2017 IL App (1st) 143552-U

No. 1-14-3552

Order filed September 15, 2017

Fifth Division

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 5956
	)	
JERMAINE NICHOLSON,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Hall and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for attempted burglary is affirmed over his contention that the State failed to prove every element of the offense beyond a reasonable doubt because the evidence established that he did not commit an act which constituted a substantial step towards the commission of a burglary where he did not merely attempt to enter the building, but, rather, entered the building, and thus completed the act of burglary.

¶ 2 Following a bench trial, defendant Jermaine Nicholson was found guilty of attempted burglary and sentenced to four years' imprisonment. On appeal, defendant solely contends that

the State failed to prove him guilty of the charged offense of attempted burglary beyond a reasonable doubt because the evidence, if it established anything, showed that "he completed the act of burglary" and thus "there is no factual basis to conclude that he was guilty of attempted burglary." We affirm.

¶ 3 Defendant was charged by information with one count of attempted burglary and one count of possession of burglary tools. The attempted burglary count alleged that defendant, with intent to commit the offense of burglary, performed an act which constituted a substantial step toward the commission of burglary, namely, that he removed the security grate from a window of the building of the Port Ministries, and reached his hand or arm inside the building, without authority and with intent to commit a theft therein. Prior to trial, the State *nolle prossed* the count charging defendant with possession of burglary tools. The following evidence was adduced at trial.

¶ 4 Chicago police officer Chris Hackett testified that on March 22, 2014, at about 9:05 a.m., he and his partner, Officer John Dowling, were on patrol in the area of 5140 South Ashland Avenue. As the officers drove north on Ashland, past the building located at that address, Officer Hackett noticed defendant removing a metal security grate from a window of the building. The officers exited their vehicle and approached the building on foot. As they did so, they observed defendant with his arm, "all the way past his elbow," inside a window located near the top of an outer door to the building. Officer Hackett testified that the glass of the window was shattered. The security grate had been pulled from a window and the bolts were lying on the ground. A red canvas bag lay nearby with a wrench and other tools inside of it. Defendant was arrested.

¶ 5 The State proffered five photographic exhibits which Officer Hackett identified as depicting the building as it appeared on the date of the offense. The exhibits, which are part of the record on appeal, include two photographs of an outside chain-link fence surrounding the building with the chain-link panel of the fence gate rolled back. The three remaining photographs depict the window into which defendant had his arm inserted. The photographs depict what appears to be an exterior metal door with a square-shaped window, about 12 inches in size, set into the upper portion of the door. Most of the glass of the window is broken.

¶ 6 Detective Ben Olvera testified that he was assigned to investigate the attempted burglary, and, on the date thereof, interviewed defendant at the police station. Defendant told the detective that he had intended to enter the building "to grab some stuff" to collect money for drug use. Defendant also told the detective that he was attempting to enter the building by reaching through a window in a door in order to open the door.

¶ 7 John Biegel testified that on the date in question he was the acting director of Port Ministries, which owned the building at 5140 South Ashland. At the time of the attempted burglary, the building was unoccupied and listed for sale. Biegel testified that as of one day prior to the attempted burglary, the building was in an unbroken condition and there were grates in place over the windows. After the incident in question, Biegel went to the building and observed that one of the grates covering a window was half-removed and dangling. A small window on a door was also broken. Biegel stated that the State's photographic exhibits truly and accurately depicted the damaged condition of the building when he viewed it shortly after the attempted burglary. Biegel testified that he was not familiar with defendant and that, in his capacity as

acting director of the Port Ministries, he did not give defendant permission to enter or attempt to enter the building.

¶ 8 Based on this evidence, the trial court found that the State had proved each and every element of attempted burglary beyond a reasonable doubt. The court sentenced defendant to four years' imprisonment.

¶ 9 On appeal, defendant essentially challenges the sufficiency of the evidence to sustain his conviction. When a court reviews a challenge to the sufficiency of the evidence, the relevant question is whether, after reviewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution and will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to raise a reasonable doubt of the defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 10 Here the State charged defendant with attempted burglary. Section 19-1 of the Criminal Code of 2012 (Code) provides: "(a) A person commits burglary when without authority he knowingly enters *** a building *** with intent to commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2014). Section 8-4(a) of the Code defines attempt as follows: "A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2014).

¶ 11 In this court, defendant does not *per se* challenge the sufficiency of the evidence to sustain his conviction. Rather, he concedes, and we agree, that the evidence established that he committed a burglary, not an attempted burglary, because the record demonstrates that he "actually entered the building and did not merely attempt entry." Defendant points out, and again we agree, that "under Illinois law, the burglary was completed the moment that [he] reached through the window, and thereby cross[ed] the planes that enclose the protected space." Defendant argues, however, that, "based on the[se] undisputed facts," the State could not prove attempted burglary beyond a reasonable doubt because the evidence established that he "either committed a burglary or no offense at all." With this, we disagree.

¶ 12 In support of his argument, defendant asserts that: "since the evidence showed that [he] crossed the plane of the building when he reached through the window, it proved an act that constitutes the commission of burglary and not a substantial step toward the commission of a burglary." As such, defendant maintains that a finding of guilty for attempted burglary was impermissible.

¶ 13 Because defendant concedes, and we agree, that the evidence established that he committed a burglary we need not recount the facts here. Instead, we merely point out that defendant's argument seems to overlook the fact that "attempt" is an "included offense" of the crime which was allegedly attempted. See 720 ILCS 5/2-9 (West 2014). In this case, attempted burglary is a lesser-included offense of burglary. See *People v. Newell*, 105 Ill. App. 3d 330, 333-34 (1982); *People v. Rangel*, 104 Ill. App. 3d 695, 700 (1982).

¶ 14 That said, defendant's all-or-nothing argument is requesting that we hold because the evidence adduced at trial supported a conviction for the more serious, albeit uncharged, offense

of burglary, he should have been acquitted on the lesser-included, and charged, offense of attempted burglary. Stated differently, defendant is essentially requesting this court to reward him for successfully completing the more serious, uncharged, offense of burglary, and punish the State for exercising its discretion to pursue the lesser-include offense of attempted burglary. See *People v. White*, 2011 IL 109616, ¶ 25 (The State has discretion in deciding which charges to pursue).

¶ 15 We decline defendant's invitation to do so where, as here, the evidence, and the reasonable inferences therefrom, clearly established that defendant was guilty of attempted burglary beyond a reasonable doubt. The record establishes that defendant, who was in possession of tools, had rolled back a chain-link fence that was surrounding the building and gained access to the premises. He then broke a window located above a door to the building and, as admitted by defendant to a detective, attempted entry into the building by reaching through the window in order to open the door. Needless to say, these were all substantial steps toward the commission of a burglary. Accordingly, after reviewing the evidence in the light most favorable to the State, we conclude that there was sufficient evidence for a rational trier of fact to find defendant guilty of attempted burglary.

¶ 16 In reaching this conclusion, we have considered *Rangel*, cited by defendant in support of his argument and find it readily distinguishable. Here, unlike in *Rangel*, the issue is not whether defendant was prejudiced by the trial court's error in instructing the jury that they may, after a burglary prosecution, return a verdict of guilty on the lesser-included offense of attempted burglary. *Rangel*, 104 Ill. App. 3d at 700. Rather, the issue in this case is whether defendant may be convicted of the charged offense of attempted burglary where the evidence adduced at trial

rationally supported a conviction on the more serious, uncharged offense of burglary. Under the facts presented, we find that he may.

¶ 17 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.