NOTICE
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2012 IL App (4th) 100498-U

Filed 2/3/12

NO. 4-10-0498

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
PRESTON WINFREY,	)	No. 10CF120
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice McCullough concurred in the judgment.

ORDER

¶ 1 *Held*: (1) An accountability instruction was unnecessary where the evidence presented was sufficient to convict defendant of burglary as a principal.

¶ 2 (2) The trial court sufficiently admonished defendant he could be sentenced *in absentia* where defendant was present in open court and the trial court admonished him if he failed to appear, the court would have the sentencing hearing without him.

¶ 3 (3) Defendant forfeited his excessive-sentence claim because he failed to file a postsentencing motion.

¶ 4 In May 2010, a jury convicted defendant, Preston Winfrey, of theft with a prior theft conviction (720 ILCS 5/16-1(a)(1)(A) (West 2008)) and burglary (720 ILCS 5/19-1(a) (West 2008)). In June 2010, the trial court sentenced defendant to 12 years' imprisonment.

¶ 5 Defendant appeals, arguing (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt of burglary where (a) the jury was not instructed it could find him

guilty as an accessory and (b) he was not observed doing anything to indicate he intended to commit a theft, (2) the trial court erred in failing to admonish him he could be sentenced *in absentia*, and (3) his sentence was excessive. We affirm.

¶ 6 I. BACKGROUND

¶ 7 On April 1, 2010, the State charged defendant by indictment with theft and burglary. Count I of the indictment alleged defendant committed burglary when he, without authority, knowingly entered the Meijer store with the intent to commit theft (720 ILCS 5/19-1(a) (West 2008)). Count II of the indictment for theft, enhanced by a prior theft conviction, alleged defendant, or one for whose conduct he was legally responsible, knowingly exerted unauthorized control over property of Meijer's, namely cartons of cigarettes having a total value not exceeding $300 (720 ILCS 5/16-1(a)(1)(A) (West 2008)).

¶ 8 During defendant's May 2010 trial, Sherry Gray testified she was working as a service coordinator at Meijer, in Urbana, on January 11, 2010. According to Gray's testimony, she was standing by the cash register in front of the tobacco area at approximately 8:50 a.m. when she observed defendant walk into the store with another man. The cashier working the register in front of the tobacco area was on break. Gray testified defendant walked up to the service desk, which was located away from the tobacco area, and began speaking in an unusually loud voice. Defendant walked all the way to the end register, which Gray testified was "as far away from the tobacco area as possible." Gray turned away from the tobacco area and toward defendant to see if he needed any assistance. Gray testified she began talking with defendant, whose voice became quieter as they spoke. Gray testified defendant asked her if the store was hiring. Gray told defendant the store accepted applications electronically and he could use the in-

store job kiosks to fill out an employment application. However, defendant did not "express an interest in" or use the kiosks.

¶ 9 Defendant and Gray continued to speak for approximately another minute or two. However, Gray testified there was no point to that portion of the conversation and defendant was just "shooting the breeze." Gray testified she then heard a loud whistle, and defendant abruptly ended the conversation and walked away. Defendant walked quickly out of the store with the other man. Gray testified neither defendant nor the other man had stopped to pay for anything on their way out. Gray observed the other man holding his arm flexed at a right angle up against the side of his coat. According to Gray's testimony, there appeared to be a bulge under his coat. At that point, Gray called the store's loss-prevention department because she suspected the two men had engaged in a "coordinated effort" to steal merchandise.

¶ 10 Anson Huckleby, a loss prevention detective at Meijer, testified he received a report of a possible theft from the tobacco area of the store. Huckleby testified he reviewed the surveillance video taken on January 11, 2010, which showed a brown truck enter Meijer's parking lot just before 9:00 a.m. Two men then exited the truck and walked into the store. Three minutes and thirty-five seconds later, the two men left in the truck. Huckleby identified defendant as one of the men he saw on the video. Huckleby testified another portion of the video showed the other man in the tobacco area of the store. The video showed the man squatting down and "manipulating" cartons of cigarettes. The surveillance video was admitted into evidence as people's exhibit No. 1 and played for the jury.

