2011 IL App (5th) 090442-U

NO. 5-09-0442

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRETT A. KELLER, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Bond County. No. 08-CF-91 Honorable John Knight, Judge Presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Goldenhersh and Spomer concurred in the judgment.

O R D E R

¶ 1 *Held*: The State proved beyond a reasonable doubt that the defendant exerted unauthorized control over the property of another with an intent to permanently deprive the owner of the use or benefit of that property.

¶ 2 Following a jury trial, the defendant, Brett Keller, was convicted of theft of personal property exceeding $10,000 but less than $100,000. The trial court sentenced Keller to seven years' imprisonment in the Illinois Department of Corrections and ordered him to pay restitution of $500, within 12 months of his release from incarceration.

¶ 3 On appeal, the defendant raises the issue of whether the State sufficiently proved, beyond a reasonable doubt, that the defendant possessed an "intent to permanently deprive" the victim of his property. For the reasons stated below, we affirm.

¶ 4 BACKGROUND

¶ 5 The defendant was charged with three counts of theft. In count I the defendant was charged with knowingly exerting unauthorized control over a truck having a value in excess of $10,000, but not more than $100,000, with the intent to permanently deprive the owner of its use or benefit, in violation of section 16-1(a)(1)(A) of the Criminal Code of 1961 (720 ILCS 5/16-1(a)(1)(A) (West 2008)). In count II the defendant was charged with knowingly exerting unauthorized control over a truck and using the truck knowing that the use probably would deprive the owner permanently of its use or benefit, in violation of section 16-1(a)(1)(C) of the Code (720 ILCS 5/16-1(a)(1)(C) (West 2008)). In count III the defendant was charged with knowingly exerting unauthorized control over a truck and abandoning it knowing that the abandonment probably would deprive the owner permanently of its use or benefit, in violation of section 16-1(a)(1)(C) of the Code.

¶ 6 Gerald McCray, the complainant, testified that between 5:30 and 6 p.m. on the night of April 22, 2008, he parked his 2002 Ford F-350 pickup truck at his farm on Hazel Dell Road and left the keys in the truck. McCray drove his all-terrain vehicle to go mushroom hunting and then drove the all-terrain vehicle to his house. When he returned to the farm the next morning to pick up the truck, it was not there. He testified that a neighbor told him that the truck was at the farm when she drove by around 8:15 that evening.

¶ 7 Amy Hickman-Willis testified that, because she has been diagnosed with multiple sclerosis, she is unable to drive. She stated that on April 21, 2008, the defendant gave her a ride in her boyfriend's vehicle from Jacksonville, Illinois, to her mother's unoccupied summer house in Greenville, Illinois. Her mother, who lives in Greenville, planned to drive her to a doctor's appointment in St. Louis early the next morning. At some point during the trip, the defendant added the wrong type of fuel

to the gas tank, and the vehicle broke down before they reached the summer house. Shortly after the vehicle broke down, the defendant and Hickman-Willis flagged down another motorist, who gave them a ride to the summer house, where they spent the night.

¶ 8 The next morning, Hickman-Willis was awakened when her mother arrived to take her to her doctor's appointment. When she awoke, she noticed that the defendant was gone and that the house was in "total disarray," with pills and clothes lying all over the place. She also noticed that her cell phone was missing.

¶ 9 After Hickman-Willis noticed that her cell phone was missing, she called her own phone using her mother's phone, and the defendant answered. Hickman-Willis and the defendant exchanged phone calls throughout the day. Hickman-Willis testified that her conversations with the defendant "got crazier as the day went on" and that the defendant was making comments about "running through some woods, getting dirty, there was mud all over." Hickman-Willis also stated that the defendant sounded intoxicated. Hickman-Willis's last conversation with the defendant that day took place between 10 and 10:30 p.m., and the defendant told her "he had taken a truck, he was at a gas station, and he didn't know what to do."

¶ 10 Robin Hackethal testified that she was working as a clerk at the CC Food Mart when the defendant entered the store between 10 and 10:30 p.m. on the night of April 22, 2008. Surveillance video from the food mart showed McCray's truck arriving in the parking lot at 10:14 p.m. The video showed the truck pulling into the parking space in front of the store and then immediately moving to the side of the store away from the camera's view. It then showed the defendant entering the store at 10:25 p.m. Hackethal stated that the defendant was dirty and scratched up like he had been in a fight and was pacing in and out of the store, acting nervously. She said that the

defendant acted like he needed help and that he was trying to call someone. After the defendant had been in the store for 5 to 10 minutes, Hackethal called the police, as she customarily does whenever a customer is acting suspiciously or hangs around too long.

¶ 11 Shortly after Hackethal called the police, Officer Dietz arrived at the food mart. Upon his arrival, Dietz found the defendant in the food mart restroom standing on a toilet seat, shining a flashlight into an overhead vent. Dietz told the defendant to come outside to talk with him. At this time, the defendant told Dietz that Hickman-Willis had dropped him off and that he was trying to get a ride home. Dietz noted that the defendant was muddy, very dirty, and looked like he had been out running in a field.

