



**TWENTY-NINTH JUDICIAL DISTRICT OF PENNSYLVANIA
COUNTY OF LYCOMING**

CHRISTIAN D. FREY, ESQ.
MAGISTERIAL DISTRICT JUDGE

MAGISTERIAL DISTRICT COURT 29-1-01
605 WEST FOURTH STREET
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To: Martin Wade, First Asst. District Attorney
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From: Christian Frey, Magisterial District Judge
RE: Commonwealth v. Richard Mirabito
CR-2-2024
Date: January 18, 2024

Introduction

The Defendant, Richard Mirabito (hereinafter "Defendant" or "Mirabito"), is charged with three (3) counts: Burglary (18 Pa.C.S. §3502(a)(1)(ii)), Criminal Trespass (18 Pa.C.S. §3503(a)(1)(i)), and Theft by Unlawful Taking (18 Pa.C.S. §3921(a)). The Defendant, a residential landlord, allegedly entered the apartment of a tenant, Joyleen McClements (hereinafter "McClements"), on January 1, 2024 without her consent, in order to regain possession of McClements' keys to the apartment and building. McClements had previously told Mirabito that she would vacate the apartment before that date.

Preliminary Hearing Testimony

The Commonwealth called McClements as its only witness. McClements testified that she rented an apartment from Mirabito, located on Vine Avenue in the City of Williamsport. The apartment was on the second floor of the building, and Mirabito's rental business office is located on the first floor. On November 27, 2023, she notified Mirabito, via a text message to his wife, Sara, that she would be

vacating the apartment prior to January 1, 2024. Specifically, McClements wrote, "I am just going to give u[sic] my months[sic] notice and will be out by January 1." Despite the text message, McClements did not vacate the apartment, and still possessed the premises as of January 1, 2024.

McClements testified that on January 1, 2024, around 11:00 AM, she was across the hall at a neighbor's apartment having a cup of coffee. As she was leaving the neighboring apartment, she saw Mirabito walking up the stairs. Mirabito addressed McClements, saying, "It's the first. Where are your keys?" He then entered the unlocked apartment and again asked where the keys were. McClements directed Mirabito to the location of the keys, stating, "They're right there." Mirabito took possession of the key to the apartment and the key to the front security door of the building. No other keys or possessions were removed from the apartment. At no time did McClements tell Mirabito to stay out of the apartment, or to leave the apartment once he was inside. Mirabito was in the apartment for five (5) minutes or less.

Analysis

1. Burglary

A person commits the offense of burglary if, ***with the intent to commit a crime therein***, the person...enters a building or occupied structure...that is adapted for overnight accommodations in which at the time of the offense any person is present. 18 Pa.C.S. §3502(a)(1)(ii) (emphasis added). It is a statutory defense to prosecution for burglary if, at the time of the commission of the offense, the actor is licensed or privileged to enter. 18 Pa.C.S. §3502(b)(3).

As such, at the preliminary hearing, the Commonwealth must establish, *prima facie*, the following three elements: (1) entry of a building or occupied structure by the defendant; (2) with the contemporaneous intent on the part of the defendant of

committing a crime therein; (3) at a time when...the defendant was not then licensed or privileged to enter. Commonwealth v. Tingle, 275 Pa.Super. 489, 419 A.2d 6 (1980); Commonwealth v. Brosko, 243 Pa.Super. 312, 315, 365 A.2d 867, 868 (1976).

The testimony of McClements clearly establishes that Mirabito entered McClements' apartment, so that element has been satisfied. The remaining element of intent, as well as the issue of license or privilege to enter, are not as clear.

McClements testified that up until the time of this incident, she had told Mirabito that she would be vacating the apartment by January 1, 2024. Indeed, as set forth above, in a text message dated November 27, 2023, McClements said, "I am just going to give u[sic] my months[sic] notice and will be out by January 1. U[sic] can use the last months[sic] rent that was paid when I moved in for December..." Based upon her testimony, it is unclear whether Mirabito even knew if McClements was still in possession of the apartment as of the morning of January 1, 2024.

Based upon McClements' sworn testimony, the only words spoken by Mirabito were when she first saw him in the hallway, when he said "It's the first; where are your keys?" and then again in the apartment, when he asked, "Where are the keys?" McClements then pointed Mirabito to the keys, saying "They're right there."

The specific intent to commit a crime necessary to establish the second element of burglary may be found in the defendant's words or conduct, or from the attendant circumstances together with all reasonable inferences therefrom. Commonwealth v. Nutter, 256 Pa.Super. 111, 389 A.2d 626 (1978).

