

No. 1-09-1816

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 06 CR 20822
)	
EDWARD CHOW,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Justices Quinn and Neville concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the evidence was sufficient to convict defendant of residential burglary, the trial court's judgment was affirmed; where defendant was not properly assessed various fines and fees, and was entitled to pre-sentence incarceration credit to offset certain fines, his sentence was modified.
- ¶ 2 Following a bench trial, defendant Edward Chow was convicted of residential burglary and sentenced to five years' imprisonment. On appeal, defendant asserts that the evidence was not sufficient to convict him on a theory of accountability because the State failed to prove that he knew the principal's conduct was criminal, or that he possessed intent to participate in an illegal act. Defendant also challenges certain pecuniary penalties imposed by the court. We affirm as modified.

¶ 3 In a Rule 23 Order entered on March 2, 2011, we affirmed defendant's conviction and found the assessment of a \$200 DNA fee proper notwithstanding that the Illinois State Police already had his DNA profile from a prior felony conviction. Subsequently, the Illinois Supreme Court entered a supervisory order directing us to vacate that decision and reconsider it in light of *People v. Marshall*, 242 Ill. 2d 285 (2011). We have done so, and, for the reasons that follow, conclude that defendant's \$200 DNA fee must be vacated.

¶ 4 At trial, John Cinkus testified that he owned an apartment building at 903 West 33rd Street in Chicago on August 19, 2006. At about 11:40 a.m. on that date, Cinkus was at the address in question and saw the front door of Chris Vesely's first floor apartment was open. He approached the open apartment and saw a woman, later identified as Maria DeRosa, inside. Cinkus asked her what she was doing inside of the apartment, and she responded that she knew Chris. Cinkus thought that the woman had permission to be inside Vesely's apartment and left. When Cinkus went outside, he saw a vehicle being driven the wrong way on a one way street. After parking the vehicle in front of the building, defendant got out of the car and entered Vesely's apartment. DeRosa and defendant left the apartment with a television. After Cinkus yelled at them, DeRosa and defendant dropped the television and left together. Cinkus obtained the license plate of the vehicle they left in, and called the police. When Cinkus returned to the building after the incident, he noticed that the screen from the front window of Vesely's apartment was damaged.

¶ 5 Officer Michael Putrow testified that based on the information he obtained from the license plate number provided by Cinkus, he went to the address of Anna McClain, the registered owner of the vehicle. Following their conversation, Putrow began searching for defendant. On August 28, 2006, Putrow went to defendant's residence and arrested him.

¶ 6 Detective Barbara Axelrod testified that Cinkus identified defendant from a photo array as the individual exiting Vesely's apartment carrying the television. After Axelrod read defendant his *Miranda* rights, defendant told her that he borrowed McClain's car, and that when

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he and his friend were coming out of a house, a man came up to him and said that he was going to call the police. Defendant and his friend dropped the television, ran away, and left in the vehicle.

¶ 7 Christopher Vesely testified that he was incarcerated for criminal damage to property at the time of trial and was previously convicted of unlawful use of a weapon by a felon. On August 19, 2006, Vesely lived at the apartment in question. When he returned home from work that day, he saw that his television was on the floor, some of his belongings were missing, a screen from his window was smashed and on the floor, a big black mark was on the wall under the window, and personal checks bearing his name were also outside of their normal place. Vesely called his landlord and police after observing the condition of his apartment. He did not know defendant or DeRosa, and never gave them permission to be inside his apartment.

¶ 8 Following closing argument, the trial court found defendant guilty of residential burglary on a theory of accountability. In doing so, the court stated that there was circumstantial evidence that Vesely's apartment was burglarized and that defendant was positively identified as the individual who drove up to the address in question and helped DeRosa remove Vesely's television. After Cinkus yelled at defendant and DeRosa, they immediately dropped the television and fled. The court stated that this was a "classic accountability case."

¶ 9 On appeal, defendant contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt of residential burglary based on a theory of accountability. He specifically maintains that the State failed to prove that he knew the principal's conduct to be criminal, or that he possessed intent to participate in an illegal act.

