2015 IL App (1st) 130911-U

THIRD DIVISION
March 31, 2015

No. 1-13-0911

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. 12 CR 797
	)	
JEFFREY SUGGS,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Mason concurred in the judgment.

O R D E R

¶ 1 ***Held:*** The evidence was sufficient to affirm the defendant's conviction for burglary, as the State established defendant entered a secured area attached to a store and removed items with the intent to commit theft. Moreover, defense counsel employed reasonable trial strategy in arguing defendant believed the items were abandoned trash without raising mistake-of-fact as an affirmative defense.

¶ 2 Following a bench trial in 2013, defendant Jeffrey Suggs was convicted of burglary based on evidence that he removed items from a dumpster in an enclosed area behind a drugstore. Defendant was sentenced to six years in prison. On appeal, defendant contends the burglary

statute requires unauthorized entry into a "building" and that the dumpster enclosure did not meet that definition. He also argues the State did not establish his specific intent to commit a theft because he believed the property in the dumpster area had been abandoned. In addition, defendant contends that even if the State established the elements of burglary, his trial counsel was ineffective for failing to present the affirmative defense of mistake of fact, based on his belief that the items were abandoned. We affirm.

¶ 3 At trial, Gregory Jackson testified that he was the head photo specialist at the Walgreens drugstore at 347 East 95th Street in Chicago. At about 5:45 a.m. on December 10, 2011, Jackson was parked in a location where he could see the back of the store. He testified he was positioned there because of "prior incidents" and to see "if this person was going to come back and how he was getting in the store." Jackson testified he "had a view of the entire dumpster area and the electrical box attached to it." Jackson described the dumpster area as a "brick enclosure on two sides with a chain link gate in front and a steel roof on top." The fourth side of the enclosure was the store's wall. The roof was attached to the side brick walls. The structure was secured with a padlock and chain.

¶ 4 At about 7 a.m., Jackson saw defendant approach the dumpster area, "jiggle the gate," and walk to the side of the enclosure where the electrical box was located. Defendant jumped up onto the electrical box and onto the roof. Defendant then entered the enclosure by pushing the gate in and sliding in between the edge of the roof and the gate with his feet first. Jackson testified that defendant was "in there for a period of time" and, as he emerged, he pushed white Walgreens bags outside the structure. Jackson testified that as he saw defendant enter the

enclosure, he called 911, and when police arrived, defendant was "coming out" and "walking across the parking lot."

¶ 5 A store surveillance video depicting those actions was played, and Jackson narrated the video for the court. Jackson testified that the dumpster was chained and that the enclosure contained a "chute that goes through a trash compactor that leads to a door inside of our stockroom." Jackson stated that if a person was inside the enclosure, he would have access to the stockroom. When the police arrived, defendant "walked away from the area where he dropped the bag." Jackson testified defendant was not a store employee and did not have authority to enter the dumpster area.

¶ 6 Chicago police officer Brian Baader testified that after defendant was placed into custody, he asked why he had been arrested and said "he just went in there for some food because he was hungry." Baader collected the items that were recovered from defendant and gave them to a store employee to scan in order to determine their retail value. A Walgreens receipt generated at 8:05 a.m. on December 10, 2011, was entered into evidence. The four items listed on the receipt were contact lens solution, gum, cookies, and jewelry and had a total value of $26.34. Baader viewed the stockroom and trash compactor area inside the store and testified that the hatch door by which the trash compactor would feed out to the dumpster was bolted.

¶ 7 In the defense case, Phebe Rodgers, the manager of the Walgreens store, testified there was no door between the trash chute and the store, only "a latch that cuts off but it's not locked." Rodgers testified that a bolt was applied to the trash compactor door in November 2011 "after we noticed someone was coming in the store." Rodgers was not sure if the bolt was in place on

December 10. In its rebuttal case, the State recalled Baader, who testified that at the police station, defendant said he knew that he could navigate the Walgreens store without setting off motion detectors by crawling on the floor.

