STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1071

State of Minnesota,
Respondent,

vs.

Ronald Joseph Wadja,
Appellant.

Filed July 27, 2010
Affirmed in part, reversed in part, and remanded
Minge, Judge

Hennepin County District Court
File No. 27-CR-08-14336

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David Merchant, Chief Appellate Public Defender, Marie L. Wolf, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

On appeal from his conviction of third-degree burglary, as well as two lesser-included offenses of trespass and attempted theft, appellant argues, among other things,

that the evidence was insufficient because (1) the condemned structure he entered was not a building suitable for affording human shelter (Minn. Stat. § 609.581, subd. 2 (Supp. 2007)); and (2) appellant did not intend to deprive an owner of property. Because we conclude that the evidence—even viewed in a light most favorable to the verdict—does not support a finding that the structure appellant entered was suitable for human shelter, we reverse appellant's burglary and trespass convictions. Because the jury could reasonably conclude that appellant intended to deprive the owner of property, we affirm appellant's attempted-theft conviction and remand to the district court for sentencing on this conviction.

FACTS

Beginning in December 2006, appellant lived next door to a deteriorating, vacant house. Appellant testified that trespassers would occasionally get into the house; that the house caught fire around May 2007; that after the fire, the windows on the main floor were boarded up; and that a much worse fire occurred in July 2007, burning off half the roof, completely gutting the inside, and leaving the structure full of debris. At that time, the structure was condemned and plans were made for its demolition. Appellant testified that he talked to a contractor who was at the site and learned that it was slated for demolition within a week and that the contractor did not intend to remove anything because it was not cost effective. On March 19, appellant entered the structure and cut out copper pipe.

A real estate agent testified that the property had been the subject of a foreclosure and that after the foreclosure sale, she was hired by an asset management company to

market and manage the property. She arranged to secure the structure after break-ins. After the second fire, she made arrangements for the structure to be demolished. Before her demolition arrangement could occur, the City of Minneapolis condemned and demolished the structure. She testified that appellant did not have permission to be in the burned out structure or remove copper pipe and that permission would never be given if requested.

A police officer also testified that he was informed that someone was removing property from the structure, that he ultimately identified appellant as that person, and that appellant first denied and then admitted cutting up copper pipe.

Appellant was charged with felony third-degree burglary of a building under Minn. Stat. § 609.582, subd. 3 (Supp. 2007); attempted theft under Minn. Stat. § 609.52, subd. 2(1) (Supp. 2007); and trespass under Minn. Stat. § 609.605, subd. 1(b)(4) (2006). Following a jury trial, he was convicted of all three charges and sentenced for the third-degree burglary. No sentences were imposed for the lesser-included offenses of attempted theft and trespass. This appeal followed.

D E C I S I O N

Appellant argues that the evidence was insufficient to support his convictions. In considering a claim of insufficient evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach their verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). "A defendant bears a heavy burden to overturn a jury verdict." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001). The

reviewing court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). But, we also recognize that the state must prove the required elements of the charged offense beyond a reasonable doubt. *State v. Kaster*, 211 Minn. 119, 121, 300 N.W. 897, 899 (1941). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offenses. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

I.

The first issue is whether the evidence was sufficient for a jury to convict appellant of third-degree burglary under Minn. Stat. § 609.582, subd. 3. This statute makes it a crime to enter a "building" without consent and with intent to steal. *Id.* A *building* is "a structure suitable for affording shelter for human beings." Minn. Stat. § 609.581, subd. 2 (Supp. 2007). The trespass statute under which appellant is charged similarly applies to trespass of a "dwelling . . . or . . . building." Minn. Stat. § 609.605, subd. 1(b)(4). Because there is no claim that the structure here meets the definition of a *dwelling* and because the trespass statute incorporates the definition of *building* found in the burglary statute, Minn. Stat. § 609.605, subd. 1(a)(vii), our analysis of whether the structure is a *building* for burglary applies equally to the trespass charge.

Minnesota courts have concluded that a structure satisfies the statutory definition of *building* when the structure is suitable and accessible as a shelter for people and is used as a shelter. *State v. Bronson*, 259 N.W.2d 465, 466 (Minn. 1977); *State v.*

Hoffman, 549 N.W.2d 372, 374 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996); *In re Welfare of R.O.H.*, 444 N.W.2d 294, 295 (Minn. App. 1989). In *Bronson*, a basketball arena being reconstructed and temporarily open at one end was a *building* "because it in fact provided shelter for the people who were working inside it." 259 N.W.2d at 466. In *R.O.H.*, 8 x 10 feet storage units were deemed *buildings* because renters entered them on a daily basis and because the units' purpose (the storage of personal property) "required that the units provide shelter from the elements." 444 N.W.2d at 295. In *Hoffman*, a motor home was a *building* because the victims resided in it, which "demonstrated that it was suitable for affording shelter for human beings." 549 N.W.2d at 374 (quotation omitted).

