[Cite as *In re M.B.*, 2015-Ohio-1912.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

IN RE: M.B.		APPEAL NOS. C-140405
	:	C-140406
		TRIAL NOS. 14-268x
	:	14-269x
	:	*O P I N I O N.*

Appeals From: Hamilton County Juvenile Court

Judgments Appealed From Are: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal:

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Rachel Lipman Curran*, Assistant Prosecuting Attorney, for Appellee State of Ohio,

Raymond T. Faller, Hamilton County Public Defender, and *Gordon C. Magella*, Assistant Public Defender, for Appellant M.B.

Please note: we have removed this case from the accelerated calendar.

SYLVIA SIEVE HENDON, Presiding Judge.

{¶1} Appellant M.B. was adjudicated delinquent for conduct that would have constituted breaking and entering and possession of criminal tools, both felonies of the fifth degree, had he been an adult.

The Evidence at Trial

{¶2} At trial, the state adduced evidence that a police officer on bike patrol saw two boys in an alley make what looked like a warning motion to someone and then walk away. As the officer approached the boys, he saw another boy, M.B., wriggle through a fence from a patio area behind a closed convenience store and run. M.B. had a crowbar in his hand.

{¶3} The officer stopped M.B., who "immediately said you can't arrest me, I didn't get into the place." M.B. admitted that he had been in the process of breaking into the store to steal cigarettes to sell them on the street. He also said that the other boys had been looking out for the police while he tried to break into the store.

{¶4} The officer returned to the store and saw that its closed rear door had been damaged. A metal push plate had been pried nearly off the door. Most of a deadbolt lock had been pried out of the door, leaving a small circular hole in the door. The hole exposed the lock's bolt, which extended through the door's edge into its strike plate in the doorframe. The edge of the door near the lock had been pushed slightly inward, about a half inch from its original seating in the frame. Pieces of the deadbolt lock were lying on the patio.

Attempted Breaking and Entering

{¶5} In his first assignment of error, M.B. argues that the evidence adduced at trial was insufficient to support his adjudication for breaking and entering, because the state failed to prove that he had entered the store. At most, he contends, the evidence supported a finding of an attempt to commit the offense.

{¶6} In a challenge to the sufficiency of the evidence, the question is whether after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 491 (1991), paragraph two of the syllabus.

{¶7} M.B. was charged with breaking and entering under R.C. 2911.13(A), which provides: "No person by force, stealth, or deception shall trespass in an unoccupied structure, with purpose to commit therein any theft offense * * * or any felony." For the trespass element of the offense, the state need only prove "the insertion of any part of defendant's body" into the structure. *State v. Cuthbertson*, 1st Dist. Hamilton No. C-75362, 1976 Ohio App. LEXIS 8575 (June 1, 1976), *5, quoting *State v. Harris*, 68 N.E.2d 403, 45 Ohio Law Abs. 598 (10th Dist.1943).

{¶8} In *Cuthbertson*, the defendant had opened and demolished a store's outer screen door and had pushed in an inner wood-and-glass door, breaking the glass. *Cuthbertson* at *3. Nothing was disturbed inside the store. *Id.* We held that the defendant's conviction for breaking and entering was based upon sufficient evidence because the wrecking of the inner door had "required some further projection or intrusion of his body into the structure of the building." *Id.* at *7.

{¶9} In the case at bar, however, the record was devoid of evidence that any part of M.B.'s body had protruded through or beyond the closed rear door. Therefore, M.B.'s adjudication for conduct that would have constituted breaking and entering had he been an adult was based upon insufficient evidence.

{¶10} While the state's failure of proof on the trespass element negated an adjudication for breaking and entering, we agree with M.B. that his conduct constituted an attempt, because he had engaged in conduct that, if successful, would have resulted in the offense of breaking and entering. *See* R.C. 2923.02(A); *see also In re K.R.*, 2d Dist. Montgomery No. 25141, 2012-Ohio-5212 (a juvenile's adjudication for an attempted breaking and entering was supported by sufficient evidence where one of a store's two rear doors was found ajar with a broken screwdriver on the ground, and the juvenile admitted that he had tried to break into the store). Although M.B. was wrongly adjudicated for breaking and entering, we hold that there was sufficient evidence to adjudicate him for an attempted breaking and entering.

{¶11} Where the evidence shows that a defendant is not guilty of the offense for which he was convicted, but is guilty of a lesser-included offense, a court may, instead of granting a new trial, modify the conviction. *In re Meatchem*, 1st Dist. Hamilton No. C-050291, 2006-Ohio-4128, ¶ 24; *see State v. Grier*, 1st Dist. Hamilton No. C-110240, 2012-Ohio-330; *State v. Harris*, 109 Ohio App.3d 873, 673 N.E.2d 237 (1st Dist.1996). Accordingly, we reverse M.B.'s adjudication for breaking and entering and remand this cause to the trial court with instructions to enter a judgment adjudicating M.B. delinquent for attempted breaking and entering,

conduct that would have been a first-degree misdemeanor had M.B. been an adult. The first assignment of error is sustained.

Possession of Criminal Tools

{¶12} In his second and final assignment of error, M.B. argues that his delinquency adjudication for felony possession of criminal tools must be reduced to a misdemeanor because the underlying offense, attempted breaking and entering, was a misdemeanor. This argument is based on a flawed reading of the criminal-tools statute.

{¶13} The offense of possession of criminal tools is typically a misdemeanor of the first degree. R.C. 2923.24(C). But "[i]f the circumstances indicate that the substance, device, instrument, or article involved in the offense was intended for use in the commission of a felony, possessing criminal tools is a felony of the fifth degree." *Id.*

{¶14} M.B. does not dispute that he used the crowbar in an attempt to break into the store to steal cigarettes. His intent was not to simply commit an attempted breaking and entering, because his conduct, if successful, would have resulted in the offense of breaking and entering, a felony of the fifth degree. In other words, M.B. intended to commit breaking and entering, a felony offense. Consequently, he was properly adjudicated for felony possession of criminal tools. We overrule the second assignment of error.

Conclusion

{¶15} Therefore, we affirm the trial court's judgment adjudicating M.B. delinquent for what would have constituted felony possession of criminal tools had

he been an adult. We reverse the trial court's judgment adjudicating M.B. delinquent for breaking and entering and remand the cause to the trial court to enter an adjudication for an attempted breaking and entering, and to enter a disposition for that offense.

Judgment accordingly.

DEWINE and **STAUTBERG, JJ.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.