¶ 8 In convicting defendant of burglary, the court stated:

> "The court had the ability to observe the witnesses, their interest and bias as they testified in this case. The issues in this case really come down to the legal issue as to what a burglary is. The first issue the court is going to address is the question of whether or not the defendant had the intent to commit a theft. One need only watch the video and see him gather distance between himself and the bags that he's just removed from the trash can area, the dumpster area, when Chicago state police [*sic*] arrive to know that he didn't think he was doing the right thing.
>
> The issue really comes down to whether or not he entered the building by entering that area that is confined. First of all, the property that he recovered is not abandoned or trash at the moment since there's still a lock on that gate with a chain. The property only has – is only supposed to have access to either Walgreens or agents of Walgreens or people that are lawfully authorize to enter that area.
>
> So the question is the actual structure itself, is that a building? The structure is two wing walls that come out from the main building with a gate across the front, a Cyclone gate that is chain closed [*sic*]. It has a roof over the top of it, although it was indicated in the testimony, the roof doesn't cover the entire area. The exterior, [which] is the exterior wall of most of the rest of the premises is the interior wall of that area which

is using a portion of structure in question. This is an area which is not a detached area. It's not a detached garage. It's attached to the building.

I find that the defendant entered a building. Finding of guilty."

¶ 9 The court found that defendant was subject to a Class X sentence due to his criminal background and sentenced defendant to six years in prison.

¶ 10 On appeal, defendant first contends the State failed to prove his guilt beyond a reasonable doubt. He asserts the prosecution did not establish that he entered a building and, moreover, he believed he was taking trash, as opposed to property that belonged to Walgreens. The State responds that defendant entered a "building" as contemplated by the burglary statute when he forced his way into the dumpster enclosure, which was a walled structure with a steel roof and a padlocked fence, and that defendant knew the property contained therein had not been abandoned.

¶ 11 In reviewing the sufficiency of the evidence in a criminal case, it is not the function of this court to retry the defendant. *People v. Lloyd*, 2013 IL 113510, ¶ 42. Rather, our inquiry is whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Davison*, 233 Ill.2d 30, 43 (2009), citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is the function of the trier of fact to weigh the evidence, determine the credibility of the witnesses, resolve conflicts in the evidence, and draw reasonable inferences from these factors. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). We view the evidence in the light most favorable to the State and allow all reasonable inferences from that evidence to be drawn in favor of the prosecution. *People v. Martin*, 2011 IL 109102, ¶ 15 (2011).

¶ 12 A person commits burglary when he, without authority, knowingly enters a building with intent to commit a theft. 720 ILCS 5/19-1(a) (West 2010). In the context of the burglary statute, a "building" has been described as a structure designed for habitation or for the shelter of property. *In Interest of E.S.*, 93 Ill. App. 3d 171, 172-73 (1981), citing *People v. Gillespie*, 344 Ill. 290, 294 (1931) (finding that a tool shed met the requirement of a building even though it was under construction and lacked complete walls on three sides). "The gravamen of the offense of burglary is the unauthorized entry into a *defined structure* with the intent to commit theft." (Emphasis added.) *People v. Melmuka*, 173 Ill. App. 3d 735, 737 (1988).

¶ 13 Accordingly, structures that have been found to be buildings under the burglary statute have included a commercial semi-trailer used to store property (*People v. Denton*, 312 Ill. App. 3d 1137, 1139 (2000)), a tent (*People v. Netznik*, 66 Ill. App. 3d 72, 75 (1978)), an open-ended car wash consisting of wash bays, a roof and concrete sidewalls and floors (*People v. Blair*, 52 Ill. 2d 371, 373 (1972)), and a telephone booth (*People v. Embry*, 12 Ill. App. 3d 332, 336 (1973)). A burglary conviction also was upheld when the defendant broke into a shed attached to a brick garage; the shed was divided by a center partition and one side of the east half of the shed was open to the elements. *People v. Wilson*, 24 Ill. 2d 598, 601 (1962).

¶ 14 Here, in asserting his entry into the Walgreens dumpster enclosure did not constitute entry into a "building," defendant relies on *E.S.*, which held that a fenced-in lot adjoining an auto body shop and surrounded by a 10-foot-high fence with a sliding gate was not a building under the burglary statute. *E.S.*, 93 Ill. App. 3d at 172-73. The court noted the common elements in the structures held to be "buildings" included "a roof and at least one wall that would provide

some shelter from the elements for persons or property." *Id*. at 173. The court in *E.S.* held that despite the lot's proximity to the body shop, the defendant's entry into the lot did not constitute entering a building because the area did not include walls or a roof, and the space did not provide shelter or shield the contents from the elements. *Id*. at 173-74.

¶ 15 Based on *E.S.*, defendant contends the Walgreens dumpster enclosure did not meet the definition of a "building" because it was only intended to provide a temporary location for the store's refuse and was not used as a habitat or shelter. He argues that although the enclosure had a roof, the roof covered only part of the structure.