The mere presence of a defendant at the scene is not sufficient to prove burglary. Commonwealth v. Eddington, 255 Pa.Super. 25, 386 A.2d 117 (1978);

Commonwealth v. Smith, 264 Pa.Super. 303, 399 A.2d 788 (1979).

While entry by force is not a required element, our appellate courts have held that a factfinder may conclude that when one enters a building by force, he did so with the intent to commit a crime therein. Commonwealth v. Lynch, 227 Pa.Super. 316, 319, 323 A.2d 808, 810 (1974). There is no force alleged in the instant matter.

The Commonwealth introduced the lease between McClements and Mirabito Properties, Inc., dated August 2, 2023 (“the Lease”) as Commonwealth’s Exhibit 1. Paragraph 16 of the lease states,

“Tenant agrees that Landlord and people working for landlord may go into the leased property **at reasonable times**. Landlord and people working for landlord **may inspect**, make repairs, do maintenance, and show the leased property to others.” (emphasis added)

Examining the totality of the circumstances, this Court cannot conclude that Mirabito entered the apartment with the intent to commit a crime therein. Mirabito did not enter the apartment by force. He had a contractual right to enter the apartment “at reasonable times” and for the purpose of “inspect[ing]” the premises. On the heels of McClements having previously informed Mirabito that she would no longer be living at the apartment as of January 1, 2024, such an inspection at approximately 11:00 AM that day would be reasonable, and Mirabito would have been “licensed or privileged” to enter.

Absent the requisite specific intent to commit a crime inside the apartment, the Commonwealth fails to establish a *prima facie* case of burglary.

2. Criminal Trespass

The crime of criminal trespass is defined by 18 Pa.C.S. § 3503, which provides that “a person commits an offense if, knowing that he is not licensed or

privileged to do so, he enters, gains entry by subterfuge or surreptitiously remains in any building or occupied structure...” The basic element of the crime of criminal trespass is an unprivileged entry, the same element as in the crime of burglary. What makes burglary more serious in nature is the added element of an intent to commit a crime while inside the building or occupied structure. Commonwealth v. Thomas, 561 A.2d 699, 522 Pa. 256 (Sup.1989).

As set forth above, the relationship between Mirabito and McClements was dictated by a written contract, a month-to-month residential lease agreement starting August 1, 20023. One of the lease terms, quoted above, gives the landlord, Mirabito, the right to “go into the leased property at reasonable times;” the lease does not define “reasonable” and does not require any advance notice.

The Commonwealth presented no testimony about any communications between McClements and Mirabito after the November 27, 2023 text message and before the incident on January 1, 2024. As such, based upon the representations by McClements in the November text message, Mirabito would have reasonably believed the apartment to be vacant as of the morning of January 1st. When he encountered McClements in the hallway and asked for her keys, he presumably would not have known whether she had vacated or not.

Based solely upon the testimony and exhibits provided at the preliminary hearing, the Court cannot reach the conclusion that Mirabito was acting outside the scope of the terms of the lease. In other words, the Commonwealth has not established, even *prima facie*, that Mirabito entered the apartment “knowing that he [was] not licensed or privileged to do so.”

3. Theft by Unlawful Taking

The Commonwealth alleges that Mirabito committed a theft when he took possession of the key to McClements’ apartment and the key to the front security door of the building. A person is guilty of theft if he unlawfully takes, or

exercises unlawful control over, movable property of another with intent to deprive her thereof. 18 Pa.C.S. §3921(a). To be guilty of theft under this definition, the ***actor's intention or conscious object must be to take unlawfully the property of another*** for the purpose of depriving the other of his or her property. Commonwealth v. Pickett, 244 Pa.Super. 433, 368 A.2d 799 (1976). (emphasis added).

The contract between the parties contains two primary references to the apartment keys: Para. 2 states that a key was provided to McClements to use, and that she may not make any copies of the key. Para. 6 states that McClements shall “return all keys” at the end of the lease.

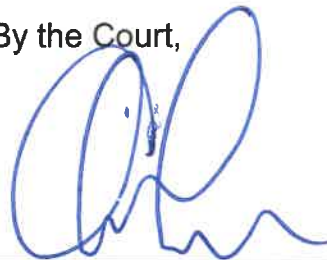
The testimony of McClements was that Mirabito asked her, “Where are the keys?” In response, she pointed to them on the TV stand, he grabbed them, and he left.

McClements’ testimony paints the picture of a landlord who, when confronted with a tenant whom he believed had already vacated, asked for the apartment keys. McClements then voluntarily and willfully provided them to Mirabito, and he left. The Court cannot infer criminal intent from this interaction.

Conclusion

For the reasons stated above, all counts are DISMISSED.

By the Court,



Christian D. Frey, Mag. Dist. Judge

