STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1938

State of Minnesota,
Respondent,

vs.

James Aaron McLafferty,
Appellant.

Filed September 14, 2010
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Washington County District Court
File No. 82CR083645

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Douglas Johnson, Washington County Attorney, Stillwater, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Stauber, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

STONEBURNER, Judge

Appellant challenges his convictions of third-degree burglary and attempted theft, arguing that (1) the evidence is insufficient to prove beyond a reasonable doubt that he entered a "building," as that term is defined for purposes of the burglary statute, and (2) the evidence is insufficient to support a finding that he intended to commit theft because the property he intended to take was abandoned. Appellant also argues that he was improperly charged with third-degree burglary because the state should have charged him only with the more specific crime of attempted theft from an abandoned or burning building, and the district court erred in answering the jury's question about the definition of "building." Finally, appellant argues that he cannot be sentenced for convictions of both third-degree burglary and attempted theft because the elements of attempted theft from an abandoned or burning building are the same as the elements of third-degree burglary. Because the state proved that appellant intended to commit theft, we affirm his conviction of attempted theft. But we conclude that the evidence is insufficient to support a finding that appellant entered a "building," as that term is defined for purposes of the burglary statute. We therefore reverse the conviction of burglary and remand for resentencing.

FACTS

Appellant James Aaron McLafferty and a companion entered a substantially fire-damaged four-unit apartment complex, intending to take metals that could be sold and recycled. Police officers set up a perimeter around the structure after one of the officers

discovered a truck suspiciously parked near the unit and heard noises coming from inside the unit. McLafferty was apprehended when he came out of an open door, covered in fire debris and wearing a headlamp. The officers did not enter the structure. One officer later testified that he did not consider the structure safe to enter.

According to an agent for Fannie Mae, which owned the property at the time McLafferty entered, the property had been sold at a sheriff's foreclosure sale and that during the redemption period, no one had access to the property for any reason. There were "no trespassing" signs posted all over the property. Signs on the structure itself, which was scheduled for demolition, warned people to stay out because it was unsafe.

The fire had caused the roof to collapse over a portion of the structure and the resulting opening had not been covered after the fire. A refrigerator had fallen through a kitchen floor, creating a hole, and there were other large holes in the floor. The stairway from the first to second floor had been removed to prevent people from accessing the upper units. Firefighters had broken the windows and only some had been covered with plywood after the fire. Deputy Fire Chief Kevin Wold's report stated that the fire did heavy damage to the entire building and that "the building is a total loss." But, at trial, Wold testified that three units were safe and the basement was not damaged at all, and could "provide shelter."

McLafferty was charged, in relevant part, with third-degree burglary and attempted theft from an abandoned or burning building. A significant issue at trial was whether the structure met the definition of "building" for purposes of the burglary statute.

During jury deliberations, the jury asked the following question about the definition of "building":

> At one point [the definition] says that [the structure] does not have to be designed or intended primarily for the purpose of human shelter. Then it says that it must be adapted to use as an ordinary shelter for human beings. This seems contradictory. Can you clarify?

The district court referred the jury to the jury instructions and stated: "In the end, if that still doesn't seem clear, apply your own common sense to the definition of building."

The jury found McLafferty guilty of all charges. The district court sentenced him to 29 months for the burglary conviction and a concurrent year and a day for the attempted theft conviction. McLafferty appeals the convictions and imposition of sentence for both convictions.

D E C I S I O N

I. The evidence is insufficient to support McLafferty's conviction of burglary.

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 its 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 the state must prove the required elements of a charged offense beyond a reasonable doubt. *State v. Kaster*, 211 Minn. 119, 121, 300 N.W. 897, 899 (1941). We will not

disturb a 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 offense. *Bernhardt v. State*, 684 N.W.2d, 465, 476–77 (Minn. 2004).