¶ 16 The cases set out above illustrate that a structure need not be fully enclosed to constitute a "building" under the burglary statute. See, *e.g.*, *Blair*, 52 Ill. 2d at 373 (car wash);*Gillespie*, 344 Ill. at 294 (tool shed); *Wilson*, 24 Ill. 2d at 601 (shed attached to garage). Here, the structure containing the dumpster was described at trial as including brick walls on two sides (with the third, or back, wall being the outer wall of the store) and enclosed in front by a chain-link gate. A roof was attached to the side walls, and the structure was locked with a padlock and chain. Therefore, the structure contained three walls, a roof and a locked gate and was intended as a shelter for the store's property. We find the evidence supported the trial court's finding that the structure attached to the Walgreens store met the definition of a "building" as contemplated under the burglary statute.

¶ 17 Defendant next contends the State did not prove his specific intent to commit a theft. He asserts that by retrieving items from a dumpster, he was merely obtaining property that any reasonable person would believe was abandoned.

¶ 18 The intent to commit a theft as an element of burglary may be established circumstantially but must be proved beyond a reasonable doubt. *People v. Boguszewski*, 220 Ill. App. 3d 85, 88 (1991). "Criminal intent is a state of mind that is usually inferred from the surrounding circumstances." *People v. Woodrum*, 223 Ill. 2d 286, 316 (2006). Whether a defendant accused of theft had the requisite mental state may be deduced by the trier of fact from the facts and circumstances surrounding the act, including the time, place and manner of entry, as well as alternative explanations for the defendant's entry. *People v. Maggette*, 195 Ill. 2d 336, 354 (2001).

¶ 19 Theft occurs when a person obtains or exerts unauthorized control over property of the owner with the specific intent to permanently deprive the owner of the property. 720 ILCS 5/16-1(a)(1)(A) (West 2010). Proof of ownership or some form of possessory interest in the property is essential in a theft prosecution to establish a material element of the offense. *People v. Walker*, 193 Ill. App. 3d 277, 279 (1990). Property is generally considered to be abandoned when the owner, intending to relinquish all right to the property, leaves it free to be appropriated by any other person. *Bell Leasing Brokerage, LLC v. Roger Auto Service, Inc.*, 372 Ill. App. 3d 461, 467 (2007). If property has been abandoned or if a defendant believes it to have been abandoned, the defendant cannot have the requisite intention to commit a theft of that property. *Morisette v. United States*, 342 U.S. 246, 271 (1952).

¶ 20 In the instant case, the circumstances support the trial court's finding that defendant had the intent to commit theft. Jackson testified that he observed defendant approach the dumpster enclosure and "jiggle" the locked gate. Defendant then climbed onto the roof and entered the

enclosure by jumping onto the roof and easing himself down between the gate and the edge of the roof. Defendant therefore was aware that the Walgreens store had secured the enclosure with a lock and knew that he was entering an area to which the public did not have general access. Thus, defendant could not have had a reasonable belief that the items in the enclosed area had been abandoned.

¶ 21 Officer Baader testified that defendant told him he entered the dumpster enclosure to obtain food because he was hungry; however, the evidence established that defendant took items other than food, including contact lens solution and a watch. In finding defendant had the requisite intent, the trial court noted that, as observed on the store video, defendant separated himself from the bags he removed from the enclosure when he saw police had arrived.

¶ 22 In asserting the items in the dumpster area were abandoned trash, defendant relies on two cases that examined whether police could use evidence from a warrantless search of trash left at curbside to support probable cause to search a nearby residence. See *People v. Balsey*, 329 Ill. App. 3d 184 (2002); *People v. Burmeister*, 313 Ill. App. 3d 152 (2000). Those cases held that the placement of a trash container at the curb terminated the "possessory or ownership interest" of each defendant in the container's contents and reflected the "abandonment of the trash." *Burmeister*, 313 Ill. App. 3d at 155. The court reasoned that household trash was placed at the curb to be conveyed to a third party and that it could be searched by police because it was "accessible to the public." *Id.* Those cases are distinguishable from the circumstances here and, in fact, weigh against the defendant in this case.

