

NOTICE
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2012 IL App (4th) 100714-U

Filed 2/3/12

NO. 4-10-0714

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Petitioner-Appellee,)	Circuit Court of
v.)	Livingston County
ROBERT G. SPISAK, JR.,)	No. 09CF92
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court rejected defendant's argument that the State's evidence was insufficient to convict him of two burglary charges but vacated the trial court's imposition of an appointed-counsel fee and remanded with directions that the court conduct a hearing to determine defendant's ability to pay that fee.
- ¶ 2 Following a bench trial, the trial court convicted defendant, Robert G. Spisak, Jr., of two counts of burglary (720 ILCS 5/19-1(a) (West 2008)). The court later sentenced defendant to four years in prison on each count, to be served concurrently, and imposed, in part, a \$350 appointed-counsel fee.
- ¶ 3 Defendant appeals, arguing that (1) the State failed to prove him guilty beyond a reasonable doubt of either burglary count and (2) the trial court erred by imposing an appointed-counsel fee without conducting a hearing on his financial ability to pay that fee.
- ¶ 4 Because we accept the State's concession with regard to defendant's appointed-

counsel fee, we affirm defendant's conviction, vacate the imposition of an appointed-counsel fee, and remand with directions.

¶ 5

I. BACKGROUND

¶ 6 In March 2009, the State charged defendant with two counts of burglary, alleging that in May 2008, defendant knowingly, and without authority, entered Casey's General Store (count I) and Art's Food Center (count II), intending to commit a theft. At a bench trial, which began in December 2009, the parties presented the following evidence.

¶ 7 On May 23, 2008, at about 2:20 a.m., Livingston County Deputy Doug Bunting responded to a police dispatch of a burglar alarm at Casey's. Bunting observed that the bottom half of the store's glass entrance was shattered and that the resulting opening was large enough to permit a person to enter. Bunting entered Casey's and noticed (1) a brick located about 25 feet away from the front entrance, (2) the glass door to a cooler had been left open, (3) liquor bottles had been disturbed, and (4) a carton of cigarettes on the floor behind the cash register. Bunting exited Casey's, called the store's manager, and waited for a detective to arrive.

¶ 8 At 3:42 a.m., Bunting responded to another dispatch regarding a disturbance at Art's—which was located "several blocks" away from Casey's. After arriving at Art's, Bunting observed that someone had attempted, unsuccessfully, to shatter the store's glass entrance with a piece of concrete. Bunting called the store's representative and waited for that person to arrive. At approximately 4:30 a.m., Bunting drove to Casey's, but 30 minutes later, he followed Detective Earl Dutko back to Art's to reevaluate the scene. Bunting noticed that the glass entrance to Art's had since been shattered, which left an opening large enough to permit a person to enter a small entryway leading to an interior glass entrance. Bunting observed that someone

had attempted, unsuccessfully, to shatter the glass on the interior entrance.

¶ 9 Dutko informed Bunting that as he entered Art's parking lot, he observed someone running away. Bunting and Dutko separated and attempted to locate the fleeing suspect. Bunting later emerged from a side street and saw a male, whose stature and clothing matched a surveillance video recording of the person who had burglarized Casey's, which Bunting had viewed prior to returning to Art's. Bunting noted that the suspect had a slender build, was approximately five feet, nine inches tall, and wore a gray "hoodie" and gray shorts. Bunting ordered the suspect to stop, but he successfully eluded Bunting's attempt to apprehend him.

¶ 10 Dutko testified that although he was initially called to respond to the burglary at Casey's, he heard the subsequent dispatch and proceeded to Art's. Upon arriving, Dutko noted that someone had thrown concrete "chunks" at Art's glass entrance but the resulting opening was too small to permit someone to enter the store. Dutko left Art's and drove to Casey's. While at Casey's, Dutko viewed a video recording of the burglary, which showed that the suspect (1) was wearing a grey hooded sweatshirt with a dark colored shirt underneath, white hat, and "cargo shorts" and (2) stole a carton of "Newport" cigarettes and a bottle of whiskey from the store. After Dutko finished his initial investigation at Casey's, he returned to Art's to investigate further.

¶ 11 As Dutko approached Art's, he noticed a man wearing the same clothing depicted in the Casey's surveillance video walking away from the front entrance. Dutko told Bunting—who had just arrived—to proceed around to the back of Art's in a different direction, but they both lost sight of the suspect. After returning to the scene, Dutko noted that the damage to the exterior entrance of Art's was more extensive than he had earlier observed. Dutko described Art's exterior entrance as two "double doors" with one of the "doors" being a full-sized glass window.

Dutko stated that the exterior window had since been shattered, which left an opening large enough to permit a person into Art's entryway. Dutko surmised, based on the concrete in the entryway, that after the suspect entered through the exterior entrance, he continued to hurl concrete in an unsuccessful attempt to create an opening large enough to enter Art's through the interior entrance. Dutko's investigation recovered a drop of blood that was located midway up the metal frame in between the window and the door of the exterior entrance.

¶ 12 That same morning, Dutko interviewed various people, which led him to question defendant, whom he later found that afternoon walking down an alley. Upon searching defendant, Dutko seized a pack of Newport cigarettes. Because defendant was not old enough to buy cigarettes, Dutko asked defendant how he came to possess them. Dutko testified that defendant told him that Carlos Mauricio, defendant's friend, had bought the cigarettes for him.