Minn. Stat. § 609.582, subd. 3 (2008), provides:

> Whoever enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building, or enters a building without consent and steals or commits a felony or gross misdemeanor while in the building, either directly or as an accomplice, commits burglary in the third degree . . . .

A "building" is defined as "a structure suitable for affording shelter for human beings including any appurtenant or connected structure." Minn. Stat. § 609.581, subd. 2 (2008); *see also State v. Bronson*, 259 N.W.2d 465, 466 (Minn. 1977) (noting that under caselaw, "the sole test of whether a structure is a 'building' is whether the structure is 'suitable for affording shelter for human beings'"). "A burglary conviction can be sustained only if the building involved is within the statutory definition." *In re Welfare of R.O.H.*, 444 N.W.2d 294, 294 (Minn. App. 1989).

The state argues that even though McLafferty came out of a heavily damaged portion of the structure, that portion was "appurtenant or connected" to relatively undamaged portions of the structure that remained capable of sheltering a human being. 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. v. Tahash*, 277 Minn. 302, 306, 152 N.W.2d 497, 501 (1967) (emphasis

added) (holding that a tool shed on an unoccupied farm site which was capable of sheltering people was not a "building" as defined in the burglary statute because it was not suitable for shelter). We find that distinction critical in this case.

In several cases involving the question of whether a structure was a building for purposes of the burglary statute, there was evidence that the structure was, in fact, providing shelter for people or their property. *See Bronson*, 259 N.W.2d at 466 (stating that whether a roofed structure with one wall removed during remodeling from a basketball site to an ice arena was a "building" was a close case, but determining that it was a "building" despite being open at one end "because it in fact provided shelter for the people who were working inside it"); *R.O.H.*, 444 N.W.2d at 295 (holding that a mini storage unit is a "building" under the burglary statute because the purpose of the unit is storage of personal property, requiring that the unit provide shelter from the elements, making it suitable for affording shelter for human beings); *State v. Hofmann*, 549 N.W.2d 372, 374 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996) (holding that a motor home in which people were residing full-time was a "building" for purpose of the burglary statute).

By contrast, there is no evidence in this case that the heavily damaged structure was being used to shelter people or property: in fact, a law enforcement officer deemed the structure too unsafe to enter at the time McLafferty was apprehended. We conclude that the evidence produced by the state was insufficient to show that the structure was *suitable* for sheltering humans, and therefore the evidence is insufficient to support McLafferty's conviction of burglary. We reverse the burglary conviction without

reaching McLafferty's argument that the district court erred in answering the jury's question about the definition of "building." And, because we are reversing the burglary conviction, we do not reach McLafferty's argument that he was improperly sentenced for both burglary and attempted theft.

II. The evidence is sufficient to support McLafferty's conviction of attempted theft.

A person commits theft by intentionally taking the property of another with the intent to deprive the owner permanently of possession of that property. Minn. Stat. § 609.52, subd. 2(1) (2008). A person is guilty of an attempted crime when the person, "with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1 (2008).

McLafferty does not deny that he intended to take metals from the damaged structure, but he argues that what he intended to take had been abandoned by the owners. "[A]bandonment is the voluntary relinquishment, surrender, or disclaimer of a known property right . . . ." *State v. McCoy*, 228 Minn. 420, 423, 38 N.W.2d 386, 388 (1949). Abandonment involves both an act and an intention; without both, there is no abandonment. *Id.*

McLafferty's argument that the property inside the structures was abandoned is meritless. The property was plainly marked with "no-trespassing" signs and the property owner's agent testified that no one was allowed access to the property at the time McLafferty entered without permission. There is no evidence of either intent or an act demonstrating abandonment. The fact that McLafferty parked away from the site and

entered under cover of darkness is circumstantial evidence of his intent to commit a crime and is inconsistent with a theory that he was merely removing abandoned property. The evidence is sufficient to support his conviction of attempted theft. We reverse the sentences imposed and remand for resentencing consistent with this opinion.

Affirmed in part, reversed in part, and remanded.