

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0420**

State of Minnesota,
Respondent,

vs.

Daniel Edward Nixon,
Appellant.

**Filed March 29, 2021
Reversed
Johnson, Judge**

Ramsey County District Court
File No. 62-CR-19-77

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Slieter, Judge.

SYLLABUS

To prove that a defendant is guilty of second-degree burglary pursuant to section 609.582, subdivision 2(a)(4), of the Minnesota Statutes, the state must prove that the defendant committed burglary while possessing a tool for the purpose of gaining access to money or property, either when entering the building or while in the building.

OPINION

JOHNSON, Judge

A Ramsey County jury found Daniel Edward Nixon guilty of second-degree burglary of a convenience store. Nixon argues that the state did not prove beyond a reasonable doubt that he used a tool to gain access to the property that he stole, which is an essential element of second-degree burglary. We conclude that the evidence is insufficient to prove that element. Therefore, we reverse the conviction.

FACTS

The state alleged that, on May 18, 2018, Nixon burglarized a SuperAmerica convenience store in the city of St. Paul. An indoor surveillance camera captured images of a tall glass pane, which is next to a glass door, as the glass pane was shattered and a man stepped through it, into the store. The indoor surveillance camera also captured images of the man, who wore red-and-black gloves, as he walked behind the checkout counter, checked the safe (which was locked), and placed boxes of cigars and cigarettes into a black plastic garbage bag before leaving the store. An outdoor surveillance camera captured images of the man as he walked between the store and a white Chevrolet Impala that was parked nearby.

One week after the burglary, a police officer stopped a white Chevrolet Impala and identified Nixon as the driver. The officer arrested Nixon. During a subsequent search of the vehicle, officers found, among other things, a pair of red-and-black gloves and black plastic garbage bags.

In January 2019, the state charged Nixon with second-degree burglary, in violation of Minn. Stat. § 609.582, subd. 2(a)(4) (2016). The case was tried to a jury on two days in May 2019. Nixon represented himself with the assistance of advisory counsel. *See* Minn. R. Crim. P. 5.04, subd. 2. The state called six witnesses, including the manager of the store and the police sergeant who investigated the break-in.

During the state's case, the sergeant testified that he had watched the surveillance video-recordings, which he described for the jury. He stated that a white Chevrolet Impala drove past the store, turned around, and parked. He testified that a person walked from the car toward the store. He also testified that, shortly thereafter, a man broke the glass pane beside the front door, stepped through it, walked behind the checkout counter, and placed boxes of cigars and cigarettes inside a black plastic garbage bag. He testified that the man left the store and walked toward the white car. The district court admitted into evidence 129 photographic images that were taken from the surveillance video-recordings (but not the video-recording itself) as well as photographs of Nixon and the interior and exterior of the white car.

On cross-examination, Nixon asked the sergeant what tools the burglar used to gain access to the store. The sergeant responded, "A small pointed tool, . . . at the initial cracking of the window, there appeared to be some kind of a small item, something as, maybe, a screwdriver, maybe, a small hammer of some kind or mallet or something to that effect." When asked what tool the burglar used while inside the store, the officer responded that the burglar "didn't need to use a tool once inside" but that he "used the bags as a tool to carry the . . . stolen property out of the business."

On re-direct examination, the prosecutor asked the sergeant whether the appearance of the broken glass was consistent with the use of a fist. The sergeant answered in the negative, saying that he did not believe that a person would punch through the glass with a fist because of the likelihood of pain or injury. The prosecutor asked the sergeant how a bag could be used as a tool, and the sergeant responded, “The burglar, specifically, brought the bag to do one thing, . . . to recover, be able to carry large amounts of stolen property from the business, which would be the cigarettes, away with him out of the business.” The prosecutor then asked the sergeant whether the gloves were used as a tool. The sergeant responded in the affirmative, saying that they protected the burglar from injury when going through the broken glass pane and that they allowed the burglar to commit the crime without leaving behind any fingerprints or DNA.

Nixon did not testify and did not introduce any other evidence. In closing argument, the prosecutor referred to the statute’s requirement of a tool by stating: “As you heard from the sergeant, we’re not quite sure how that window got broken, but it’s unlikely it got punched through. So ‘probably’ is what was used. [sic] But ‘probably’ isn’t good enough.” The prosecutor then argued to the jury that Nixon used the gloves and the black plastic garbage bag to collect and remove as much property as possible. Nixon argued to the jury that the state’s case rested on circumstantial evidence and that the state had not proved beyond a reasonable doubt that he was the burglar.

