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3-09-0402

Order Filed March 2, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	For the 14th Judicial Circuit
)	Henry County, Illinois
Plaintiff-Appellee,)	
)	No. 07-CF-238
v.)	
)	Honorable Charles H. Stengel,
JOHNNIE H. LAWVER,)	Judge, Presiding
)	
Defendant-Appellant.)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Wright and Holdridge concurred in the judgment.

ORDER

Held: Defendant was proved guilty beyond a reasonable doubt; the trial court provided an adequate inquiry into defendant's *pro se* posttrial motion claims; the trial court considered proper factors in aggravation in determining defendant's sentence.

Following a bench trial, defendant Johnnie Lawver was convicted of burglary and sentenced to 15 years' imprisonment. On appeal, Lawver asserts the State failed to prove him guilty beyond a reasonable doubt; the trial court did not afford him a full and fair hearing on his *pro se* posttrial motions; and the trial court improperly considered his past convictions in aggravation in sentencing him. For the reasons given below, we affirm the trial court.

FACTS

Defendant Johnnie Lawver was charged with burglary (Count I) (720 ILCS 5/19-1(a) (West 2006)) in connection with an incident in which he entered an establishment in Henry County known as the Country Corner and stole money from the cash register. The State's amended information stated Lawver had been previously convicted twice of burglary, each case arising out of a different series of acts. The information indicated a violation of 730 ILCS 5/5-5-3(c)(8) (West 2006), which was a sentencing enhancement statute and the information also contained the notation "Class X." Lawver was also charged with theft (720 ILCS 5/16-1(a)(1)(A) (West 2006)) based on the same incident. The State's information on the theft charge (Count II) stated he had been previously convicted of theft. Lawver entered a plea of guilty to the theft charge as detailed below.

During the pretrial proceeding, in which the trial court granted the State's motion to amend the information with respect to the burglary charge to include the enhancement provisions, the trial court stated to Lawver:

"Count II is the same. But on Count I, instead of a Class 2 felony, it's now a Class X felony. They enhance it if you have two other convictions for burglary, and this is a burglary, if you're found guilty of this one, instead of three to seven years or three to 14, now it's nonprobationable and it's a minimum of six, a maximum of 30 years, plus three years' mandatory supervised release. *** They enhanced it."

Lawver replied:

"I want to ask a question before we go any farther. *** On this

amending it, it's a Class X sentencing. He's amending it. This law came out in 1977, and the law clearly states *** if a defendant has a Class 1, a Class 2, or greater, *** and he had two convictions— they enhance him to a Class X sentencing, not a Class X felony. The classification stays the same. Am I correct?"

The state's attorney responded, "[i]t might very well be that case, but it's just the sentencing document shows that." The trial court stated, "I think it's just a matter of semantics." Lawver further stated:

“Now, the reason why I asked *** is I also was being charged with *** theft. Now, the *** theft was originally a misdemeanor, which was enhanced to a felony, so now they want to extend another charge that was related to that charge” I don't think you can extend a charge and then enhance it. I mean, that would be a piggyback. That's against the law *** ?”

The trial court then informed Lawver that “this is a lesser-included,” that he should speak to his attorney and that if he had concerns he should present a motion detailing them.

During the subsequent open plea proceeding on the charge of theft, Lawver engaged in an extensive discussion with the trial court and his defense attorney regarding the charge and possible sentencing. Lawver acknowledged the theft charge had been enhanced from a misdemeanor to a Class 4 felony; he stated he understood that as the law. During a discussion of the sentencing, the trial court explained that the enhanced charge was also extendable based on prior convictions. Lawver queried: “A misdemeanor can be enhanced to a felony, and then it can be extended, both?”

The trial court replied in the affirmative and the defense attorney explained, “[i]f you have enough convictions.” Lawver acknowledged he had thirteen prior felonies including two burglary convictions. The trial court explained to Lawver that he could therefore be sentenced to one to six years’ imprisonment and asked Lawver if based on his understanding he still wanted to plead guilty. Lawver stated that he did. Following admonishments, the trial court found Lawver understood the plea to a charge of theft enhanced to a felony and the possible penalties. The guilty plea was accepted by the trial court. This conviction was later vacated.

