2015 IL App (2d) 131250-U
No. 2-13-1250
Order filed December 8, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. IVORY BIGGS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 13-CF-349 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: After viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime of burglary proven beyond a reasonable doubt.

¶ 2 I. INTRODUCTION

¶ 3 Defendant, Ivory Biggs, was charged with one count of burglary (720 ILCS 5/19-1(a) (West 2012)) and one count of retail theft (720 ILCS 5/16-25(a)(1) (West 2012)). After a bench trial in the circuit court of De Kalb County, defendant was found guilty of both offenses. The court sentenced defendant to concurrent prison terms of six years for burglary and one year for

retail theft. On appeal, defendant does not challenge his conviction of retail theft. However, he contends that the evidence presented at trial was insufficient to prove him guilty beyond a reasonable doubt of the charged offense of burglary because the State failed to prove the requisite element of entry with intent to commit a felony or theft. We disagree and affirm.

¶ 4 II. BACKGROUND

¶ 5 The charges against defendant stemmed from an incident occurring on the evening of May 25, 2013, at Thirsty Liquors, a retail liquor store in De Kalb. The State called two witnesses to testify to the events that took place on that date. Sam Salem, a clerk at Thirsty Liquors, recalled that on May 25, 2013, he was watching the store near the cashier area, while a coworker manned the register. At around 8 p.m., Salem saw a group of four to five people enter the store, including defendant. While other members of the group purchased liquor, defendant appeared to be looking at merchandise. However, Salem noticed defendant "was just kind of standing around," which drew Salem's attention to defendant. During the time Salem was watching defendant, defendant stuck a bottle of vodka down his pants. When Salem was about to confront defendant, defendant said "he had a .45 that would eat all of us up." Salem asked defendant what he had said, and defendant reiterated that he had a gun. Upon hearing that, Salem let defendant walk out of the store and called the police.

¶ 6 A surveillance video from Thirsty Liquors was played for the court during Salem's testimony. On the video, a man identified by Salem as defendant is seen taking a bottle off the shelf and putting it down his pants. The video then shows defendant walking out of the store without paying for the liquor. The total time elapsed in the surveillance video is about four minutes.

¶ 7 Officer Joshua Boldt of the De Kalb police department testified that on May 25, 2013, he was on routine patrol when he was dispatched to Thirsty Liquors in response to a report of a theft of a bottle of liquor. He was given a description of the suspect. Around 8:25 p.m., Officer Boldt saw an individual matching the description of defendant "a couple hundred yards" south of the liquor store. When Officer Boldt approached, defendant was with three other people. Officer Boldt told the group to stop and told defendant that he matched the description of a suspect in a theft from Thirsty Liquors. Defendant then handed Officer Boldt a bottle of Smirnoff Green Apple Vodka. Defendant was subsequently searched by another officer. The searching officer found no money or credit cards in defendant's possession. Other members of the group were searched as well, but Officer Boldt could not recall whether they had any money or credit cards on them. Officer Boldt testified that there was a church, a convenience store, and a Mexican restaurant about 50 yards in either direction of Thirsty Liquors. However, when searched, defendant did not have any items that looked like they were purchased from the nearby establishments. Officer Boldt testified that, after defendant's arrest, as he was trying to put defendant in his squad car, defendant unsuccessfully attempted to flee on foot.

¶ 8 Following Officer Boldt's testimony, the State rested. Defendant then moved for a directed finding as to the burglary charge. Specifically, defendant argued that the State failed to prove that he had the requisite intent to steal before entering the liquor store. The court denied defendant's motion, after which the defense rested without calling any witnesses. After considering all the evidence presented at trial, the court found defendant guilty of burglary and retail theft. Following the denial of defendant's motion to reconsider, the matter proceeded to sentencing. The parties agreed that defendant was subject to mandatory class X sentencing based on his prior convictions. Ultimately, the trial court sentenced defendant to concurrent

terms of six years' imprisonment on the burglary conviction and one year' imprisonment on the conviction for retail theft. Defendant now appeals.

