2015 IL App (4th) 130493-U

NO. 4-13-0493

FILED
September 3, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
SHANNON HEMPHILL,	)	No. 12CF495
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pope and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding defendant (1) was not entitled to an instruction on criminal trespass to real property as a lesser-included offense of burglary and (2) failed to demonstrate the trial court improperly influenced his decision to testify by asserting it would craft a "strong" admonishment instructing the jury to disregard opening remarks if the defense failed to present evidence.

¶ 2 In April 2013, a jury found defendant, Shannon Hemphill, guilty of burglary (720 ILCS 5/19-1(a) (West 2010)). In May 2013, the trial court sentenced defendant to seven years' imprisonment. Defendant appeals, arguing the trial court (1) erred in denying his request for a jury instruction on the lesser-included offense of criminal trespass to real property and (2) improperly influenced his decision to testify by indicating it would "strongly" admonish the jury to disregard opening remarks if the defense failed to present evidence. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In October 2012, the State charged defendant by information with one count of burglary (720 ILCS 5/19-1(a) (West 2010)). The State alleged that on October 12, 2012, defendant, Marlon Phillips, and Joel Williams "knowingly and without authority entered a building of Heatcraft Refrigeration Products, located at 1625 E. Voorhees Street, Danville, Vermilion County, Illinois, with the intent to commit therein a theft." In April 2013, a jury trial commenced for defendant and Phillips.

¶ 5 A. Defense's Opening Statement

¶ 6 Defendant and Phillips's joint opening statement presented a detailed version of the events of October 12, 2012. Defendant, Philips, and Williams were together in Indianapolis, when they met "a couple girls" from Danville through a social-media website. Indicating they would like to meet the men, the women drove from Danville to Indianapolis, where they picked up the men, and drove back to Danville. After an argument, the women left the men at a Danville gas station. Since the men did not know anyone in Danville, they called friends on their cell phones but could not find anyone willing to travel to Danville and take them back to Indianapolis. They were walking around trying to figure out a plan when they came to an abandoned warehouse. Although they knew they were not authorized to enter the building, because of the cold they walked past an unlocked gate and went inside. Upon entry, an alarm was activated, which the men were able to turn off. However, the warehouse caretaker was notified of the alarm. After arriving at the warehouse, the caretaker observed several individuals inside and called the police, who then apprehended the men. According to the defense, the men did not take or damage anything. Defense counsel suggested defendant and Phillips had only committed a simple trespass, not burglary.

¶ 7 B. State's Case in Chief

¶ 8 1. *John Albers*

¶ 9 John Albers, the warehouse caretaker, testified for the State. Albers testified that in October 2012, the warehouse was empty but its switchgear, which distributed power within the warehouse, was still there and it contained copper wire.

¶ 10 On the evening of October 12, 2012, Albers received a call indicating a "trouble alarm" associated with the warehouse's fire-sprinkler system. A "trouble alarm" indicated a problem with the system, including a possible loss of power. Approximately 20 minutes later, Albers arrived at the warehouse and tried to enter using an electronic entry. The electronic entry did not work. Albers attempted to manually enter through another door using a key. As he unlocked the door he noticed, through the glass, the lights were off inside, and he observed flashlight beams near the location of the switchgear. Albers called the police.

¶ 11 The police arrived but were unable to pass through an electric gate at the rear of the warehouse as it did not have power. Albers assisted the officers in locating an alternative access point to the warehouse. Upon their entry, the officers apprehended the three men.

¶ 12 After the three men were in custody, Albers walked through the warehouse with a police officer. Albers observed the levers on the switchgear were pulled down, shutting off power to the rest of the building. Approximately 8 to 12 panels to the switchgear cabinets had been removed and were on the floor. Each panel is normally secured by six to eight screws. Albers also observed items the police found near the switchgear, including a backpack, vice grips, pliers, two screwdrivers, a tool case, flashlights, a pair of cotton jersey gloves and bolt cutters. Albers testified he had not seen these items during his last visit to the warehouse on October 9, 2012. On October 13, 2012, Albers returned with a police officer to look for a source

of entry. Albers discovered a locked door that had been pried open. An image of the door with pry marks depicted was admitted into evidence.