¶ 10 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This standard recognizes the responsibility of the trier of fact to resolve conflicts in testimony, weigh the

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evidence, and draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A reviewing court will not set aside a criminal conviction unless the evidence is so unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 11 In order to sustain a conviction for residential burglary, the State must prove beyond a reasonable doubt that defendant knowingly and without authority entered or remained in the dwelling place of another with the intent to commit therein a felony or theft. 720 ILCS 5/19-3(a) (West 2006). Intent must often be inferred from surrounding circumstances and may be proved by circumstantial evidence. *People v. Moreira*, 378 Ill. App. 3d 120, 129 (2007), citing *People v. Maggette*, 195 Ill. 2d 336, 354 (2001). A trier of fact may infer the defendant's intent to commit residential burglary from proof that he unlawfully entered a building containing property that could be the subject of a larceny. *In re Matthew M.*, 335 Ill. App. 3d 276, 282-83 (2002). Other relevant circumstances include the time, place, and manner of entry into the premises, the defendant's activity within the premises, and any other explanation offered for the defendant's presence in the residence. *Maggette*, 195 Ill. 2d at 354.

¶ 12 In addition, to convict a defendant on a theory of accountability, the State was required to prove that: (1) he solicited, ordered, abetted, agreed, or attempted to aid another in the planning or commission of the crime; (2) his participation took place before or during the commission of the crime; and (3) he had the concurrent intent to promote or facilitate the commission of the crime. *Matthew M.*, 335 Ill. App. 3d at 283. Therefore, in order to prove defendant guilty of residential burglary on an accountability basis, the State had to show that defendant had, with the requisite intent, aided or abetted DeRosa prior to or during the commission of the crime. See *Matthew M.*, 335 Ill. App. 3d at 283.

¶ 13 We believe that the evidence, when viewed in the light most favorable to the State, was sufficient to prove defendant's guilt beyond a reasonable doubt on an accountability theory. Cinkus saw DeRosa inside Vesely's apartment. Defendant entered the same apartment, and

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Cinkus observed DeRosa and defendant leave the apartment carrying a television. When Cinkus yelled at them, DeRosa and defendant dropped the television and fled the scene together. The evidence also showed that the window screen appeared to have been pushed in during a forced entry, Vesely's personal checks were out of place, and Vesely was missing several personal items. Vesely never gave DeRosa or defendant permission to enter his apartment. Furthermore, defendant told police that when he and his friend were coming out of a house, a man came up to him and said that he was going to call the police. Defendant and his friend dropped the television and fled.

¶ 14 From such evidence, we believe that the trial court could have found beyond a reasonable doubt that defendant knew a crime was occurring, and intended to commit a theft in Vesely's residence. Defendant arrived at the scene of the crime while the crime was in progress, assisted DeRosa in removing the television from Vesely's apartment, and fled with DeRosa when Cinkus threatened to call police. Although police did not find any of the proceeds from the burglary in defendant's possession, the trial court could conclude that his presence at the scene, his actions during the commission of the offense, his flight from the scene, and his statements to police indicated that he assisted DeRosa in the commission of the offense. See *People v. Clayborn*, 194 Ill. App. 3d 1079, 1083 (1990) (finding defendant guilty of burglary on a theory of accountability where defendant was present at the scene of a burgled car, held property taken from the car, and fled when approached).

¶ 15 In reaching this conclusion, we find defendant's claim that he was "duped" into helping DeRosa carry a television that he did not know was the proceeds of a burglary unpersuasive. The totality of the evidence in this case belies defendant's claims. When weighing the evidence, the trier of fact is not required to disregard inferences that flow from the evidence, nor is it required to analyze all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *People v. McDonald*, 168 Ill. 2d 420, 447 (1995). As we stated in *McKinney*, "even if it were assumed that defendant McKinney could offer a reasonable alternative, *** this

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fact does not require reversal of his conviction unless the evidence is shown to be so improbable or unsatisfactory that it creates a reasonable doubt of his guilt." *People v. McKinney*, 260 Ill. App. 3d 539, 548 (1994). Therefore, defendant's argument that he simply thought he was "helping a tenant move some items" is not sufficient to show a reasonable doubt of his guilt.

¶ 16 Furthermore, we find *People v. Taylor*, 186 Ill. 2d 439 (1999), relied upon by defendant, distinguishable from the case at bar. In *Taylor*, the defendant was convicted of aggravated discharge of a firearm on a theory of accountability. The reviewing court reversed defendant's conviction because there was no evidence that the defendant knew his friend intended to fire the gun due to the unforeseeable circumstances surrounding the incident. *Taylor*, 186 Ill. 2d at 448. In this case, nothing in the record indicates that DeRosa's actions were spontaneous or unforeseeable, and defendant's actions show that he acquiesced to the burglary. Moreover, defendant relies on *People v. Reid*, 136 Ill. 2d 27, 61 (1990) for the proposition that presence at the scene of the crime, even when coupled with flight, is not a persuasive basis to convict. Here, however, defendant was not only present at the scene of the crime, but was actively aiding DeRosa in the burglary.

