

NOTICE

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2015 IL App (4th) 130494-U

NO. 4-13-0494

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 3, 2015

Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

MARLON PHILLIPS,

Defendant-Appellant.

) Appeal from
) Circuit Court of
) Vermilion County
) No. 12CF495
)
) 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 was not entitled to an instruction on criminal trespass to real property as a lesser-included offense of burglary.

¶ 2 In April 2013, a jury found defendant, Marlon Phillips, 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 erred in denying his request for a jury instruction on the lesser-included offense of criminal trespass to real property. 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, Shannon Hemphill, 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 Hemphill.

¶ 5 A. Defense's Opening Statement

¶ 6 Defendant and Hemphill's joint opening statement presented a detailed version of the events of October 12, 2012. Defendant, Hemphill, 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 Hemphill had only committed a simple trespass, not burglary.

¶ 7 A. 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 and Williams went to the ground after taking three to four steps. Officer Lewallen stayed with defendant and Williams while Sergeant McCord followed Hemphill. Hemphill was eventually found hiding within the building behind a sheet of plywood. Sergeant McCord searched Hemphill 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 Hemphill 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 Hemphill. Officer Miller found Hemphill 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. Defendant and Williams quickly went to the ground. Hemphill continued to flee. Sergeant McCord followed Hemphill while Officer Lewallen stayed with defendant and Williams.

¶ 20 Officer Lewallen searched defendant 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 defendant 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 *B. Defendant and Hemphill's Case in Chief*

¶ 27 Hemphill testified he lived in Indianapolis, Indiana. On October 12, 2012, at approximately 7 p.m., he was at Williams's house in Indianapolis with Williams and defendant.

While there, two young women, unfamiliar to Hemphill, 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 Hemphill went inside. After exiting the liquor store, Hemphill noticed Williams and defendant standing outside. The women had left. The temperature outside was 30 degrees. For approximately 30 minutes, defendant, Hemphill, and Williams walked around Danville.

Hemphill attempted to call someone for a ride, but his cell phone battery died. Williams and defendant 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. Hemphill testified he did not enter the building intending to steal anything but rather to seek shelter from the cold.

¶ 28 On this evidence, defendant and Hemphill rested.

¶ 29 C. Jury Instruction and Verdict

¶ 30 At the close of evidence, 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.

¶ 31 The jury returned a verdict finding both defendant and Hemphill guilty of burglary.

¶ 32 D. Posttrial Motions and Sentencing

¶ 33 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.

¶ 34 This appeal followed.

¶ 35

II. ANALYSIS

¶ 36 On appeal, 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.

¶ 37 In response, the State asserts defendant's argument should fail as he failed to provide a complete record on appeal. Specifically, the State asserts the record fails to contain the proposed defense instruction which defendant asserts the trial court should have tendered to the jury. Further, the State asserts, even if we (1) presume defendant's proposed instruction followed Illinois Pattern Jury Instruction, Criminal, No. 16.11 (4th ed. 2000) and (2) assume the information describes criminal trespass to real property, defendant was not entitled to such an instruction as the facts presented did not permit a jury to rationally find defendant guilty of criminal trespass to real property but acquit him of burglary.

¶ 38 Whether an instruction should be given to the jury rests in the sound discretion of the trial court. *People v. Jones*, 219 Ill. 2d 1, 31, 845 N.E.2d 598, 614 (2006). 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. 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-offense instruction.

¶ 39 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)). The State asserts, even assuming the information describes criminal trespass to real property, the evidence adduced at trial did not permit a jury to rationally find defendant guilty of criminal trespass to real property but acquit him of burglary. We agree.

¶ 40 The difference between criminal trespass under section subsection 21-3(a)(1) (720 ILCS 5/21-3(a)(1) (West 2010)) 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.

¶ 41 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. Officer

Lewallen searched defendant 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 defendant and Williams were apprehended, Officer Lewallen discovered a knife and flashlight. Sergeant McCord discovered a steak knife in Hemphill's back pocket and a cell phone. In the area where Hemphill was found hiding, Officer Miller discovered two screwdrivers, a pair of black gloves, a small flashlight, and a set of Channellock pliers. 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.

¶ 42 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.

¶ 43 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.

¶ 44 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.

¶ 45 III. CONCLUSION

¶ 46 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).

¶ 47 Affirmed.