¶ 13 2. *Sergeant Terry McCord*

¶ 14 The State called Terry McCord, a patrol sergeant for the Danville police department. Sergeant McCord testified he was called to the warehouse to investigate a possible burglary. Sergeant McCord and Officer Danielle Lewallen entered the warehouse and observed three individuals inside near the building's switchgear. The officers identified themselves and commanded the subjects to lie down on the ground. However, all three suspects ran.

¶ 15 Defendant was eventually found hiding within the building behind a sheet of plywood. Sergeant McCord searched defendant and discovered a steak knife in his back pocket and a cell phone. Photographs of these items were admitted into evidence. Another officer searched the area where defendant was apprehended and discovered gloves, a screwdriver, and Channellock pliers. Officers found additional pliers, tools, and a backpack full of tools by an electrical box inside the warehouse.

¶ 16 3. *Officer Doug Miller*

¶ 17 The State called Doug Miller, a Danville police officer. Officer Miller testified he entered the warehouse after Sergeant McCord and Officer Lewallen. Officer Miller assisted Sergeant McCord in locating defendant after he fled. Officer Miller found defendant hiding behind a piece of plywood, leaning up against a pillar. Officer Miller searched the area behind the plywood and discovered two screwdrivers, a pair of black gloves, a small flashlight, and a set of Channellock pliers.

¶ 18 4. *Officer Danielle Lewallen*

¶ 19 The State called Danielle Lewallen, a Danville police officer. Officer Lewallen testified that when she arrived at the warehouse, she saw flashlight beams inside. Officer Lewallen and Sergeant McCord observed three male subjects. The officers drew their guns and commanded the subjects to lie down on the ground. All three subjects instead ran from the officers. Two subjects quickly went to the ground. The third subject, later identified as defendant, continued to flee. Sergeant McCord followed defendant. Officer Lewallen stayed with the two subjects on the ground, later identified as Phillips and Williams.

¶ 20 Officer Lewallen searched Phillips and discovered a cell phone, screwdriver, and pair of gloves. She also obtained a cell phone from Williams. Officer Lewallen subsequently searched the area where Phillips and Williams were apprehended and discovered a knife and flashlight. On cross-examination, Officer Lewallen admitted, although the evidence from the warehouse could be tested for deoxyribonucleic acid or fingerprints, this was not done.

¶ 21 5. *Officer Eric Kizer*

¶ 22 The State called Eric Kizer, a Danville police officer and certified crime scene technician. Officer Kizer photographed evidence obtained from the warehouse.

¶ 23 6. *Evidence Manager Randall Osgood*

¶ 24 The State called Randall Osgood, an evidence manager for the Danville police department. Osgood testified to the condition and custody of the evidence seized from the warehouse.

¶ 25 On this evidence, the State rested its case in chief.

¶ 26 C. Defendant and Phillips's Case in Chief

¶ 27 At the close of the State's case, defense counsel indicated defendant and Phillips would not be presenting evidence. The trial court stated it was "fine" that defendant and Phillips

did not want to testify, but because counsel had presented a detailed story in opening statement, now unsupported by any evidence, the court had two options: (1) grant a mistrial; or (2) craft a "strong" admonishment directing the jury to disregard the unsupported statements made by defense counsel in her opening statement. The State moved for a mistrial. After the State's motion, defense counsel indicated defendant wished to testify. As it was Friday afternoon, the court recessed the trial until Monday, allowing defense counsel the opportunity to further discuss with defendant his decision to testify. The court concluded its comments as follows:

> "And again, I'm making it clear on the record[,] I'm not telling *** either defendant [or Phillips] they have to testify or not testify. That's their choice. Nobody can make them testify. Nobody can make them not testify. But *** I have to also make it clear if there is no evidence, not as to whether they're testifying or not[,] *** if there's no evidence to support that story that was given to them [(the jury)] at the opening statement, then I have to make it clear to the jury that they cannot consider that story, that version, anything about that. *** [A]s far as whether they testify or not, that's entirely their choice."