¶ 9 III. ANALYSIS

¶ 10 Defendant's contention on appeal is that the State failed to prove beyond a reasonable doubt the requisite element of entry with intent to commit a felony or theft for the charged offense of burglary. When the sufficiency of the evidence is challenged on appeal, we must determine whether, after viewing the evidence in the 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. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). In assessing the sufficiency of the evidence, it is not our function to retry the defendant or to substitute our judgment for that of the jury. *People v. Sanchez*, 2013 IL App (2d) 120445, ¶ 18 (2006). It is within the province of the trier of fact "to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence." *People v. Graham*, 392 Ill. App. 3d 1001, 1009 (2009). In this regard, we are mindful that the trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt. *People v. Siguenza–Brito*, 235 Ill. 2d 213, 229 (2009). A criminal conviction will not be reversed "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *Graham*, 392 Ill. App. 3d at 1009.

¶ 11 Section 19-1(a) of the Criminal Code (Code) defines burglary as follows: "A person commits burglary when without authority he or she knowingly enters or without authority remains in a building *** with intent to commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2013). Thus, the State may properly allege that a defendant knowingly entered a building

unlawfully with the intent to commit a felony or theft. *People v. Boone*, 217 Ill. App. 3d 532, 533 (1991). In the instant case, defendant was charged with burglary by an indictment which alleged that defendant did, on May 25, 2013, without authority, knowingly enter a building, Thirsty Liquors, with the intent to therein commit a theft. A person may commit a burglary by entering a building that is open to the public if the entry is not consistent with the purposes for which the building is open. *People v. Durham*, 252 Ill. App. 3d 88, 91 (1993); *People v. Boose*, 139 Ill. App. 3d 471, 473 (1985). Where a person enters a building with the intent to commit theft, the entry is outside of the scope of the purposes for which authority to enter has been granted. *People v. Rudd*, 2012 IL App (5th) 100528, ¶ 13; *Boose*, 139 Ill. App. 3d at 473. Thus, the State had the burden of showing that defendant entered Thirsty Liquors with the intent to steal. See *Boose*, 139 Ill. App. 3d at 473.

¶ 12 Burglary may be proven and a conviction sustained by circumstantial evidence and inferences drawn therefrom. *People v. Cokley*, 45 Ill. App. 3d 888, 889 (1977). Specific intent to steal must exist and be measured at the time of unauthorized entry into the building and the State has the burden of proving the necessary intent. *People v. Rossi*, 112 Ill. App. 2d 208, 211 (1969). Since specific intent is not subject to direct proof, ordinarily intent must be proven by circumstantial evidence drawn by inferences from conduct. *Rudd*, 2012 IL App (5th) 100528, ¶ 14; *People v. Davis*, 54 Ill. App. 3d 517, 523 (1977). The ultimate question is "whether the evidence was sufficient to allow a rational [fact finder] to reasonably infer that the defendant intended to commit the theft when he entered the store." *Rudd*, 2012 IL App (5th) 100528, ¶ 14.

¶ 13 In a burglary case, the relevant surrounding circumstances include the time, place and manner of entry into the premises, the defendant's activity within the premises, and any alternative explanations offered for his presence. *People v. Richardson*, 104 Ill. 2d 8, 13 (1984).

It is well settled that a building open to the public, during regular business hours, such as a liquor store, can be the subject of a burglary. *Durham*, 252 Ill. App. 3d at 91. The evidence showed that defendant entered Thirsty Liquors during business hours with a group of friends. During the short amount of time he spent in the liquor store, defendant distanced himself from the group he was with, walked towards the back of the store, put the bottle of vodka down his pants, told a store employee that he had a gun, and then exited the store.

¶ 14 Defendant argues that the State failed to prove that he had the requisite intent to steal before entering Thirsty Liquors. Defendant asserts that the evidence did not establish that his intent to steal the bottle of vodka was a preconceived plan rather than a spur-of-the-moment decision based on an opportunity that presented itself after he entered the liquor store. Defendant furthers this argument by asserting that if he intended to steal the vodka before entering, he would have chosen a spot that was not in front of a surveillance camera or would have made some other attempt to prevent detection of his theft. The State counters that defendant's almost-immediate theft after entering the liquor store coupled with his threat to the store clerk upon his exit and the fact that he was found with no money or credit cards on his person allowed for a reasonable inference that defendant entered the store with the intent to commit a theft.

