FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1876

CODY J. KEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Mark Borello, Judge.

October 12, 2022

NORDBY, J.

A jury found Cody Key guilty of burglary to a structure with damage in excess of $1,000 (Count I), burglary to a dwelling (Counts II and III), grand theft auto (Counts IV and V), and trespass in structure or conveyance (Count VI). Due to Key's classification as a habitual felony offender, violent career criminal, and prison releasee reoffender, the trial court sentenced him to life imprisonment for Count I, forty years' imprisonment for Counts II and III, ten years' imprisonment for Counts IV and V, and sixty days in jail for Count VI. Key now appeals his conviction for Count I asserting that the theft and accompanying damage did not occur within the property's curtilage. He challenges all three burglary convictions based on the instructions given to the jury. We reject Key's arguments and affirm on all issues.

I.

The testimony at trial established that in the early morning hours, Key unlawfully entered three properties with the intent to commit theft. Key began the night by breaking into a home and stealing a Lexus SUV, which he promptly got stuck in the mud of a nearby park. Fortunately for Key, Allen's Towing Service and its collection of tow trucks was located nearby. That said, Allen's Towing Service was closed, and the property was surrounded by a chain link fence. Not to be denied, Key climbed over the fence, stole a tow truck, and drove it straight through the fence's closed gate.

Key's effort to free the Lexus fell short. After getting the tow truck stuck in the mud alongside the Lexus, Key needed a new vehicle. So he broke into a different home to steal a BMW. The police found and arrested Key while he was still in the driveway.

Key moved to dismiss the burglary charge in Count I, arguing that he never entered the buildings at Allen's Towing Service and that the stolen truck was not within the property's curtilage. The trial court denied the motion. During trial, Key moved for a judgment of acquittal on Count I, arguing that the State failed to prove damage to the structure in excess of $1,000 because the only evidence of damage was for the fence at Allen's Towing Service, and the fence is not part of the structure. The trial court denied this motion as well.

After closing arguments, the trial court charged the jury. For each of the three burglary charges, the jury instructions stated that the jury could not convict Key unless the State proved, among other things, that "at the time of entering the structure, CODY J. KEY had the intent to commit an offense therein." The jury found Key guilty as charged for all three burglaries.

II.

Key raises three issues on appeal: (1) the trial court erred by denying his motion to dismiss; (2) the trial court erred by denying his motion for judgment of acquittal; and (3) the trial court

committed fundamental error by giving an erroneous jury instruction. We address each of these issues in turn.

A. Motion to Dismiss

We review a trial court's denial of a motion to dismiss de novo. *Ramsey v. State*, 124 So. 3d 444, 446 (Fla. 1st DCA 2013). The trial court may grant a defendant's motion to dismiss when there are no material disputed facts and the undisputed facts fail to establish a prima facie case of guilt. *Parks v. State*, 96 So. 3d 474, 476 (Fla. 1st DCA 2012); *see* Fla. R. Crim. P. 3.190(c)(4). At the motion to dismiss stage, all the evidence is construed in favor of the State. *State v. Petagine*, 290 So. 3d 991, 994 (Fla. 1st DCA 2020).

Key moved to dismiss Count I, which charged him with the burglary of Allen's Towing Service with damage in excess of $1,000. The burglary statute provides that burglary means "[e]ntering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter." § 810.02(1)(b)1., Fla. Stat. (2019). Under Count I, the State also had to show that Key "[caused] damage to the dwelling or structure, or to property within the dwelling or structure in excess of $1,000." § 810.02(2)(c)2., Fla. Stat. A "structure" is defined as "a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof." § 810.011(1), Fla. Stat. (2019). Key argues that he did not take the truck from the curtilage of Allen's Towing Service and therefore did not commit a burglary.

Because there is no statutory definition of curtilage, Florida uses the common law meaning of the word, which has been described as the enclosed space of ground and outbuildings immediately surrounding a building. *See State v. Hamilton*, 660 So. 2d 1038, 1041–45 (Fla. 1995). It is undisputed that the entire property of Allen's Towing Service is enclosed in a fence and that the stolen truck was taken from within that enclosure.

Even so, Key urges us to apply the factors from *United States v. Dunn*, 480 U.S. 294 (1987) to determine whether a particular

area within the enclosure is part of the curtilage.* But the *Dunn* factors are used to determine whether an area is part of the curtilage for purposes of search and seizure under the Fourth Amendment. *Dunn*, 480 U.S. at 301; *see Hamilton*, 660 So. 2d at 1043 (noting that the common law meaning of curtilage may not be equally applicable to search and seizure issues, which are based on expectations of privacy, and burglary, which is rooted in a person's right of habitation). As described by the Supreme Court, these factors were "useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Dunn*, 480 U.S. at 301. We therefore decline to apply these Fourth Amendment specific factors to determine whether an area is part of the curtilage under the burglary statute. *See Martinez v. State*, 700 So. 2d 142, 144 n.2 (Fla. 5th DCA 1997) ("Since *Hamilton*, a distinction appears to exist between the definition of 'curtilage' applied in the context of burglary and that used in the context of search and seizure."); *Abel v. State*, 668 So. 2d 1121, 1123 n.2 (Fla. 2d DCA 1996) ("Nothing in the *Hamilton* decision indicated its definition of the term curtilage would apply in a search and seizure analysis.").

Finding no basis for reversal, we affirm the trial court's order denying Key's motion to dismiss.