¶ 28 When the trial resumed, the parties and the trial court again discussed the implications if defendant and Phillips did not present any evidence. The court commented that if no evidence was presented, it would be required to admonish the jury:

> "[T]hey are to completely disregard the opening statement of the defense. They are not to consider any of the comments by counsel in their opening statement, nor are they to consider anything that

> the opening statement included as any reasonable basis for an inference on their part with regard to anything claimed by the defendants, and that there was, in fact, no evidence in [the] record to support any claim asserted by the defense in opening statement."

Defense counsel responded saying the proposed admonishment went beyond the applicable pattern jury instruction (Illinois Pattern Jury Instruction, Criminal, No. 1.03 (4th ed. 2000) (hereinafter, IPI Criminal No. 1.03), which, in relevant part, informs the jury that opening statements are not evidence) and would constitute an improper comment on the rights of defendant and Phillips. The court found, based on the detailed version of the events defense counsel gave in opening statement, that relying on the pattern jury instruction would be insufficient to cure the problem. Defendant then informed the court he would testify.

¶ 29 Defendant testified he lived in Indianapolis, Indiana. On October 12, 2012, at approximately 7 p.m., defendant was at Williams's house in Indianapolis with Williams and Phillips. While there, two young women, unfamiliar to defendant, arrived at Williams's house. The three men then rode with the young women to Danville. Once in Danville, they stopped at a liquor store and defendant went inside. After exiting the liquor store, defendant noticed Williams and Phillips standing outside. The women had left. The temperature outside was 30 degrees. For approximately 30 minutes, defendant, Phillips, and Williams walked around Danville. Defendant attempted to call someone for a ride, but his cell phone battery died. Williams and Phillips also attempted to make phone calls to get a ride. The men came upon a large warehouse complex. The gate to the complex was open. The men found an unlocked door to the building and went inside. Defendant testified he did not enter the building intending to steal anything but rather to seek shelter from the cold.

¶ 30 On this evidence, defendant and Phillips rested.

¶ 31 D. State's Motion for a Mistrial and Jury Instructions

¶ 32 At the close of evidence, the State renewed its motion for a mistrial based on defendant and Phillips's opening statement. The trial court denied the motion, concluding an instruction directing the jury not to consider statements unsupported by evidence made during the opening statement would be a sufficient remedy.

¶ 33 The defense requested an instruction be given to the jury on the offense of criminal trespass to real property. The trial court denied the request.

¶ 34 The jury returned a verdict finding both defendant and Phillips guilty of burglary.

¶ 35 E. Posttrial Motions and Sentencing

¶ 36 In May 2013, defendant filed a motion for a new trial, alleging, in relevant part, the trial court erred in failing to instruct the jury on the lesser-included offense of criminal trespass to real property. After a hearing, the court denied defendant's motion. The court sentenced defendant to seven years' imprisonment, with credit for time served in custody. Defendant filed a motion to reconsider the sentence, which was also denied.

¶ 37 This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 On appeal, defendant argues the trial court (1) erred in denying his request for a jury instruction on the lesser-included offense of criminal trespass to real property and (2) improperly influenced his decision to testify by indicating it would "strongly" admonish the jury to disregard opening remarks if the defense failed to present evidence. Defendant contends these errors warrant reversal and a remand for a new trial. We address these arguments in turn.

¶ 40 A. Denial of Defendant's Requested Jury Instruction

¶ 41 Defendant argues the trial court erred in denying his request for a jury instruction on the lesser-included offense of criminal trespass to real property. Specifically, defendant alleges he is entitled to such an instruction as (1) criminal trespass to real property is a lesser-included offense of burglary, and (2) at least "slight evidence" was introduced to support such an instruction. Defendant further contends, pursuant to *People v. Blan*, 392 Ill. App. 453, 459-60, 913 N.E.2d 23, 28-29 (2009), that to establish error for a failure to give a lesser-included jury instruction is to establish reversible error.