¶ 12 Dietz testified that 20 to 25 minutes after his arrival at the food mart, the defendant's mother and sister arrived to pick him up. Dietz found marijuana and prescription drugs on the defendant's person and testified that the defendant appeared to be intoxicated. At around 11 p.m., the defendant's mother followed Dietz to the police station. The defendant was released from the police station approximately one hour after his arrival and left with his mother and sister.

¶ 13 After Hackethal noticed that McCray's truck had been parked in the employee parking lot to the side of the food mart for several days, she notified the police. After checking the vehicle's license plate number, the police discovered that the vehicle had been reported stolen and notified McCray. When McCray recovered the vehicle, he noticed that the driver's seat was muddy and that the vehicle appeared to have been "ransacked" but that nothing was missing from inside of the vehicle. He also noted that there was some damage to the vehicle's front axle, which caused a problem with the steering.

¶ 14 The defendant did not testify.

¶ 15 On March 24, 2009, the jury found the defendant guilty of all three counts of theft in violation of section 16-1(a)(1)(A) of the Code. The trial court vacated the convictions on counts II and III and entered a judgment on the conviction on count I. A posttrial motion was filed on April 1, 2009, which was denied. On May 14, 2009, the defendant was sentenced to seven years' imprisonment in the Illinois Department of Corrections. The defendant was also ordered to pay restitution of $500 within one year after his release from incarceration. The defendant filed a timely notice of appeal.

¶ 16 STANDARD OF REVIEW

¶ 17 The intent to permanently deprive the owner of the use of a vehicle is a question for the trier of fact. *People v. Graydon*, 38 Ill. App. 3d 792, 794 (1976). On appeal, when a defendant challenges the sufficiency of the evidence supporting his conviction, a reviewing court must determine " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Bush*, 214 Ill. 2d 318, 326 (2005) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)).

¶ 18 To warrant a conviction for theft based on the defendant's recent, exclusive, and unexplained possession of a stolen vehicle, it is not necessary "that circumstantial evidence exclude every possibility of the defendant's innocence or produce absolute certainty in the mind of the trier of the facts." *People v. Kilgore*, 33 Ill. App. 3d 557, 560 (1975). A jury's verdict on criminal intent will not be disturbed unless the supporting evidence is "improbable, unconvincing or contrary to human experience." *People v Davis*, 169 Ill. App. 3d 1, 5 (1988).

¶ 19 ANALYSIS

¶ 20 The defendant argues that his theft conviction should be overturned because the State failed to prove beyond a reasonable doubt that he intended to permanently deprive McCray of the use of his truck. The statute under which the defendant was charged in count I provides, in pertinent part, as follows:

"A person commits theft when he knowingly:

(1) Obtains or exerts unauthorized control over property of the owner;

* * *

[and] (A) Intends to deprive the owner permanently of the use or benefit of the property[.]" 720 ILCS 5/16-1(a)(1)(A) (West 2008).

¶ 21 Proof of intent to permanently deprive is an essential element of theft; theft does not include the taking of property with intent to use it temporarily and then return it to the owner. *People v. De Stefano*, 23 Ill. 2d 427, 430 (1961). "The taking of articles with intent to steal, however brief defendant's control over them, may constitute theft." *Graydon*, 38 Ill. App. 3d at 794.

¶ 22 "[A] belated attempt to return stolen property in no way removes the original criminal intention" or precludes a conviction of theft. *Davis*, 169 Ill. App. 3d at 5. Thus, by implication, even if, at the time the defendant was apprehended, he planned to abandon the vehicle at a safe place, he can still be found guilty of theft if he ever possessed the intent to permanently deprive McCray of the use and benefit of the truck prior to being apprehended.

¶ 23 The defendant argues that he did not possess the intent to permanently deprive McCray of the use of the truck because the natural and probable consequence of his act of abandoning the vehicle at the food mart was that someone would notice the vehicle and look for the owner, who would be able to safely recover it. However,

when we look at the facts in the light most favorable to the State, the jury's conclusion that the defendant did not leave the vehicle in a place where the owner could safely recover it was not unreasonable. The defendant drove the vehicle 30 miles from where it was left by the owner, not merely down the road. Furthermore, the vehicle was not parked in the front of the food mart but was parked in the employee parking area, on the side of the store. The defendant made no effort to notify the owner of the location of the vehicle or to alert Officer Dietz or Hackethal that he had abandoned the vehicle at the food mart.

¶ 24 "Criminal intent is a state of mind that is usually inferred from the surrounding circumstances." *People v. Woodrum*, 223 Ill. 2d 286, 316 (2006). "[T]rue intention can be arrived at as nearly as possible by an examination of the facts and circumstances and from them draw a parallel measured by the standards of reasonable men." *People v. Heaton*, 415 Ill. 43, 46 (1953). "[T]he recent, exclusive and unexplained possession of a stolen automobile by an accused gives rise to an inference of guilt, absent other facts and circumstances which may leave a reasonable doubt." *People v. Moore*, 130 Ill. App. 2d 266, 269 (1970).