¶ 15 Viewing the circumstantial evidence in the State's favor, as we must, we cannot say that no rational trier of fact could have found that defendant entered the store with intent to commit the theft. The record reflects that defendant entered the store with a group of friends. Defendant had no money or other financial means to pay for any merchandise. Defendant walked to the back of the store, distancing himself from his acquaintances. He then put a bottle of vodka in his pants while his acquaintances were purchasing liquor and, thereby, occupying the cashier. Defendant told the store employee that he had a gun and exited. Defendant's entire "visit" lasted

no more than four minutes. A rational trier of fact could have reasonably inferred from these facts that defendant planned to commit a theft inside the store while the clerk was distracted by his acquaintances. The threat of a weapon, viewed in the State's favor, also suggests that defendant had planned his method for effectuating a quick escape.

¶ 16 Defendant directs us to *Boose*, 139 Ill. App. 3d 471, and *Durham*, 252 Ill. App. 3d 88, for the proposition that he lacked the requisite intent to steal prior to entering the liquor store. In *Boose*, the defendant, who was intoxicated, entered a department store during regular business hours. He wandered around the store for several hours, stopping in a restaurant and looking at Christmas decorations. Sometime later, the defendant realized that the store had closed. He went to sleep in a storeroom to avoid being found and suspected of wrongdoing. The following morning, however, the guards discovered him. At that time, the defendant was wearing clothing with the store's price tags and anti-theft devices still attached. He also had unpurchased merchandise in his pockets. Based on this evidence, the defendant was convicted of burglary and retail theft, and he appealed. The reviewing court vacated the defendant's burglary conviction, concluding the evidence did not support a finding that the defendant entered the store with the intent to commit a theft. *Boose*, 139 Ill. App. 3d at 473-74. In *Boose* there was evidence to support that the defendant formulated the intent to commit theft after he entered the store. Notably, almost 24 hours passed between the time that the defendant entered the store and he was discovered by security. During that time, the defendant wandered around the store for several hours without incident before discovering the store had closed. Here, by contrast, less than four minutes elapsed from the time defendant entered Thirsty Liquors until the time he left the store with the stolen merchandise. Moreover, unlike the individual in *Boose*, defendant in this case entered the store with a group of friends. As noted above, a rational trier of fact could

have reasonably inferred that defendant's acquaintances served to distract the store's employees from defendant's illicit behavior. Given these circumstances, we find *Boose* distinguishable.

¶ 17 Similarly, we are not persuaded that *Durham* requires reversal of defendant's conviction. In *Durham*, the defendant and another man entered a department store. The defendant proceeded to the men's sportswear section while the other man went to the men's suit department. A few minutes later, a customer noticed one of the men leave the store with several suits, and she notified store personnel. During this time, the defendant remained in the store browsing. When the defendant left the store, he was not observed carrying anything. A store employee followed defendant out of the store and chased him. At the time of the defendant's arrest, he had no wallet, cash, checks, or credit cards on him. The following day, a suit bearing tags from the store was found in the yard of a house the defendant passed during the chase. The defendant was accused of stealing a suit from the store and was subsequently convicted of burglary and retail theft. The reviewing court reversed the defendant's burglary conviction, explaining:

> "In the case before us, defendant carried nothing into the store that would indicate an intent to commit theft. His conduct in the store, according to the witnesses who saw him, was that of a shopper browsing through various racks and displays of men's clothing. He did not communicate with the man he entered with, and he did nothing to create a diversion which might distract those in charge while his alleged companion took away the suits. There was no evidence of a scheme or plan to steal formulated prior to entry." *Durham*, 252 Ill. App. 3d at 92.

In the present case, the evidence reflects that in a span of less than four minutes, defendant, without any money, entered the store with a group of friends, walked to the back of the establishment while his friends occupied the cashier, stuffed a bottle of vodka down his pants,

told a store employee he was armed, and exited the store. As noted above, a rational trier of fact could have reasonably inferred from this scenario that defendant planned to commit a theft inside the store while the clerk was distracted by defendant's acquaintances. For this reason, we find *Durham* distinguishable.

¶ 18 IV. CONCLUSION

¶ 19 In short, after viewing the totality of the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found all the essential elements of burglary beyond a reasonable doubt. Accordingly, we affirm the judgment of the circuit court of De Kalb County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 20 Affirmed.