2013 IL App (2d) 120069-U
No. 2-12-0069
Order filed August 19, 2013



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Du Page County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 11-CF-1271 |
| GUY E. HANSEN, | ) | Honorable Daniel P. Guerin, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held*: Under the abstract elements approach, burglary is not a lesser-included offense of retail theft. Therefore, defendant could be convicted of both offenses without violating the one-act, one-crime doctrine.

¶ 2 Defendant, Guy Hansen, was found guilty of burglary (720 ILCS 5/19-1(a) (West 2010)), retail theft (720 ILCS 5/16A-3(a) (West 2010)), and criminal trespass to real property (720 ILCS 5/21-3(a)(2) (West 2010)) for entering a Jewel-Osco grocery store and stealing a bottle of vodka. The State nol-prossed the criminal trespass conviction prior to sentencing. On appeal, defendant argues that his burglary conviction must be vacated because it is a lesser-included offense of retail

theft and therefore violates the one-act, one-crime doctrine. We find that under the abstract elements approach, burglary is not a lesser-included offense of retail theft given that there are elements of burglary that are not found in retail theft. Accordingly, we affirm the judgment of the trial court.

¶ 3 I. BACKGROUND

¶ 4 At approximately 9 p.m. on June 3, 2011, defendant entered a Jewel-Osco grocery store and immediately walked to the liquor department. The security officer monitoring the store's surveillance cameras saw defendant and became suspicious. While most shoppers were wearing shorts and t-shirts, defendant was dressed in a heavy leather jacket. As the security officer continued to monitor defendant using the surveillance cameras, he observed defendant enter the hard liquor aisle, select a bottle of vodka from the shelf, and place it under his jacket. Defendant then walked past the cash registers without paying for the merchandise and exited the store through the entrance doors.

¶ 5 The security officer followed defendant out of the store to a bench where defendant was sitting. He watched defendant remove the bottle of liquor from his jacket and place it in a plastic Jewel-Osco grocery bag. The security officer identified himself to defendant and asked that the bottle be returned. Defendant did not comply but instead warned the security officer to "back off." The security officer called the police and proceeded to follow defendant as he made his way through the store's parking lot and across a nearby street. When the police arrived, defendant was taken into custody. The officers found that he was carrying the bottle of vodka and did not have any credit or debit cards with him.

¶ 6 Defendant was later charged by indictment with (Class 4) retail theft and (Class 2) burglary and by complaint with criminal trespass to real property. The retail theft indictment alleged that

"defendant knowingly took possession of certain merchandise offered for sale in a retail mercantile establishment, Jewel, being various items of liquor with the intention of depriving the merchant, Jewel, permanently with the benefit of such merchandise, without paying the full retail value of such merchandise, said defendant having a previous conviction for burglary ***." The burglary indictment alleged that "defendant, without authority, knowingly entered into the building of Jewel, located at or about 127 E. Ogden Ave. Naperville, Du Page County, Illinois, with intent to commit therein a theft ***." The criminal trespass complaint was based on defendant entering the Jewel-Osco after being notified orally in person that he was forbidden from entering upon the grounds of the property and business.

¶ 7 This was not the first time defendant had taken merchandise from this particular Jewel-Osco. At trial, an assistant store director testified that on a prior occasion she had caught defendant stealing from the liquor department, and she had advised him not to return to the store.

¶ 8 Following a jury trial, defendant was found guilty of all three offenses. The State nol-prossed the criminal trespass conviction before sentencing. At sentencing, defendant received concurrent terms of 3 years' imprisonment on the retail theft conviction and 4½ years' imprisonment on the burglary conviction. Subsequently, defendant filed a motion to reconsider the sentence, which was denied. Defendant timely appealed.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant argues that his burglary conviction must be vacated because it is a lesser-included offense of retail theft. Defendant did not object at trial or raise the lesser-included offense claim in his posttrial motion. However, he seeks plain-error review on appeal. Reviewing courts may "invoke the plain-error doctrine to review alleged errors not properly preserved when the

evidence in a criminal case is closely balanced or the error is so fundamental and of such magnitude that the accused is denied the right to a fair trial and remedying the error is necessary to preserve the integrity of the judicial process." *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). Our supreme court has found that a one-act, one-crime violation qualifies for review under the second prong of the plain-error rule. *People v. Artis*, 232 Ill. 2d 156, 165 (2009); *People v. Smith*, 183 Ill. 2d. 425, 429 (1998). Accordingly, we will address the issue of whether burglary is a lesser-included offense of retail theft under the plain-error doctrine.