¶ 11 Huckleby testified he checked the store’s inventory and found a discrepancy regarding the tobacco inventory. Huckleby testified three carton of cigarettes, worth $141.75,

were missing. According to Huckleby, the store's inventory is automatically updated throughout the day as items are purchased. Huckleby testified the missing cartons of cigarettes corresponded to those he observed the man "manipulating" on the video.

¶ 12 Defendant was present at trial but did not present any evidence.

¶ 13 On May 4, 2010, the jury convicted defendant of theft and burglary. The trial court set the matter for a June 24, 2010, hearing on any posttrial motion filed by defendant. The court also stated if defendant's motion is denied "then we'll go to a sentencing hearing on that date." The trial court then stated the following:

> "All right. The Defendant's bond order will continue. Back here on the 24th of June at 9:30. If the Defendant is able to post bond, he has to be here for that sentencing hearing if we get to a sentencing hearing and if we get to a sentencing hearing and he's not here I will have that hearing without him."

¶ 14 Thereafter, defendant posted bond but did not appear for his June 24, 2010, sentencing hearing. The trial court sentenced defendant, *in absentia*, as stated.

¶ 15 Defendant did not file a postsentencing motion.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant argues (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt of burglary where (a) the jury was not instructed it could find defendant guilty as an accessory and (b) he was not observed doing anything to indicate he intended to commit a theft, (2) the trial court erred in failing to sufficiently admonish him he

could be sentenced *in absentia*, and (3) his sentence was excessive.

¶ 19 A. Sufficiency of the Evidence

¶ 20 Defendant argues the evidence was insufficient to prove him guilty beyond a reasonable doubt of burglary and theft. Specifically, defendant contends because the jury was not instructed it could find defendant guilty as an accessory, it needed to find him guilty as a principal. Defendant contends because he was not observed doing anything to indicate he intended to commit a theft, he could not be convicted as a principal.

¶ 21 The State argues an accountability instruction was unnecessary because a rational trier of fact could have found defendant guilty of burglary as a principal where he entered the store with a preconceived plan to commit theft. We agree with the State.

¶ 22 1. *Standard of Review*

¶ 23 Because the trier of fact is in the best position to evaluate the evidence presented, its findings are entitled to great weight. *People v. Bridgewater*, 388 Ill. App. 3d 787, 795, 904 N.E.2d 171, 178 (2009). Thus, we defer to the trier of fact on issues regarding witness credibility, the weight to be accorded testimony, and reasonable inferences to be drawn from the evidence. *People v. Daniel*, 311 Ill. App. 3d 276, 282, 723 N.E.2d 1279, 1286 (2000).

¶ 24 " 'When weighing the evidence, the trier of fact is not required to disregard inferences that flow from the evidence, nor is it required to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt.' " *People v. Saxon*, 374 Ill. App. 3d 409, 416, 871 N.E.2d 244, 250-51 (2007) (quoting *People v. McDonald*, 168 Ill. 2d 420, 447, 660 N.E.2d 832, 843 (1995)). An inference is simply a reasonable deduction from the consideration of other facts that the fact finder may draw in its discretion, but is not mandated to

draw as a matter of law. *Saxon*, 374 Ill. App. 3d at 416, 871 N.E.2d at 251. When reviewing a challenge to the sufficiency of the evidence, a reviewing court considers whether, 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. Jackson*, 391 Ill. App. 3d 11, 28, 908 N.E.2d 72, 89 (2009).

¶ 25 2. *Sufficiency of the Evidence*

¶ 26 Prior to deliberations, the trial court gave the jury the Illinois pattern jury instruction on accountability (Illinois Pattern Jury Instructions, Criminal, No. 5.03 (4th ed. 2000)). However, the accountability language was not included in the issues' instruction for the burglary count. As a result, defendant maintains to be convicted as a principal the State needed to prove he intended to physically take the cigarettes himself instead of creating the distraction that allowed the other man to take them. We disagree.