¶ 23 In the instant case, the evidence at trial completely refuted defendant's argument that the items he took were abandoned. In contrast to the cases cited by defendant, he did not take items from a receptacle that was accessible to anyone. Instead, defendant removed property from the Walgreens' enclosure, which was not an area to which the public had access. The State presented evidence that the items defendant retrieved were kept in an enclosure surrounded by three brick walls, a locked gate and a steel roof. Jackson, the store employee who observed defendant's actions, testified that defendant had difficulty gaining entry into the enclosure, having to squeeze himself between the gate and the roof. Those facts support the conclusion that, although the products defendant took from the enclosure were not inside the Walgreens store, the store management had not abandoned the merchandise by keeping it in the enclosure area. That conclusion is further supported by the fact that Walgreens engaged a surveillance camera to view the area.

¶ 24 Furthermore, the statutory elements of burglary do not require the actual taking of property, but only an unlawful entry with the intent to commit a theft therein. *People v. Heinz*, 407 Ill. App. 3d 1016, 1023 (2011). Thus, the nature of the items taken is not determinative of the defendant's intent to commit a theft when entering a building. See *People v. Rudd*, 2012 IL App (5th) 100528, ¶ 14 (noting the inquiry is not to determine whether any "possibly innocent explanation" exists for the defendant's actions); see also *People v. Sehr*, 150 Ill. App. 3d 118, 122-23 (1986) (defendant's residential burglary conviction upheld despite defendant's argument on appeal that no items were taken from house and that he only sought shelter inside).

Therefore, the particular characteristics of the items eventually taken by defendant do not mitigate his intent to commit theft.

¶ 25 In summary on this point, based on the enclosed nature of the area behind the Walgreens store, including the fact that it was covered by a roof and secured by a locked gate, the evidence was sufficient to a rational trier of fact to reasonably infer that defendant intended to commit a theft when he entered that area. Accordingly, because the evidence, when viewed in the light most favorable to the State, established that defendant entered a building with the intent to commit a theft, defendant's conviction for burglary is affirmed.

¶ 26 Defendant next contends that if the evidence is sufficient to sustain his conviction, his trial counsel was ineffective for failing to raise the affirmative defense of mistake of fact based on his statement that he merely took trash he believed had been abandoned. Defendant contends that had that defense been raised, the State would have been required to prove beyond a reasonable doubt that defendant did not believe the items in the dumpster area had been abandoned. The State responds that defense counsel argued that theory to the court in the motion for a directed finding and in closing argument and, thus, a mistake-of-fact defense would not have affected the outcome at trial.

¶ 27 A claim of ineffective assistance of counsel is considered under the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To obtain relief under *Strickland*, a defendant must prove that his counsel's performance fell below an objective standard of reasonableness and, moreover, that the result of defendant's trial would have been different absent counsel's deficient performance. *Id*. The standard of effective assistance of counsel

means a defendant is entitled to competent, not flawless, representation, and the defendant must overcome the presumption that the challenged conduct might have constituted sound trial strategy under the circumstances of his case. *People v. Mims*, 403 Ill. App. 3d 884, 890 (2010) (holding that a decision involving a matter of trial strategy typically will not support a claim of ineffective counsel). "Trial strategy includes an attorney's choice of one theory of defense over another." *People v. Cundiff*, 322 Ill. App. 3d 426, 435 (2001), quoting *People v. Campbell*, 264 Ill. App. 3d 712, 732 (1992).

¶ 28 A defense based on mistake of fact is an affirmative defense. 720 ILCS 5/4-8(d) (West 2010). In order to raise an affirmative defense, the defendant is required to present some evidence on the issue unless the State's evidence raises the issue. 720 ILCS 5/3-2(a) (West 2010). Once an affirmative defense has been raised, the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue. 720 ILCS 5/3-2(b) (West 2010).

¶ 29 As the State points out on appeal, defense counsel argued to the trial court at several points in these proceedings that defendant was not guilty because he only took items from the trash, as opposed to taking property that belonged to Walgreens. In defense counsel's motion for a directed finding, in addition to asserting that defendant did not enter a building, defendant took items that were in the trash and that "it's not a burglary to steal the trash." In closing argument, defense counsel asserted that defendant was in a "trash area" and was "picking through trash." Therefore, the record reflects the theory that defendant mistakenly believed he was taking trash was presented to the trial court, who rejected that position in finding the evidence sufficient to support defendant's guilt.

¶ 30 Accordingly, for all of the reasons set out above, the judgment of the trial court is affirmed.

¶ 31 Affirmed.