A bench trial commenced on the burglary charge and the following evidence was adduced. Alexis Nelson testified that on June 2, 2007, she worked for the Country Corner when a man she identified in open court as Lawver came into the store. Nelson stated Lawver ended up purchasing a watermelon, taking it to his car, coming back into the store and “hanging around, talking, making small talk.” Lawver asked Nelson about the location of the nearest car wash and asked for change. Nelson opened the cash register and gave Lawver change for a dollar. They continued to converse and Lawver sat down on a bench near the cash register and spoke on a cell phone. He then stood up and again asked for change for the car wash. Nelson opened the cash register and gave Lawver change. After Nelson gave Lawver change the second time, she turned and looked out the window to check on customers that were perusing plants for sale. As she turned back around, Nelson heard a noise behind her and witnessed Lawver standing “there.” Nelson said, “[w]hat was up with that?” Lawver responded by telling her the calculator had fallen to the floor. Because Nelson noticed Lawver was jerking his hand away from the area of the cash register, she immediately opened the drawer and observed that all the \$20 bills were missing. She also noted that the register indicated “no sale” which meant to her that the drawer had been opened without a purchase occurring. Lawver

left the store and Nelson followed him out the door. Her boss, "Bruce," was in the vicinity and she said to him, "call Henry County. This guy just took our money." Nelson followed Lawver to the parking lot where he was parked close to the building in a place reserved for the "elderly and handicapped." Lawver insisted, "no *** I wouldn't steal." Nelson wrote down the license number of the vehicle Lawver was driving and provided it to the Henry County sheriff's officers when they responded. Nelson testified that when he re-entered the store, Lawver was on the premises for 20 to 30 minutes. She admitted she was not sure Lawver took the watermelon out to his vehicle. She recalled it was not in his possession when he left with the money.

Bruce Curry also testified at trial. Curry is the owner of the Country Corner. He described the establishment as a fruit and vegetable stand similar to a Morton building with windows that is open in the front. The cash register is inside the building. Curry recalled that on June 2, 2007, he was working the stand and waiting on customers when he heard Nelson yell, "[s]omebody stole our money, *** [t]hat man right there just stole our money." When Curry asked Nelson what she was talking about, she stated, "[t]hat man right there just grabbed our 20-dollar bills out of the cash register." Because Nelson said he had stolen money, Curry went up to the man, who he identified in court as Lawver, and told him to "stop." Lawver denied stealing the money. Lawver appeared in a "large hurry" to get out of the building. He was walking fast and saying he had not stolen any money. Curry demanded that Lawver stop until he called the police, however, Lawver left in the car. Curry remembered obtaining the license number of the vehicle. Curry remembered that before the theft Lawver had been behaving differently than the other customers. Lawver sat down on the bench and was talking on his cell phone, looking around at the ceiling. He sat on the bench for "quite a bit." Curry thought it strange that Lawver sat in the middle of the stand talking on his phone and

“looking at the place.” Curry determined that Lawver stole approximately \$140. Curry admitted that there is a “customer needs” list beside the cash register and that store personnel write down a customer’s request with their name and phone number on the list. He did not recall Lawver asking about jalapeno peppers. He did not recall Lawver had left his name for the list. Lawver was not putting a watermelon in his car when Curry approached him trying to prevent him from leaving, however, Curry recalled that Lawver made a purchase. Lawver entered the vehicle, locked the doors and drove away.

The State rested and informed the trial court in open court that to support the amended information it would provide certified copies of two Rock Island County cases. Lawver’s attorney had no objection “[o]ther than they’re for sentencing purposes.” The trial court responded: “Correct. That’s the only reason that the Court would consider them. *** Because they would be something that would be proved up for this to be a Class X.” The State agreed it was presenting the record of the cases for the purposes of sentencing, that the priors were two Class 2 felonies, making “it” a Class X.

Lawver presented Kim Chappell as a witness. Chappell testified that on June 2, 2007, Lawver was picking up items for a cookout she was hosting. Lawver called her between 12:30 p.m. and 4:00 p.m. to ask her if she needed anything else and she requested Lawver buy a watermelon. Later, Lawver arrived at her house with a watermelon.