¶ 11 The one-act, one-crime doctrine was set forth in *People v. King*, 66 Ill. 2d 551 (1977), and prohibits the conviction of more than one offense (1) when the convictions are based on the same physical act or (2) if any offense is a lesser-included offense of the others. *Id*. at 566. The one-act, one-crime doctrine requires a two-step analysis:

> "First, the court must determine whether the defendant's conduct involved multiple acts or a single act. Multiple convictions are improper if they are based on precisely the same physical act. Second, if the conduct involved multiple acts, the court must determine whether any of the offenses are lesser-included offenses. If an offense is a lesser-included offense, multiple convictions are improper." *People v. Miller*, 238 Ill. 2d 161, 165 (2010).

¶ 12 One-act, one-crime challenges are reviewed *de novo*. *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 33.

¶ 13 Here, defendant does not dispute that his conduct involved multiple acts. Defendant does argue, however, that under the second step of the analysis, burglary is a lesser-included offense of retail theft. *Miller* established that when a defendant is convicted of multiple *charged* crimes, as defendant is here, the abstract elements approach is the correct method in determining whether one

charged offense is a lesser-included offense of another. *Miller*, 238 Ill. 2d at 173-75. Under this approach, the court examines the statutory elements of the two offenses and "if all of the elements of the first offense are included within a second offense and the first offense contains no element not in the second offense, the first offense is deemed a lesser-included offense of the second." *Id.* at 166. That is to say, it must be impossible to commit the greater offense without necessarily committing the lesser offense. *Id*.

¶ 14 In *Miller*, our supreme court used the abstract elements approach to determine whether retail theft is a lesser-included offense of burglary. *Id.* at 175. The court held that retail theft is not a lesser-included offense since it is possible to commit a burglary without necessarily committing retail theft. *Id.* at 176. This is because not all elements of retail theft are included in the offense of burglary. *Id.* While retail theft requires a "taking," burglary does not. *Id.* Additionally, retail theft requires that the defendant fail to pay for the merchandise, an element not found in the burglary statute. *Id.* The court also stated that "the requisite intents of each offense are different." *Id.* Thus, the court found that it is possible to commit burglary without necessarily committing retail theft, and the defendant's convictions for both crimes were able to stand. *Id.*

¶ 15 In the instant case, we are asked to determine if the inverse is true; whether burglary is a lesser-included offense of retail theft. Although the abstract elements approach does consider "the statutory elements of the charged offenses" (*Miller*, 238 Ill. 2d at 175), it considers the charged offenses in the statutory abstract, not in terms of how they are framed in a particular charging instrument (*People v. Bouchee*, 2011 IL App (2d) 090542, ¶ 11). Therefore, courts may look to statutory subsections other than the subsection under which a defendant was charged in comparing the elements of crimes. See *id.* ¶ 10.

¶ 16 Under section 19-1(a) of the Code of Criminal Procedure of 1963,"a person commits burglary when without authority he knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle, railroad car, or any part thereof, with intent to commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2010). Under section 16A-3, there are eight different ways for a person to commit retail theft. 720 ILCS 5/16A-3 (West 2010). The essential elements of retail theft are "(1) that [the individual] knowingly took possession of, carried away, or transferred, or caused to be carried away or transferred any merchandise; (2) that the merchandise was displayed, held, stored, or offered for sale in a retail mercantile; and (3) that he intended to retain such merchandise, or intended to deprive the merchant permanently of the possession, use, or benefit of such merchandise, without paying the full retail value of such merchandise." *People v. Rucker*, 294 Ill. App. 3d 218, 226 (1998); 720 ILCS 5/16A-3 (West 2010).