¶ 27 Section 19-1(a) of the Criminal Code of 1961 (Criminal Code) provides, in pertinent part, the following: "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 2008).

¶ 28 In this case, the jury heard the witnesses and assessed their credibility and the value of their testimony. Based on that assessment, the jury could have reasonably found defendant entered the store pursuant to the preconceived plan he provide a distraction while the other man stole the cigarettes, *i.e.*, he entered the building with the intent to commit theft. This is the theory the State argued to the jury at the end of the trial.

¶ 29 In particular, the evidence, when viewed in the light most favorable to the State,

showed the following. Defendant and the other man arrived at Meijer's together in the same vehicle. Defendant and the other man entered the store and without speaking to one another split off in two separate directions. While defendant walked to the farthest customer service alcove away from the tobacco area, the other man walked in the opposite direction toward the tobacco area. The tobacco area was not visible to the clerk at the register in the customer service alcove. Gray testified defendant drew her attention by talking in an "unusually loud voice." Once Gray left the tobacco area, defendant lowered his voice. While defendant asked Gray if the store was hiring, he did not use the job kiosks to fill out an employment application. Defendant did not ask any further questions about employment or discuss any employment-related matters with Gray. Instead, defendant "chit-chatted" with Gray for "a minute or two" until someone whistled loudly. During the time defendant was talking with Gray, the surveillance video showed the other man squatting down in the tobacco area and "manipulating" cartons of cigarettes. Gray testified upon hearing the whistle, defendant abruptly ended the conversation and walked away. Gray testified she observed defendant walking quickly out of the store with the other man, who had a bulge under his coat and was holding his arm up against the side of his coat. Defendant and the other man were in the store for a total of three minutes and thirty-five seconds. Neither man purchased any merchandise. Gray testified based on her experience in the store, defendant and the other man were engaged in a "coordinated effort" to steal merchandise. Huckleby testified cartons of cigarettes, which corresponded to those he observed the other man "manipulating" on the surveillance video, were missing from the store's inventory.

¶ 30 Considering the deference we must give the jury’s verdict, the evidence presented in this case was not so unreasonable, improbable, or unsatisfactory that it created a reasonable

doubt of defendant's guilt. See *People v. Wheeler*, 226 Ill. 2d 92, 115, 871 N.E.2d 728, 740 (2007) ("a conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt"). We conclude the evidence presented was sufficient to find defendant guilty of burglary as a principal. Accordingly, a jury instruction on accountability was unnecessary.

¶ 31 B. Sentencing *In Absentia*

¶ 32 Defendant argues the trial court erred in sentencing him *in absentia*. Specifically, defendant contends the court erred in failing to admonish him he could be sentenced *in absentia*. We disagree.

¶ 33 "As a constitutional matter, a defendant has a right to be present at all stages of his trial, including sentencing. [Citation.] A defendant's voluntary absence from trial may be construed as an effective waiver of his constitutional right to be present and he may be tried and sentenced *in absentia*, even if he is not specifically warned that this is a possible consequence of his absence. [Citation.] As recognized by the appellate court, however, a defendant in Illinois has a statutory right under section 114-4(e) of the Code [of Criminal Procedure of 1963 (Code) (725 ILCS 5/113-4(e) (West 2008))] to be admonished as to the possible consequences of failing to appear in court when required. [Citation.]" *People v. Phillips*, 242 Ill. 2d 189, 194-95, 950 N.E.2d 1126, 1130 (2011).

¶ 34 Section 113-4(e) of the Code provides, in relevant part, the following:

"If a defendant pleads not guilty, the court shall advise him at that time *or at any later court date on which he is present* that if he *** is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial court could proceed in his absence." (Emphasis added.) 725 ILCS 113-4(e) (West 2008). As a result, the admonishment requirement of section 113-4(e) applies to a defendant who "appears in open court and pleads not guilty at the time of his arraignment, or is present in court at any later date after his arraignment." *Phillips*, 242 Ill. 2d at 196, 950 N.E.2d at 1131.