Lawver also testified. He stated that on June 2, 2007, he was picking up supplies for Chappell. When Chappell told him she would like a watermelon, Lawver stopped at the Country Corner Market. Once inside, Lawver talked to Curry about purchasing jalapeno peppers. Curry told him to leave his name and number on a list by the cash register and he would be contacted when the

peppers were available. Lawver picked up a watermelon and a root beer and purchased them. He sat on a bench and drank his root beer and talked on the cell phone. He sat on the bench for approximately five minutes. He went to the counter and asked once for change for a car wash. He sat down on the bench again and he noticed “a lady” opening a zippered bag and putting money from it into the cash register. Lawver got up, “walked up, grabbed the money, and walked out.” He had the watermelon with him. As he was walking to the car, Lawver put the money in his front pocket. He put the watermelon in the car on the passenger side and Curry approached him and asked if he had taken money from the store. Lawver denied knowing what Curry was talking about. Lawver entered the vehicle and drove away. Lawver admitted he lied to Curry when he told him he had not taken the money.

Following closing arguments, the trial court found that the State had proved Lawver had entered the store with the intent to commit a theft, therefore, he was guilty of burglary. The trial court stated it was “clear” that Lawver left the store with the watermelon and re-entered the store, ostensibly to get change for the car wash, but with the purpose of “casing the place.” The trial court noted that “car washes have change, too.”

Posttrial, Lawver filed three motions. In his motion to dismiss counsel, Lawver asserted his trial counsel was ineffective. In his motion for a new trial, Lawver asserted he was entitled to a new trial based on his counsel’s ineffectiveness in failing to file pretrial motions; failing to contact and interview witnesses as requested by Lawver; failing to consult with Lawver in open court on February 20, 2009; and failing to explain to Lawver that if convicted he would be subject to Class X sentencing and that if he pled guilty to theft it would lead to a burglary conviction. In his motion for a judgment notwithstanding the verdict, Lawver asserted the State had failed to prove him guilty

beyond a reasonable doubt because it failed to prove he had the requisite intent to commit burglary when he entered the establishment and that convictions for both theft and burglary violated the one act, one crime principle.

At a hearing in which the trial court discussed with Lawver his motion to dismiss his counsel and desire to proceed *pro se*, the trial court cautioned Lawver that he was in the sentencing stage of the proceeding and that he had been convicted of a Class X offense for which the minimum sentence could be six years and the maximum a term of 30 years. Lawver responded that he was prepared to represent himself in the posttrial and sentencing proceedings. The trial court granted Lawver's motion to dismiss his counsel. In addressing his motion for a new trial, Lawver questioned his former attorney under oath. Counsel admitted he had received pretrial letters from Lawver regarding filing pretrial motions and that he had not filed any pretrial motions because he had not believed there was a basis to do so and explained in detail his reasoning. Referring to a letter he had sent to his attorney, Lawver pointed out that he had requested his attorney contact Chappell to testify on his behalf. Counsel responded that he had contacted Chappell "a couple weeks" before trial. When Lawver stated Chappell had stated she never talked to counsel, the trial court objected that Lawver was improperly testifying. Lawver asked if counsel had explained "to your defendant the penalties of an amended burglary charge as a Class X before you proceeded to a bench trial?" Counsel responded, "I'm sure we talked about that, yeah." Counsel stated he and Lawver had talked about the amended charge. Lawver declined to call any other witnesses. In arguing for a judgment notwithstanding the verdict, Lawver stated:

"I admitted to the Court that I committed a theft, and then I
asked the Court to go to a bench trial because I was not going to plead

guilty to a burglary and accept 20 years.”

The trial court denied Lawver’s posttrial motions. With respect to his allegation of ineffective assistance of counsel, the trial court found counsel’s actions to be strategy or trial tactics and that Lawver’s assertion that counsel had not called a particular witness was without merit because Lawver failed to offer any indication of the character of the evidence and how it would have changed the outcome.

The cause proceeded to sentencing. At sentencing, the trial court stated it looked at factors in aggravation and mitigation. The trial court noted its familiarity with Lawver’s presentence investigation report and his familiarity with Lawver. The trial court also noted that Lawver had a “horrible record of doing this type of stuff,” and that he would not conform his conduct and would steal whatever he had the opportunity to steal. The trial court vacated Lawver’s theft conviction and sentenced Lawver to 15 years’ imprisonment and three years of mandatory supervised release on the conviction for burglary. The sentencing order indicates Lawver was convicted of a Class 2 offense. Lawver follows with this appeal.

ANALYSIS

Lawver raises three issues on appeal: he was not proved guilty of burglary beyond a reasonable doubt because the State failed to establish he entered the store with the intent to commit a theft; the trial court erred in failing to provide him with a full and fair hearing on his *pro se* posttrial motions and in denying his claims of trial counsel neglect without appointing counsel for him; and the trial court improperly subjected him to double enhancement by using as aggravating factors the defendant’s history of prior convictions. We address Lawver’s claims in order.