The jury found Nixon guilty. The district court imposed an executed sentence of 90 months of imprisonment. Nixon appeals.

ISSUE

Is the evidence sufficient to prove beyond a reasonable doubt that Nixon, either when entering the store or while in the store, possessed a tool to gain access to money or property, as required for a conviction of second-degree burglary pursuant to section 609.582, subdivision 2(a)(4), of the Minnesota Statutes?

ANALYSIS

Nixon argues that the state's evidence is insufficient to support his conviction of second-degree burglary. Specifically, he argues that the evidence is insufficient because the state did not prove that he possessed a tool to gain access to the stolen property. He does not argue that the evidence is insufficient to prove his identity as the burglar. Accordingly, we will assume that he committed the burglary and will focus on whether the state proved that he possessed a tool to gain access to money or property.

A.

We begin by summarizing the four forms of burglary. A person commits the least-serious form, fourth-degree burglary, if he or she “enters a building without consent and with intent to commit a misdemeanor other than to steal, or enters a building without consent and commits a misdemeanor other than to steal while in the building.” Minn. Stat. § 609.582, subd. 4 (2020). A person who commits that offense is guilty of a gross misdemeanor and “may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.” *Id.*; *see also* Minn. Stat. § 609.02, subd. 4 (2020).

A person commits third-degree burglary if he or she “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.” Minn. Stat. § 609.582, subd. 3. A person who commits that offense is guilty of a felony and “may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.” *Id.*; see also Minn. Stat. § 609.02, subd. 2 (2020).

A person commits second-degree burglary if he or she “enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building,” and, in addition:

(1) the building is a dwelling;

(2) the portion of the building entered contains a banking business or other business of receiving securities or other valuable papers for deposit or safekeeping and the entry is with force or threat of force;

(3) the portion of the building entered contains a pharmacy or other lawful business or practice in which controlled substances are routinely held or stored, and the entry is forcible; or

(4) *when entering or while in the building, the burglar possesses a tool to gain access to money or property.*

Minn. Stat. § 609.582, subd. 2(a) (emphasis added). In addition (though not relevant in this case), a person may commit second-degree burglary by entering a government building, religious establishment, historic property, or school building. *Id.*, subd. 2(b). A person who commits second-degree burglary is guilty of a felony and “may be sentenced

to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both.” *Id.*; *see also* Minn. Stat. § 609.02, subd. 2.

A person commits the most-serious form, first-degree burglary, if he or she “enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building,” and, in addition, the building is an occupied dwelling, the burglar possesses a dangerous weapon, or the burglar assaults a person in or near the building. Minn. Stat. § 609.582, subd. 1. A person who commits first-degree burglary is guilty of a felony and “may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than \$35,000, or both.” *Id.*; *see also* Minn. Stat. § 609.02, subd. 2.

B.

In this case, the state charged Nixon with only one offense: second-degree burglary. The complaint specifically referenced paragraph (4) of subdivision 2(a) of the burglary statute. That statute provides that a person commits second-degree burglary if, “when entering or while in the building, the burglar possesses a tool to gain access to money or property.” Minn. Stat. § 609.582, subd. 2(a)(4). The use of the phrase “to gain,” which modifies the verb “possesses,” requires the state to prove that a burglar possessed a tool *for the purpose of* gaining access to money or property. *See State v. Townsend*, 941 N.W.2d 108, 111 (Minn. 2020) (holding that infinitive phrase in robbery statute “functions as an adverb that describes the purpose for using force”). The meaning of the word “access,” which is used as a noun in the statute, is “[t]he means, place, or way by which a thing may

be approached” or a “passageway.” *Webster’s New International Dictionary* 14 (2d ed. 1946).

Nixon argues that the state did not prove beyond a reasonable doubt that he possessed a tool to gain access to money or property, either when entering the store or while inside the store. Nixon contends that there is no evidence of any tool that was used to enter the store and that the gloves and black plastic garbage bag that he possessed while inside the store were not possessed for the purpose of “gain[ing] access to money or property.” *See* Minn. Stat. § 609.582, subd. 2(a)(4).

In analyzing an argument that the evidence is insufficient to support a conviction, this court undertakes “a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient.” *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). We “carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the factfinder to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted).

We will separately consider two issues: first, whether Nixon possessed a tool “when entering” the store and, second, whether he possessed a tool “while in” the store. *See* Minn. Stat. § 609.582, subd. 2(a)(4).

1.