¶ 17 For burglary to be considered a lesser-included offense of retail theft, all of its elements must be included in the offense of retail theft such that it is impossible to commit retail theft without necessarily committing burglary. Comparing the elements of these offenses, it is clear that this is not the case. While the offense of burglary requires that a person enter or remain within a building without authority, retail theft does not. See 720 ILCS 5/16A-3(e) (West 2010) (a person can commit retail theft by removing a shopping cart from the premises of a retail mercantile establishment). Even if we consider just the statutory subsection of retail theft under which defendant was charged, we note that burglary can also be based on a felony other than theft. See 720 ILCS 5/19-1(a) (West 2010). Further, our supreme court clearly stated in *Miller* that the requisite intent for the two crimes is different. *Miller*, 238 Ill. 2d at 176. Therefore, under the abstract elements approach, burglary is not a lesser-included offense of retail theft.

¶ 18 Defendant argues that burglary does not require an entry because burglary can be committed when the intent to commit a theft is formed *after* the person enters the building. However, defendant's argument is misguided. It is clearly established that the abstract elements approach is the most formulaic approach and considers only the statutory elements of the two offenses. *Miller*, 238 Ill. 2d at 166. While defendant's hypothetical may be true, it is irrelevant to our analysis. The abstract elements approach requires only that we consider whether all of the elements of one offense are included within a second offense. If this is not the case, as it is not here, then the first offense is not a lesser-included offense of the second.

¶ 19 Defendant goes on to argue that when the legislature enacted the retail theft statute, it was not for the purpose of convicting shoplifters of two crimes for a single shoplifting incident. However, *Miller* dispels of this argument by noting that the legislature created the two separate offenses of retail theft and burglary. The *Miller* court stated that had the legislature intended that a defendant only be convicted of one such offense where there is a single criminal transaction, the legislature could have said so, but it did not. *Miller*, 238 Ill. 2d at 173; see also *People v. Poe*, 385 Ill. App. 3d 763, 767 (2008) ("[T]he supreme court has never said that one cannot be convicted of both burglary and theft where one commits a burglary by entering a building with the intent to commit a theft and, once inside, actually commits a theft.").

¶ 20 Next, defendant claims that if burglary is not a lesser-included offense of retail theft, we should find that his burglary conviction amounted to nothing more than attempted retail theft, in that the same evidence that proved burglary also proves attempted retail theft. Defendant argues that because a person may not be convicted of both the inchoate and the principal offense (720 ILCS 5/8-

5 (West 2010)), the attempted retail theft conviction would then have to be vacated, leaving just the retail theft conviction in place.

¶ 21 A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense. 720 ILCS 5/8-4 (West 2010). For example, a defendant in the possession of merchandise who has the intent to commit retail theft commits only attempted retail theft if he is arrested before passing the last known point of sale. *People v. Dicostanzo*, 304 Ill. App. 3d 646, 651-52 (1999). In this case, a conviction of attempted retail theft is inappropriate given that defendant's actions constituted more than merely attempted retail theft. Defendant was not arrested before passing the last known point of sale. Rather, defendant, while in possession of merchandise, walked past the cash registers and completely exited the building. Moreover, defendant does not argue that there was insufficient evidence to convict him of burglary or that attempted retail theft is a lesser-included offense of burglary. Therefore, defendant's argument that his burglary conviction should be replaced with an attempted retail theft conviction is without merit.

¶ 22 Finally, defendant contends that common sense supports his position that both convictions cannot stand. Defendant cites *People v. McDaniel*, 2012 IL App (5th) 100575. There, the defendant was charged with retail theft and two counts of burglary for stealing fishing reels from a store. *Id.* ¶¶ 1, 4. The first burglary count alleged that the defendant entered the store with the intent to commit a theft, and the second burglary count alleged that he remained within the store with the intent to commit a theft. *Id.* ¶ 1. The jury found the defendant guilty of retail theft and the second count of burglary, and it found the defendant not guilty of the first count of burglary. *Id.* ¶ 7.