¶ 42 In response, the State concedes, on the facts presented, criminal trespass to real property is a lesser-included offense of burglary. Nevertheless, the State contends, the trial court correctly denied defendant's instruction as (1) defendant's bare assertion he did not intend to steal anything in the warehouse, standing alone, did not warrant a criminal-trespass instruction as it failed to meet the minimum threshold of credibility required by *People v. Jones*, 219 Ill. 2d 1, 31, 845 N.E.2d 598, 614 (2006) ("An instruction on a lesser offense is justified when there is some credible evidence to support the giving of the instruction."); and (2) no rational jury could have convicted defendant of the lesser offense while acquitting him of burglary as his story was incredible given the unexplained presence of burglary tools. The State further asserts, even if the court erred in rejecting defendant's criminal-trespass instruction, the error was harmless beyond a reasonable doubt.

¶ 43 Whether an instruction should be given to the jury rests in the sound discretion of the trial court. *Jones*, 219 Ill. 2d at 31, 845 N.E.2d at 614. Absent an abuse of discretion, the decision whether to grant or deny a request for a jury instruction will not be reversed. *Jones*, 219 Ill. 2d at 31, 845 N.E.2d at 614. We initially note, the proposed jury instruction defendant argues was erroneously rejected does not appear in the record on appeal and the report of proceedings

fails to reveal its contents. In *People v. Emerson*, 189 Ill. 2d 436, 503, 727 N.E.2d 302, 339 (2000), our supreme court found a defendant forfeited review of the propriety of his proposed instruction by failing to include it in the record on appeal. Here, due to defendant's failure to include his proposed instruction in the record on appeal, he has forfeited any claimed error. Forfeiture aside, we find defendant was not entitled to a lesser-included instruction.

¶ 44 A defendant is entitled to an instruction on a lesser-included offense if (1) "the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the [charging instrument] can reasonably be inferred" (*People v. Kolton*, 219 Ill. 2d 353, 367, 848 N.E.2d 950, 958 (2006)); and (2) the evidence adduced at trial is such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater (*People v. Medina*, 221 Ill. 2d 394, 405, 851 N.E.2d 1220, 1226 (2006)).

¶ 45 We must first determine whether the offense of criminal trespass to real property is identified by the charging instrument as a lesser-included offense of burglary. *People v. Thomas*, 374 Ill. App. 3d 319, 323, 872 N.E.2d 438, 442 (2007). Whether a charged offense encompasses another as a lesser-included offense is a question of law, which we review *de novo*. *Kolton*, 219 Ill. 2d at 361, 848 N.E.2d at 955.

¶ 46 Here, the State charged defendant by information with one count of burglary (720 ILCS 5/19-1(a) (West 2010)). The State alleged on October 12, 2012, defendant, Phillips, and Williams "knowingly and without authority entered a building of Heatcraft Refrigeration Products *** with the intent to commit therein a theft." A person commits criminal trespass to real property when he "knowingly and without lawful authority enters or remains within or on a building." 720 ILCS 5/21-3(a)(1) (West 2010). The State acknowledges that "[b]ecause the

language in the criminal trespass statute is identical to the first element of burglary, it was a lesser[-]included offense in this case." We agree.

¶ 47 We next examine the evidence adduced at trial to determine whether "the evidence *** is such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Medina*, 221 Ill. 2d at 405, 851 N.E.2d at 1226. The difference between criminal trespass under section subsection 21-3(a)(1) and burglary is that the latter offense additionally requires defendant intend to commit a felony or theft. "[I]ntent may be inferred by surrounding circumstances and may be proved by circumstantial evidence." *People v. Taylor*, 344 Ill. App. 3d 929, 936, 801 N.E.2d 1005, 1010 (2003). Here, the circumstantial evidence and the rational inferences to be drawn from it admit of only one conclusion: defendant entered the warehouse with the intent to commit a theft.