¶ 25 In this case, there are various circumstantial factors that suggest that the defendant had the intent to permanently deprive the owner of the vehicle. Before taking the victim's vehicle, the defendant was in an unfamiliar town a considerable distance away from his home, without any means of transportation. The defendant's nervous behavior and his statement to Hickman-Willis that he had taken a truck and did not know what to do is also strong circumstantial evidence that would lead a reasonable fact finder to conclude that at the time the defendant took the vehicle, he had the intent to permanently deprive the owner of its use.

¶ 26 The State's case is strengthened by the fact that the defendant was apprehended

at the food mart shortly after he had taken the vehicle. If it appears that a taker of goods kept the goods as his own until apprehension, that fact has a material bearing on whether the taker had a felonious intent to steal. *Heaton*, 415 Ill. at 46. Courts have found sufficient evidence of an intent to permanently deprive where the defendant was stopped by police while still driving the vehicle. *Heaton*, 415 Ill. at 46; *People v. Henry*, 203 Ill. App. 3d 278, 279 (1990); *People v. Pozdoll*, 230 Ill. App. 3d 887, 889 (1992). Courts have also found sufficient evidence to support an intent to permanently deprive where the defendant had abandoned a stolen vehicle after it was stuck in a swamp (*People v. Eatherly*, 78 Ill. App. 3d 777, 779 (1979)) or after the vehicle crashed on the highway (*People v. Adams*, 161 Ill. 2d 333, 336-37 (1994)).

¶ 27 The defendant argues that this case is distinguishable from *Henry* and *Pozdoll* because he was apprehended in the food mart bathroom and not driving the vehicle. The defendant contends that his attempts to call for a ride home while at the food mart suggest that he intended to abandon the vehicle in a safe place where it could reasonably be recovered by the owner. However, it is unclear whether the defendant's efforts to get a ride home were made before or after Hackethal called the police. The defendant's sister testified that he called her for a ride home at approximately 9 p.m. on the night of the incident. However, the defendant did not enter the food mart until 10:25 p.m., and Hackethal testified that the defendant asked to use a cell phone to call someone for help after his arrival. The defendant also told Dietz that he was at the food mart attempting to get a ride home. However, when the defendant was questioned by Dietz regarding how he arrived at the food mart, he stated that Hickman-Willis drove him there. Hickman-Willis was not seen at the food mart on the night of the incident, and she testified that she has been unable to drive for many years due to her disability. The defendant offered no other explanation for why he

was at the food mart, and Officer Dietz's presence there prevented him from leaving with the truck because he was apprehended for possession of marijuana and prescription drugs while still at the food mart.

¶ 28 The defendant also suggests that this case can be distinguished from *Eatherly* and *Adams* because the vehicle had little damage and could still be driven when he was apprehended. However, this argument is also without merit because the record is unclear on the question whether the defendant was capable of continuing to drive the vehicle when he arrived at the food mart. McCray testified that at the time he recovered the vehicle, there was damage to the vehicle's front axle, which caused a problem with the steering. The record does not indicate whether the damage to the axle would prevent someone from being able to drive the vehicle. Looking at the evidence in the light most favorable to the State, a reasonable person could conclude that the defendant's attempt to call for a ride home and abandon the vehicle was a result of him being unable to continue driving the vehicle and not a result of him merely intending to take the vehicle for a joyride and then abandon it in a safe place.

¶ 29 It is the jury's duty to determine whether the defendant intended to permanently deprive the owner of the vehicle or merely intended to use the vehicle temporarily and abandon it in a safe place, and "[t]he court 'will not substitute its judgment' for determinations made by the trier of fact regarding the weight of evidence and credibility of witnesses." *People v. Turner*, 375 Ill. App. 3d 1101, 1103 (2007) (quoting *People v. Young*, 128 Ill. 2d 1, 51 (1989)). Given the defendant's nervous behavior, his admission to Hickman-Willis that he had taken the truck, his misrepresentation to Dietz regarding how he arrived at the food mart, and the fact that he was apprehended while still at the food mart, providing no explanation for why he

was there, the jury could have reasonably concluded that the defendant possessed the intent to permanently deprive the owner of the vehicle. While the jury's finding that the defendant possessed the intent to permanently deprive the owner of the use of the stolen vehicle was not the only possible conclusion, it was not unreasonable or contrary to human experience. Thus, the defendant's conviction on count I must be affirmed.

¶ 30 The defendant also argues that the jury erred in finding him guilty on counts II and III beyond a reasonable doubt. The trial court vacated the convictions on count II and III because they were based on alternative allegations of the same theft. Having determined that the evidence was sufficient to convict the defendant on count I, we need not discuss the defendant's arguments on counts II and III.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, we affirm the defendant's conviction.

¶ 33 Affirmed.