Appellant argues that his convictions of third-degree burglary and trespass should be reversed because the evidence was insufficient to prove beyond a reasonable doubt that the condemned, boarded-up, burned-out vacant house was *suitable* for *shelter* for *human beings*. Here, by the time appellant entered the structure, the first-floor windows and doors were boarded up because of the fires, a large part of the roof was gone, and the inside was gutted by fire and full of debris. Unlike the various structures described in *Bronson*, *R.O.H.*, and *Hoffman*, there was no evidence that the condemned, boarded-up, burned-out vacant house was suitable as a shelter. It's very description indicates that the structure was not something that our society considers suitable for human beings to enter, much less use as a shelter. In this regard, we note that the very act of condemnation and order for demolition was such a determination. The structure was neither legally accessible as a shelter nor useable as an actual shelter at the time of the attempted theft.

Although there was some testimony about break-ins, it appears those entering were vandals. There was no evidence that even vagrants used the structure as a shelter or that anyone used it to store property.

The state argues that even though the structure had problems, it was still capable of affording shelter. But the supreme court has rejected this precise argument, observing that "[t]o be capable of affording shelter and to be *suitable* for affording shelter are two different things." *State ex rel. Webber v. Tahash*, 277 Minn. 302, 306, 152 N.W.2d 497, 501 (1967) (emphasis added). Not only was the structure neither accessible as a shelter nor used as a shelter at the time of the theft, but in its condition it clearly was not even safe for human beings.

Accordingly, we conclude that even when viewed in the light most favorable to the verdict, the evidence was not sufficient for a jury to conclude that the condemned structure in question was suitable to afford shelter for human beings and to support appellant's burglary and trespass convictions. We reverse these convictions.[1]

II.

The other issue raised on appeal is whether the evidence was sufficient for a jury to convict appellant of attempted theft under Minn. Stat. § 609.52, subd. 2(1) and Minn. Stat. § 609.17 (2006). This charge requires, among other things, that the jury find that appellant attempted to take the copper pipe "with intent to deprive the owner permanently of possession of the [pipe]." Minn. Stat. § 609.52, subd. 2(1). Appellant's only argument

[1] Our decision obviates the need to consider appellant's other arguments against his burglary conviction.

against this charge is that the evidence was insufficient to prove that he intended to deprive the owner of the pipe because the owner had abandoned the pipe. Appellant argues that the owner abandoned any possessory interest in the copper pipe "by failing to appeal the city's decision to demolish the property and failing to attempt to save any property in the house." Arguably, if the owner did abandon the copper pipe, then the owner did not possess the pipe, so there is no longer an owner to be deprived of the pipe and the conviction for attempted theft should be reversed.

Whether property has been abandoned is an issue of fact determined by the jury. *State v. McCoy*, 228 Minn. 420, 423-25, 38 N.W.2d 386, 388-89 (1949); 1 Am. Jur. 2d *Abandoned, Lost, and Unclaimed Property* § 55 (2010) ("Abandonment is generally said to be a matter of fact proper for the decision of the jury, to be ascertained from a consideration of all the facts and circumstances of the case."). Abandonment has two elements: act and intention. *McCoy*, 228 Minn. at 423, 38 N.W.2d at 388. The abandoning party's act must actually relinquish the property and be "accompanied by an intent to part with [the property] permanently, so that it may be appropriated by *any one* finding it." *Shepard v. Alden*, 161 Minn. 135, 139, 201 N.W. 537, 539 (1924) (emphasis added); *accord McCoy*, 228 Minn. at 423, 38 N.W.2d at 388.

The real estate agent testified that she had the property resecured after break-ins and the fire. This is not consistent with relinquishing the property. As the state points out, the earliest the property could be said to be actually relinquished would be the day of demolition. Appellant was cutting up the copper pipe before then. Moreover, the realtor testified that appellant did not have permission to take the copper pipe, and that the owner

"would never give permission for [appellant] to do that." This shows that the owner did not have the intent that the pipe could be appropriated by *anyone*, as abandonment requires. *Hediger v. Zastrow*, a case appellant cites, reinforces this point. 174 Minn. 11, 218 N.W. 172 (1928). In *Hediger*, a car purchaser left her car at the location of the finance company rather than continue payments. *Id*. at 11-12, 218 N.W. at 172. The purchaser's mechanic then took the car and argued that the purchaser abandoned the car by surrendering it to the finance company. *Id*. at 12, 218 N.W. at 172. The supreme court rejected this argument, reasoning that "there was no intention on her part to surrender the car to any one other than the [finance company]." *Id*.

Here, the owner's act of allowing the city to demolish the property and haul away the debris similarly does not indicate that the owner intended to surrender the copper pipe to anyone other than the city or the contractor. The realtor's attempt to arrange for a private demolition belies appellant's argument that the owner had abandoned the copper pipe. Appellant never obtained consent from the owner, the contractor, or the city to salvage the copper pipe.[2]

Because there was sufficient evidence for the jury to find that the owner had not abandoned the copper pipe when appellant attempted to take it, we affirm the attempted-theft conviction and remand to the district court for sentencing on this conviction.

Affirmed in part; reversed in part, and remanded.

[2] This court does create an impediment to recycling. A scavenger of copper pipe needs to do due diligence.