¶ 48 The evidence of the tools and other items found on the men and in the warehouse belies defendant's claim the men simply entered the warehouse in search of shelter. Sergeant McCord discovered a "steak knife" in defendant's back pocket and a cell phone. In the area where defendant was found hiding, Officer Miller discovered two screwdrivers, a pair of black gloves, a small flashlight, and a set of Channellock pliers. Officer Lewallen searched Phillips and discovered a cell phone, screwdriver, and pair of gloves. Officer Lewallen also obtained a cell phone from Williams's possession. In the area where Phillips and Williams were apprehended, Officer Lewallen discovered a knife and flashlight. A search of the warehouse uncovered additional Channellock pliers, screwdrivers, bolt cutters, and a backpack full of tools near the switchgear. Albers testified he had not seen any of these items before in the warehouse.

¶ 49 In addition, the jury heard evidence that when the police entered the warehouse, they found the three men standing near the building's switchgear. Approximately 8 to 12 panels

on the switchgear cabinets had been removed and the power to the units had been turned off. The switchgear contained copper wire. After the men were arrested, the police found one of the warehouse's locked doors had been pried open.

¶ 50 Coupled with the men's flight when the police identified themselves, the above evidence was overwhelming that defendant entered the building with the intent to commit a theft.

¶ 51 Based on this evidence, we find a fact finder could not have rationally found defendant guilty of trespass to real property and acquitted him of burglary. Defendant was not entitled to the lesser-included-offense instruction, and the trial court did not err when it refused to so instruct the jury. Having concluded no error occurred, we need not address whether the failure to give a lesser-included jury instruction establishes reversible error.

¶ 52 B. Defendant's Decision To Testify

¶ 53 Defendant argues the trial court improperly influenced his decision to testify by indicating it would "strongly" admonish the jury to disregard opening remarks if the defense failed to present evidence. The State asserts, and defendant concedes, this issue is forfeited as defendant failed to raise this issue in a posttrial motion, thus preserving the issue for review. Defendant requests this court review his claim under the substantial-rights prong of the plain-error doctrine.

¶ 54 "[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479 (2005).

¶ 55 Our first step is to determine whether any error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007). Again, defendant argues the trial court

improperly influenced his decision to testify by indicating it would "strongly" admonish the jury to disregard opening remarks if the defense failed to present evidence.

¶ 56 "The purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove." *People v. Kliner*, 185 Ill. 2d 81, 127, 705 N.E.2d 850, 874 (1998). It is improper for counsel to make opening statements about evidence to be introduced at trial and then fail to produce that evidence. *Kliner*, 185 Ill. 2d at 127, 705 N.E.2d at 874. Here, after learning the defense did not intend to present any evidence, the trial court indicated it was considering crafting a "strong" admonishment directing the jury to disregard statements made in opening statement. However, the court did not so instruct the jury as defendant subsequently testified, thus providing support for the defense's opening statement. Instead, the court admonished the jury according to IPI Criminal No. 1.03, which reads, in relevant part, as follows:

> "Opening statements are made by the attorneys to acquaint you with the facts they expect to prove. *** Neither opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded."

Had defendant not testified and provided evidentiary support for the story presented in the defense's opening statement, it would not have been an abuse of discretion for the court to have instructed the jury as it generally outlined in its conversations with the attorneys. Simply giving IPI Criminal No. 1.03 without any modification might not have adequately instructed the jury regarding the defense's opening statement. See *People v. Bunning*, 298 Ill. App. 3d 725, 729, 700 N.E.2d 716, 720 (1998) ("The giving of [IPI Criminal 1.03] alone is not always curative

***."); *People v. Blue*, 189 Ill. 2d 99, 131-32, 724 N.E.2d 920, 937 (2000) (rejecting the State's contention that giving IPI Criminal 1.03 cured any error introduced by the State's improper argument).

¶ 57 Further, defendant has failed to demonstrate the trial court's comments improperly influenced his decision to testify. The court advised defendant of the two options it was considering if no evidence was presented by the defense. After defendant indicated he wished to testify, the court postponed the trial for the day, allowing defense counsel and defendant the weekend to discuss the decision. The court made clear, it was defendant's choice whether to testify. Defendant subsequently testified substantially along the lines of the defense's opening statement with very limited cross-examination by the State. Based on the record before us, we find defendant has failed to demonstrate the trial court improperly influenced his decision to testify.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm defendant's conviction and sentence. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 60 Affirmed.