¶ 17 Defendant next challenges the imposition of several fines and fees. He first contends, and the State agrees, that the \$25 court supervision fee (625 ILCS 5/16-104c (West 2008)), the \$20 serious traffic violation fee (625 ILCS 5/16-104d (West 2008)), and the \$5 court system fee (55 ILCS 5/5-1101(a) (West 2008)), should be vacated. We agree that these fees must be vacated because the events necessary to trigger them were not present. The record does not show that defendant violated any relevant portion of the Illinois Vehicle Code, or was convicted or pled guilty to any serious traffic violation.

¶ 18 Second, defendant contends that the \$10 arrestee's medical costs fund fee (730 ILCS 125/17 (West 2006)) was unauthorized because there was no evidence that he suffered any injury during his arrest or that Cook County incurred any expense relating to any medical treatment for him. The supreme court has recently settled the split of authority that developed on this issue,

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and held that section 17 of the County Jail Act (730 ILCS 125/17 (West 2006)) authorizes the \$10 medical cost assessment regardless of whether defendant receives medical treatment. *People v. Jackson*, 2011 IL 110615, ¶27. In light of that decision, we find that the trial court's assessment of the fee was proper.

¶ 19 Third, defendant maintains, and the State correctly agrees, that the \$30 children's advocacy assessment imposed against him pursuant to section 5-1101(f-5) of the Counties Code (55 ILCS 5/5-1101(f-5) (West 2008)), should be vacated because it was not effective on August 19, 2006, when the crime occurred.

¶ 20 A criminal law will run afoul of the prohibition against *ex post facto* laws if it is retroactive and disadvantageous to the defendant. *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). A law disadvantages a defendant if it was innocent when committed, increases the punishment, or alters the rules of evidence by making a conviction easier to obtain. *Malchow*, 193 Ill. 2d at 418. The prohibition against *ex post facto* laws applies only to laws that are punitive in nature, such as fines, but does not apply to costs, which are compensatory. *People v. Bishop*, 354 Ill. App. 3d 549, 561-62 (2004).

¶ 21 Here, the children's advocacy charge assessed against defendant is a fine. See *Jones*, 397 Ill. App. 3d at 664 ("the Children's Advocacy Center charge is appropriately characterized as a fine rather than a fee"). Because this charge is a fine, and section 5-1101 of the Counties Code did not contain a provision for it at the time of the offense at bar, it is vacated. See Pub. Act 95-103, § 5, eff. January 1, 2008 (adding 55 ILCS 5/5-1101(f-5)).

¶ 22 **Fourth, defendant contests the \$200 DNA analysis fee, arguing that it cannot be imposed because he was assessed the fee upon a prior conviction. We agree. Pursuant to the supreme court's ruling in *Marshall*, 242 Ill. 2d at 303, the trial court was not authorized to assess defendant the \$200 DNA fee where he is currently registered in the DNA database. We thus vacate that fee.**

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¶ 23 Defendant finally contends, and the State agrees, that he spent time in custody before sentencing and, therefore, is entitled to a \$5 per-day custody credit to offset fines imposed by the trial court pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963. 725 ILCS 5/110-14(a) (West 2008). Here, the fines imposed against defendant included a \$10 mental health court assessment, and a \$5 youth diversion assessment. 55 ILCS 5/5-1101(d-5),(e) (West 2008). Because fines are subject to reduction (*People v. Jones*, 223 Ill. 2d 569, 587-599 (2006)), defendant is entitled to a pre-sentence incarceration credit to offset them. The mittimus states, and the parties agree, that defendant served 381 days in pre-sentencing custody.

¶ 24 For the foregoing reasons, we vacate the \$25 court supervision fee, the \$20 serious traffic violation fee, the \$5 court system fee, the \$30 children's advocacy assessment, and the \$200 DNA fee; find that defendant is entitled to a \$5 per-day custody credit to offset the \$10 mental health court assessment and the \$5 youth diversion assessment; and affirm his conviction in all other respects.

¶ 25 Affirmed as modified.