¶ 35 In this case, the March 17, 2010, docket entry shows "Defendant admonished as to trial and sentencing *in absentia*." However, the report of the proceeding for March 17, 2010, does not show defendant was so admonished. Where a conflict exists between the common-law record and the report of the proceedings, the report of the proceedings controls. *People v. Martinez*, 361 Ill. App. 3d 424, 427, 837 N.E.2d 479, 481 (2005). While it appears defendant was not admonished prior to trial he could be sentenced *in absentia* if he failed to appear, defendant *was* present in court on May 4, 2010, when the trial court set the matter for a June 24, 2010, hearing on any posttrial motion filed by defendant. The court also stated if defendant's posttrial motion is denied "then we'll go to a sentencing hearing on that date." The court then stated the following in defendant's presence:

> "All right. The Defendant's bond order will continue. Back here on the 24th of June at 9:30. If the Defendant is able to post bond, he has to be here for that sentencing hearing if we get to a sentencing hearing and if we get to a sentencing hearing and he's not here I will

have that hearing without him."

¶ 36 Thus, the trial court admonished defendant, who was present in court at the time of the admonishment, that if he posted bond and did not appear for sentencing the court would "have that hearing without him." "[S]ection 113-4(e) unambiguously requires the trial court to admonish a defendant in open court." *Phillips*, 242 Ill. 2d at 199, 950 N.E.2d at 1132. We find the trial court sufficiently complied with the section 113-4(e) admonition requirement.

¶ 37 C. Excessive-Sentence Claim

¶ 38 Defendant argues his 12-year-extended-term sentence was excessive. Specifically, defendant contends the trial court erred in imposing a "near maximum" sentence where it was disproportionate to defendant's level of culpability and the circumstances of the offense.

¶ 39 The State argues defendant has forfeited his excessive-sentence claim because defendant did not file a postsentencing motion.

¶ 40 Defendant concedes he failed to preserve his claimed error in a postsentencing motion but contends his failure should be excused because he was absent from sentencing and thus was not admonished pursuant to Illinois Supreme Court Rule 605(a)(3) (eff. Oct. 1, 2001) regarding the requirement of filing a motion to reconsider sentence.

¶ 41 In *People v. Woolridge*, 292 Ill. App. 3d 788, 792, 686 N.E.2d 386, 388-89 (1997), this court held the Rule 605 admonishments must be given at the time of imposing the sentence and "defendant's failure to appear at the sentencing hearing constituted waiver of his right to be personally informed of his appeal rights." Further, "[a] defendant who does not appear for sentencing and is therefore not present to be advised by the court cannot claim error when the court declines to engage in the ineffective ritual of advising an empty chair." *Woolridge*, 292 Ill.

App. 3d at 791, 686 N.E.2d at 388. A "defendant's failure to appear at the sentencing hearing constituted waiver of his right to be personally informed of his appeal rights as required by Rule 605(b)." *Woolridge*, 292 Ill. App. 3d at 792, 686 N.E.2d at 388-89.

¶ 42 As previously stated above, the trial court in this case sufficiently admonished defendant he would be sentenced *in absentia* if he failed to appear at sentencing. Defendant failed to appear at sentencing. As a result, defendant effectively waived his right to be properly admonished as to his appeal rights. Defendant's failure to appear at sentencing as directed cost him the benefit of the Rule 605 admonitions the trial court would have provided had he appeared. As a result, defendant's ability to preserve any errors relating to his sentence was lost 30 days after the sentence was imposed. See *People v. Reed*, 177 Ill. 2d 389, 394, 686 N.E.2d 584, 586 (1997) (sentencing issues must be raised in the trial court within 30 days following the imposition of sentence in order to preserve those issues for appellate review).

¶ 43 III. CONCLUSION

¶ 44 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 45 Affirmed.