31 A defendant may not be convicted of more than one offense arising from the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). To determine whether convictions violate the one act-one crime rule, the court first determines whether a defendant's conduct consisted of separate acts or a single physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). If the court determines that convictions are based on the same physical act, the multiple convictions are improper. *Id.* Burglary and possession of burglary tools are generally separate acts unless the possession is shown to be exclusively for the purpose of committing the burglary for which the defendant was convicted. *People v. Watson*, 35 Ill. App. 3d 723, 724 (1976). Here, the State's consistent theory at trial was that defendant possessed the tools for the purpose of breaking into Lee's apartment. Defendant's conviction thus arose from the same act. If defendant was found guilty of these two offenses on retrial, the conviction for possession of burglary tools would have to be vacated. See *People v. Richmond*, 34 Ill. App. 3d 328, 333-34 (1975); *People v. Blahuta*, 131 Ill. App. 2d 200, 205-06 (1970).

¶ 32 Because we are remanding this cause for a new trial, we will not address defendant's remaining contentions that his sentence is excessive and that his mittimus is incorrect.

¶ 33 For the foregoing reasons, we reverse the judgment of the trial court and the cause is remanded for a new trial.

¶ 34 Reversed and remanded.