Sufficiency of the evidence: When examining a challenge to the sufficiency of the evidence,

we must view the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Collins*, 366 Ill. App. 3d 885, 894 (2006). The weight to be given to the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and the reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). We will not substitute our judgment for that of the trier of fact. *Sutherland*, 223 Ill. 2d at 242.

“A person commits burglary when without authority he knowingly enters or without authority remains within a building *** with intent to commit therein a felony or theft.” 720 ILCS 5/19-1(a) (West 2006). In the instant case, Nelson testified that Lawver came into the store and purchased a watermelon. He then left the store with the watermelon. Although Nelson admitted she was not sure Lawver took the watermelon out to his vehicle, when Curry testified about following Lawver to the car after the theft, he stated that Lawver did not have a watermelon with him. Lawver does not dispute that he purchased the watermelon. Nelson stated that when Lawver re-entered the store he asked her twice to open the cash register for change for the car wash. He also stayed in the store for 20-30 minutes, sitting on a bench, talking on a cell phone, looking around, and not making any further purchase. Curry testified such behavior was “different” when compared to that of other customers. While she was turned away, Nelson heard a noise behind her. She turned and saw Lawver jerk away from the cash register. When she immediately opened the cash register drawer, the \$20 bills were missing. Although Lawver testified he entered the store only once, therefore inferring he did not have the requisite intent to steal when he entered the store, the trial court found credible the testimony indicating that Lawver left the store with a watermelon and re-entered the store. The trial

court found the testimony regarding Lawver's actions indicated he was "casing the place" on his second trip into the store and that he had made the second entry with the intent to commit a theft. Any inconsistencies or conflicts in the evidence were for the trial court, as trier of fact, to resolve. The evidence supports the trial court's findings of fact and the guilty verdict. We find no reason to substitute our judgment for the trial court's in this case.

Full and fair hearing on ineffective assistance of counsel claim: On appeal, we will not overturn a trial court's decision to decline to appoint new counsel for a defendant asserting ineffective assistance of counsel unless the trial court's decision is manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008). The trial court need not automatically appoint new counsel whenever a defendant files a *pro se* posttrial motion for a new trial based on an ineffective assistance claim. *McCarter*, 385 Ill. App. 3d at 940. Instead, the trial court must conduct a preliminary inquiry to examine the factual basis behind the defendant's claim. *McCarter*, 385 Ill. App. 3d at 940. The trial court may deny the motion without appointing new counsel if the claim is not meritorious, or if it solely concerns matters of trial strategy. *McCarter*, 385 Ill. App. 3d at 940. Only when the claim points to possible neglect of the case must new counsel be appointed. *McCarter*, 385 Ill. App. 3d at 940. Furthermore, although in general some interchange between the trial court and counsel regarding the complained-of conduct is necessary, the trial court may also draw upon its observation of counsel's performance at trial and the adequacy of defendant's allegations on their face. *McCarter*, 385 Ill. App. 3d at 940-41. There are instances where a brief discussion between the trial court and the defendant is sufficient for the trial court to properly deny an ineffective assistance claim. *McCarter*, 385 Ill. App. 3d at 941.

In the instant case, the trial court that conducted the preliminary inquiry into Lawver's

posttrial ineffective assistance of counsel claim was the same trial court that conducted the bench trial on Lawver's burglary charge. Lawver was given an opportunity to examine his trial counsel under oath. Counsel explained his trial strategy and rationale for declining to file pretrial motions although Lawver had requested that he do so. With respect to the witness Chappell, counsel explained that he had contacted the witness. An affidavit of record indicates that Chappell gave a pretrial affidavit. Chappell also testified at trial. As noted by the trial court, Lawver gave no indication at the hearing of the substance of any further testimony Chappell would have given had his counsel been "effective." Lawver declined to call any other witnesses.