¶ 13 Casey's store manager, Becky Schlabowski, confirmed that Casey's had a video surveillance system that recorded the burglary from four different vantage points, which included three different angles of the cash register and the liquor section. Schlabowski described that the recording showed the burglar entering Casey's on two separate occasions. The burglar initially stole a carton of Newport cigarettes and, shortly thereafter, returned and stole a bottle of whiskey. Schlabowski confirmed further that the cigarettes police recovered from defendant contained the same tax stamp numbers and coupon expiration date as a shipment Casey's had recently received. (The surveillance video was played for the trial court.)

¶ 14 Forensic testing confirmed to a reasonable degree of medical certainty (1 in 130 trillion), that the deoxyribonucleic acid (DNA) profile of blood recovered at Art's matched defendant's DNA profile.

¶ 15 Mauricio testified that he had not purchased cigarettes for defendant in May 2008.

¶ 16 Defendant testified that sometime after 7 a.m. on May 23, 2008, he threw "a couple of bricks at the window" of Art's because he was drunk, but denied that he intended to enter the store. Defendant also denied being near Casey's that morning. Defendant testified further that although he gave Mauricio money to purchase cigarettes for him, Mauricio's girlfriend bought the cigarettes police later seized from him.

¶ 17 On this evidence, the trial court convicted defendant on both burglary counts. Following a June 2010 hearing, the court (1) sentenced defendant to four years in prison on each burglary count, to be served concurrently, and (2) imposed a \$350 appointed-counsel fee.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 A. Sufficiency of the Evidence

¶ 21 1. *The Offense of Burglary*

¶ 22 Section 19-1(a) of the Criminal Code of 1961 provides, in pertinent part, as follows:

"A person commits burglary when without authority he knowingly enters or without authority remains within a building *** or any part thereof, with intent to commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2008).

¶ 23 2. *The Standard of Review*

¶ 24 In *People v. Burney*, 2011 Ill App (4th) 100343 ¶¶ 24-25, this court outlined the following standard for reviewing claims challenging the sufficiency of the evidence:

"When reviewing a challenge to the sufficiency of the evidence in a criminal case, the relevant inquiry is whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] This standard of review applies when reviewing the sufficiency of evidence in all criminal cases, including cases based on direct or circumstantial evidence. [Citation.] Circumstantial evidence alone is sufficient to sustain a conviction where it satisfies proof beyond a reasonable doubt of the elements of the crime charged. [Citation.]

The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. [Citation.] [A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable[,] or unsatisfactory as to create a reasonable doubt of the defendant's guilt." (Internal quotations omitted.)

¶ 25

3. Defendant's Insufficient-Evidence Claim

¶ 26

Defendant argues that the State failed to prove him guilty beyond a reasonable doubt of either burglary count. Specifically, defendant contends that the State's evidence failed to establish beyond a reasonable doubt that he entered Art's or was the person depicted in the

Casey's surveillance video recording. We disagree.

¶ 27 In this case, the direct evidence presented by the State showed that defendant was present at Art's on the morning of May 23, 2008, based on the recovery of defendant's DNA from the frame of Art's exterior entrance. Defendant also testified that he vandalized Art's that same morning by throwing bricks through the exterior entrance. In addition, the circumstantial evidence presented by the State allowed the trial court to reasonably infer that after defendant shattered the exterior glass, he continued throwing concrete at the interior glass door from the entryway located just past the exterior entrance.

¶ 28 We find defendant's claim that he did not cross the threshold of Art's exterior entrance into the store's entryway unpersuasive. Defendant's account would *require* the trial court—as the finder of fact—to infer that after defendant vandalized Art's exterior entrance, he left and between 4:30 a.m. and 5 a.m., the half hour that Bunting left Art's and later returned with Dutko, a second, unidentified person happened upon the initial damage and unsuccessfully attempted to shatter the interior glass entrance.

¶ 29 We similarly reject defendant's contention that the State's evidence was insufficient to find him guilty of the burglary of Casey's. In this regard, the overwhelming evidence of defendant's guilt showed that (1) defendant possessed cigarettes that had been recently delivered to Casey's; (2) Mauricio contradicted defendant's initial explanation to police regarding how he acquired the cigarettes; (3) Bunting and Dutko both identified the stature and clothing the suspect was wearing at the time they both arrived at Art's as consistent with that of the suspect videotaped at Casey's; (4) DNA evidence places defendant at Art's during the morning of May 23, 2008, when both burglaries occurred; (5) the method and manner of the

burglaries were consistent with each other and occurred within the same general time frame; and (6) defendant admitted that he was present at Art's and vandalized its exterior entrance.

¶ 30 Viewing this evidence in the light most favorable to the prosecution, we conclude that the trial court—as a rational trier of fact—could have found the essential elements of the burglary counts charged by the State beyond a reasonable doubt. Thus, we reject defendant's argument to the contrary.

¶ 31 B. Defendant's Claim Regarding the Imposition of an Appointed-Counsel Fee

¶ 32 Defendant next argues that the trial court erred by imposing an appointed-counsel fee without conducting a hearing on his financial ability to pay that fee. The State concedes, urging this court to vacate the \$350 fee imposed by the court and remand the matter so that the court can conduct the appropriate hearing. Because section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2008)) requires that the court hold a hearing on defendant's ability to pay the fee prior to imposing it, we accept the State's concession. See *People v. Carreon*, 2011 Ill App (2nd) 100391, ¶ 11 (vacating the trial court's imposition of the fee and remanding with directions to conduct the appropriate hearing in accordance with section 113-3.1(a) of the Code).

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm defendant's convictions, vacate the \$350 appointed-counsel fee, and remand for a hearing on the defendant's ability to pay an appointed-counsel fee. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 35 Affirmed in part and vacated in part; cause remanded with directions.