With respect to when Nixon entered the store, the state argues that Nixon “entered the building . . . either by breaking the window’s glass with an unidentified hand tool or with his hand protected by the black and red glove.”

The first part of this argument is without merit. The state did not introduce evidence that Nixon possessed any particular tool or type of tool for the purpose of breaking the glass pane. The state’s contention that Nixon used “an unidentified hand tool” to break the glass indicates that the state does not know whether Nixon actually used a tool to break the glass. There are other ways in which Nixon could have broken the glass, such as by kicking it or throwing a large rock at it. But the state’s investigation did not reveal that any particular tool was used to break the glass. The investigating sergeant testified that the burglar may have used either a “small pointed tool”; “maybe, a screwdriver”; “maybe, a small hammer of some kind”; or a “mallet or something to that effect.” This testimony consists of mere speculation. The sergeant did not testify that he saw any of those tools on the surveillance video-recordings. The photographic exhibits do not show the burglar in possession of any of the tools mentioned by the sergeant. The sergeant did not explain why the physical evidence indicated the use of any of the tools mentioned. In the state’s closing argument, the prosecutor admitted that “we’re not quite sure how that window got broken,” asserted that an unidentified tool “probably” was used, but conceded that “‘probably’ isn’t good enough.” He then transitioned to an argument about the use of tools inside the store, without attempting to convince the jury that Nixon used a tool to break the

glass. We agree with the prosecutor that the state's evidence is inconclusive as to whether Nixon used a tool to break the glass.

The second part of the state's argument about Nixon's entry into the store—that he broke the glass using gloved hands—also is unpersuasive. We assume without deciding that a pair of gloves may be considered a “tool” as that word is used in section 609.582, subdivision 2(a)(4). Regardless, the state did not introduce any evidence that Nixon broke the glass with a gloved hand. In fact, the sergeant testified to the contrary. He testified that he “can't imagine somebody punching through a window with their fists.” He did not qualify his testimony by making a distinction between a bare fist and a gloved fist. The photographic exhibits do not indicate that the burglar broke the glass with a gloved fist.

Thus, the evidence is insufficient to prove that, when Nixon entered the store, he possessed and used a tool to gain access to money or property.

2.

With respect to when Nixon was inside the store, the state argues that Nixon “used the gloves or the black garbage bag to help him obtain and carry away the stolen merchandise.” The state contends that the gloves allowed Nixon to avoid leaving forensic evidence such as fingerprints and DNA. The state also contends that the black plastic garbage bag “allowed him to carry away more than an armful of stolen goods” and thereby “make more profit from the burglary.”

The state's argument is without merit because it does not conform to the requirements of section 609.582, subdivision 2(a)(4). Assuming again that a pair of gloves or a black plastic garbage bag may be considered a “tool,” mere possession is insufficient;

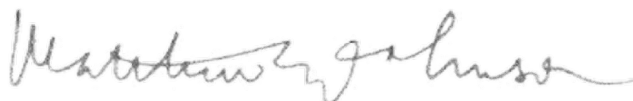
the tool must be possessed “*to gain access to money or property.*” Minn. Stat. § 609.582, subd. 2(a)(4) (emphasis added). In other words, the tool must have been used *for the purpose of* gaining access to money or property, that is, for the purpose of gaining a “means,” “way,” or “passageway” to money or property. *See Townsend*, 941 N.W.2d at 111; *Webster’s New International Dictionary* 14. After Nixon was inside the store, he had full access to the property that he stole. There were no obstacles in the pathway from the broken glass pane to the cigars and cigarettes, and there was no cover on the display of tobacco products. As Nixon contends in his reply brief, possession of a tool to facilitate the carrying away of property or to prevent detection after the fact is possession for a purpose *other than* the purpose specified in section 609.582, subdivision 2(a)(4). The state does not attempt to argue that the purposes it has identified are within the meaning of the phrase “to gain access to money or property.”

Thus, the evidence is insufficient to prove that, while Nixon was inside the store, he possessed a pair of gloves or a black plastic bag for the purpose of gaining access to money or property.

DECISION

The state’s evidence is insufficient to prove beyond a reasonable doubt that Nixon committed burglary while possessing a tool to gain access to property or money, as required by section 609.582, subdivision 2(a)(4), of the Minnesota Statutes. In light of that conclusion, we need not consider Nixon’s alternative argument that the district court erred by giving the jury a supplemental instruction.

Reversed.

A handwritten signature in cursive script, appearing to read "Matthew J. Johnson".