Counsel also indicated, in response to Lawver's question, that he was sure he had discussed with Lawver the possible penalties associated with a conviction for the burglary as charged. We also find from the record that there were many instances in open court, as noted above, when Lawver was admonished and demonstrated that he understood the sentencing ramifications of being tried for burglary as it was charged with reference to his prior felonies. As one example, Lawver stated at the posttrial proceedings that the reason he pled guilty to theft in a pretrial proceeding was because he "was not going to plead guilty to a burglary and accept 20 years." As Lawver's knowledge exhibits, the range of sentencing for a Class 2 burglary conviction without sentence enhancement is not less than 7 years and not more than 14 years (730 ILCS 5/5-4.5-35 (West 2006)), whereas, an enhanced sentence using Class X factors is a possible 6 to 30 years (730 ILCS 5/5-4.5-25 (West 2006)). Furthermore, at one point in a pretrial proceeding, Lawver instructed the trial court: "The law clearly states *** if a defendant has a Class 1, a Class 2, or greater, *** and he had two convictions— they enhance him to a Class X sentencing, not a Class X felony. The classification stays the same." Lawver's continued assertion that due to counsel's ineffectiveness he was not on notice regarding

the sentencing ramifications of the burglary charge is disingenuous; he was obviously not prejudiced by a failure, if any, on the part of counsel to discuss the subject with him. See *People v. Moore*, 356 Ill. App.3d 117, 121-22 (2005) (the defendant must show that counsel's deficient performance rendered the trial result unreliable or rendered the proceeding fundamentally unfair). The trial court was aware of Lawver's knowledge of the sentencing implications. After an exchange with Lawver and after hearing counsel's testimony, the trial court found that Lawver's ineffective assistance of counsel arguments were without merit or refuted by the trial court's finding of trial strategy. Under these circumstances, we find no manifest error in the trial court's decision to forgo appointing counsel for Lawver or in its failure to directly question counsel, whose trial performance the trial court had witnessed.

Improper double enhancement at sentencing: The rule against double enhancement is a rule of statutory construction and when deciding whether a trial court's sentence represents improper double enhancement, the standard of review is *de novo*. *People v. Fish*, 381 Ill. App. 3d 911, 913 (2008). Double enhancement occurs when a factor already used to enhance an offense or penalty is reused to subject a defendant to a further enhanced offense or penalty. *People v. Thomas*, 171 Ill. 2d 207, 223 (1996). Section 5-5-3(c)(8) of the Unified Code of Corrections (the Code) (730 ILCS 5/5-5-3(c)(8) (West 2006)), however, did not elevate the class of a crime, but merely set forth criteria under which a convicted defendant would be sentenced according to the guidelines for a Class X felony. *Thomas*, 171 Ill. 2d at 224 (under section 5-5-3(c)(8), a defendant's sentence is increased because of prior felony convictions, but the classification of offense with which the defendant is charged and convicted remains the same). For this reason, the "second use" of a defendant's prior convictions as aggravating factors in sentencing does not constitute an improper double

enhancement. *Thomas*, 171 Ill. 2d at 224. Rather, in considering the prior convictions, the sentencing court is exercising its discretionary power to fashion a particular sentence tailored to the needs of society and the defendant within the available parameters. *Thomas*, 171 Ill. 2d at 224-25 (the judicial exercise of the sentencing court’s discretion in fashioning an appropriate sentence is within the framework provided by the legislature, and is not properly understood as an “enhancement”). Furthermore, double enhancement does not occur if different and separate convictions are relied upon to enhance the classification of the defendant’s offense and to increase the length of his prison term. *Fish*, 381 Ill. App. 3d at 915 (no improper double enhancement occurs where “no single factor” is used both to establish the elements of the defendant's crime and to sentence him to an extended term, but rather a separate, independent factor is used in each capacity).

In the instant case, the State’s amended information charged Lawver with burglary (720 ILCS 5/19-1(a) (West 2006)) and also a violation of section 5-5-3(c)(8) of the Code (730 ILCS 5/5-3(c)(8) (West 2006)), which, as noted above, set forth the criteria under which Lawver would be sentenced according to the guidelines for a Class X felony if he was convicted of the burglary. The sentencing order noted Lawver was convicted of a Class 2 felony, indicating the class of the offense was not elevated. As noted above, Lawver, himself stated this principle for the trial court. For this reason, the trial court did not err if it in fact considered Lawver’s two prior burglary convictions in aggravation in sentencing. Moreover, Lawver admits, and his presentence report confirms, that by the time of this trial, he had been convicted of thirteen prior felonies, any of which could also form the basis of the trial court’s consideration.

For the foregoing reasons, the judgment of the circuit court of Henry County is affirmed.

Affirm.