B. Motion for Judgment of Acquittal

We review a trial court's denial of a motion for judgment of acquittal de novo to determine whether competent, substantial evidence supports the elements of the crime. *Chambers v. State*, 200 So. 3d 242, 245 (Fla. 1st DCA 2016). "A judgment of acquittal

* These four factors look to "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Dunn*, 480 U.S. at 301.

should only be granted when the jury cannot reasonably view the evidence in any manner favorable to the opposing party." *Carter v. State*, 238 So. 3d 362, 364 (Fla. 1st DCA 2017) (quoting *Criner v. State*, 943 So. 2d 224, 225 (Fla. 1st DCA 2006)).

At trial the State submitted evidence that Key caused more than $1,000 in damage to the fence at Allen's Towing Service during the burglary. Key argues that this evidence could not prove the damage element of Count I because the fence is not part of the curtilage and thus not part of the structure. Once again relying on the *Dunn* factors, he argues that the curtilage only includes the area within the enclosure, not the enclosure itself. As already explained, the *Dunn* factors do not apply.

There do not appear to be any Florida cases that directly address whether the fence is itself part of the curtilage. But the fence is inextricably tied to the curtilage and therefore the structure itself. *See Hamilton*, 660 So. 2d at 1044 (requiring there be some form of an enclosure for an area to be part of the curtilage). The curtilage is not just an area next to the structure. By statute, the curtilage *is* the structure. *See* § 810.011(1), Fla. Stat. (including the curtilage in the definition of "structure"); *Baker v. State*, 636 So. 2d 1342, 1344 (Fla. 1994) ("[T]he curtilage is not a separate location wherein a burglary can occur. Rather, it is an integral part of the structure or dwelling that it surrounds."). When a building stands on its own, the boundaries of the structure are defined by the walls of the building. When a building has a curtilage, the boundaries of the structure are defined by the fence. Just as the building's walls are part of the structure, the curtilage's fence is also part of the structure.

We find that the State presented sufficient evidence to allow the jury to conclude that Key caused over $1,000 in damage to the structure during the burglary of Allen's Towing Service. We therefore affirm the trial court's denial of Key's motion for judgment of acquittal.

C. Jury Instructions

Key did not object to the jury instructions, so this issue is not preserved for appeal. *Croom v. State*, 36 So. 3d 707, 709 (Fla. 1st

DCA 2010). We therefore review the jury instructions for fundamental error. *Id.*

Not every error in jury instructions is fundamental error. *Garzon v. State*, 980 So. 2d 1038, 1042 (Fla. 2008). For erroneous jury instructions to constitute fundamental error, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *State v. Delva*, 575 So. 2d 643, 644–45 (Fla. 1991) (quoting *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960)). When part of the jury instructions is omitted, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." *Id.* at 645 (quoting *Stewart v. State*, 420 So. 2d 862, 863 (Fla. 1982)).

For all three counts of burglary, the jury instructions stated that the jury must find: "At the time of entering the structure, CODY J. KEY had the intent to commit an offense therein." But the standard jury instructions for burglary were amended in 2013 to say that the defendant "had the intent to commit an offense *other than burglary or trespass* in that structure." Fla. Std. Jury Instr. (Crim.) 13.1 (emphasis added); *In re Standard Jury Instructions in Criminal Case--Report No. 2012-01*, 109 So. 3d 721, 721 (Fla. 2013). The addition of the phrase "other than burglary or trespass" was meant to make clear to jurors that "the crime intended cannot be burglary or trespass." *Id.*

We find that the deviation from the standard jury instructions here was error because the given instructions would have allowed the jury to improperly convict Key based on his intent to commit a burglary or trespass. *See Grant v. State*, 311 So. 3d 156, 162 (Fla. 2d DCA 2020) (holding that a burglary instruction with the language "intent to commit an offense other than trespass" was erroneous because the jury could have convicted the defendant based on his intent to commit a burglary); *see also Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001) ("The standard jury instructions are presumed correct and are preferred over special instructions.").

Yet this error was not fundamental as it did not implicate a disputed element of the crime. When reviewing an erroneous jury

instruction for fundamental error, courts distinguish between errors on a disputed element of the crime and those on an undisputed element of the crime. *State v. Weaver*, 957 So. 2d 586, 588–89 (Fla. 2007). "Failing to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error . . . ." *Delva*, 575 So. 2d at 645; *see Reed v. State*, 837 So. 2d 366, 369 (Fla. 2002). The State argues that the instruction was not fundamental error because Key conceded the burglaries occurred and thereby conceded the element of intent; his only defense at trial was identification.

Key presented three arguments to the jury: (1) that there was no proof Key had been inside Allen's Towing Service or the two homes; (2) that the fence at Allen's Towing Service was not part of the structure; and (3) that the State failed to prove beyond a reasonable doubt that the damage to the fence exceeded $1,000. Key's trial counsel never suggested that the burglaries did not occur or that someone had entered the structure or dwellings without the requisite intent. Meanwhile, the State presented significant evidence that Key entered all three properties with the intent to commit theft. Because Key's defense was based on identification and did not dispute the element of intent, the erroneous jury instruction was not fundamental error. *See Battle v. State*, 911 So. 2d 85, 89 (Fla. 2005) ("[A] dispute does not arise when mistaken identity is the sole defense and the facts of the crime are conceded by the defendant."); *Morton v. State*, 459 So. 2d 322, 323–24 (Fla. 3d DCA 1984) (trial court's failure to instruct jury on any of the elements of robbery was not fundamental error because "the sole defense throughout the trial was that the defendant was mistakenly identified by the victims").

AFFIRMED.

MAKAR and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Jessica J. Yeary, Public Defender, and Tyler K. Payne, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Heather Flanagan Ross, Assistant Attorney General, Tallahassee, for Appellee.