¶ 23 On appeal, the court stated that the issue before it was whether, given the defendant's authority to enter the building and the fact that he did not exceed the physical scope of that authority, the defendant's formation of an intent to commit a theft and act upon that intent constituted the offense of burglary. *Id.* ¶ 11. The court stated that the defendant was found by the jury not to have entered the building with the intent to commit a theft, and the record showed that he did not exceed the scope of his authority to be within the building, in that he remained in the general retail area open to the public and left immediately after stealing the reels. *Id.* ¶ 18. The court held that under these facts, the defendant did not " 'remain within' " the building in order to commit a theft. *Id.* ¶ 19. The court agreed with the defendant's argument that the "remaining within" language of the burglary statute should not be read so broadly so that every retail theft is converted into a burglary. *Id.* Accordingly, the court reversed the defendant's burglary conviction, leaving just the retail theft conviction in place. *Id.* ¶ 20.

¶ 24 Defendant argues we should also read the statute in a manner that would not support convictions of both burglary and retail theft based on the single shoplifting incident. We find that the instant case differs from that of *McDaniel* in several significant ways.

¶ 25 First, the *McDaniel* court specifically recognized that it was not confronted with a lesser-included offense issue. *Id.* ¶ 13. Instead, the court was asked to determine whether the defendant's actions constituted a burglary under the second burglary charge. *Id.* ¶ 11. In the instant case, defendant does not argue that his burglary conviction is not supported by the evidence; rather he argues that burglary is a lesser-included offense of retail theft. Under a lesser-included offense analysis, we do not look at the facts of the case to determine whether there is proof of the offense

but instead, we simply compare the statutory elements of the two offenses. As a result, we are not required to interpret the language of the burglary statute, as in *McDaniel*.

¶ 26 Second, even if we were to look at the facts of the case, *McDaniel* is distinguishable. In *McDaniel*, the court emphasized that defendant did not commit burglary because there was no allegation that he entered without authority or exceeded the scope of his authority while in the retail establishment. *Id.* ¶ 16. In contrast, in the instant case, defendant had been previously told by a Jewel-Osco employee not to return to the store. Additionally, before it was nol-prossed by the State, defendant was convicted of criminal trespass for knowingly entering the Jewel-Osco after receiving notice that entry was forbidden. This further substantiates that defendant did not have the authority to enter the building. Moreover, in the context of burglary, where there is a public building such as a retail store, the permission to enter does not extend to people who enter for purposes inconsistent with those for which the building is open to the public. *People v. Rudd*, 2012 IL App (5th) 100528, ¶ 13. That is, an entry into such a building with the intent to commit a theft cannot be labeled as within the authority granted to those who enter. *People v. Bailey*, 188 Ill. App. 3d 278, 285 (1989). In such cases, the State does not need to prove unlawful presence apart from proving the defendant's intent to steal at the time of entry. *Rudd*, 2012 IL App (5th) 100528, ¶ 13; see also *People v. Taylor*, 164 Ill. App. 3d 938 (1987) ("entry with the intent to commit a felony is entry 'without authority.' "). Therefore, the jury's finding that defendant entered the Jewel-Osco with the intent to steal also supported its finding that he entered without authority for the burglary conviction. Thus, while the defendant in *McDaniel* had a right to enter the building under the jury's verdict, in this case, defendant clearly did not.

¶ 27 Relatedly, the burglary conviction at issue in *McDaniel* is clearly different from the burglary conviction at issue here. The *McDaniel* court emphasized that the defendant did not remain within the store with the intent to commit a theft, as charged in the second count of burglary of which the defendant was convicted, because he entered with authority, did not exceed the physical scope of his authority, and left immediately after stealing the fishing reels. *Id.* ¶ 19. In contrast, here defendant's burglary conviction was based on entering the store with the intent to commit a theft. Therefore, the "remaining within" the store language that was critical to the *McDaniel* court's determination that the defendant did not commit burglary is simply inapplicable to defendant's burglary conviction here. Accordingly, defendant's reliance on *McDaniel* is unpersuasive.

¶ 28 III. CONCLUSION

¶ 29 For these reasons, we conclude that under the abstract elements approach, burglary is not a lesser-included offense of retail theft. Thus, the one-act, one-crime doctrine was not violated and both convictions may stand. We further conclude that the analysis in *McDaniel* does not apply to this case. Accordingly, we affirm the judgment of the circuit court of Du Page County.

¶ 30 Affirmed.