

No. 1-11-0077

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County, Illinois.
Plaintiff-Appellee,)	
)	
v.)	No. 09 CR 15038
)	
STEVEN GARCIA,)	
)	Honorable Jorge Luis Alonso,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Harris, P.J., and Connors, J., concurred in the judgment.

ORDER

- ¶ 1 *HELD:* Where sentencing court noted an off-the-record discussion with jurors following trial regarding a mistrial on a second charge of residential burglary as support for considering that incident in aggravation, the court did not err where it considered all evidence in aggravation and mitigation and imposed a sentence within the statutory guidelines.
- ¶ 2 *HELD:* Where defendant is convicted of a Class 1 felony but subject to sentence enhancement provisions based on his prior convictions, the trial court properly sentenced defendant as a Class X offender and entered a three-year Mandatory Supervised Release term.
- ¶ 3 *HELD:* Where defendant elicits testimony from investigating police officer regarding his

summary investigation report to impeach occurrence witness by omission, defendant implied the witness's testimony was recently fabricated and it was proper for State to introduce on redirect a prior consistent statement from a subsequent police report to rehabilitate occurrence witness.

¶ 4 Following a jury trial, defendant, Steven Garcia, was found guilty of one of two counts of residential burglary (720 ILCS 5/19-3(a) (West 2010)) related to incidents on January 22, 2008, and February 6, 2008. Defendant filed a motion for a new trial alleging the trial court erred in granting miscellaneous motions and that the verdict was against the manifest weight of the evidence. The trial court entered a sentence of 20 years' imprisonment with a term of 3 years' mandatory supervised release (MSR). Defendant filed a motion to reconsider his sentence as excessive and asserting the trial court considered improper factors in aggravation. That motion was denied and this appeal followed.

¶ 5 On appeal, defendant argues that the trial court deprived him of a fair sentencing hearing by considering in aggravation off-the-record conversations between the trial court and the jury following the trial. Defendant also argues that he was improperly sentenced to three years' MSR as a Class X felon when the underlying offense is classified as a Class 1 felony. Finally, defendant contends that he suffered ineffective assistance of trial counsel for counsel's failure to object to the State's introduction of a prior consistent statement to rehabilitate the testimony of its key eyewitness. For the following reasons, we affirm the judgment of the trial court.

¶ 6 I. BACKGROUND

¶ 7 Defendant was charged with two counts of residential burglary. The two counts were related to two separate incidents on January 22, 2008, and February 6, 2008, at the same address, 2022 West Division Street, Chicago, Illinois. The counts were joined, over defendant's

objection, and defendant was tried before a jury.

¶ 8 At trial, the State presented the testimony of Matthew Fulton. Fulton testified that he lived in a first floor apartment in the rear of the building at 2022 West Division Street, Chicago, Illinois. After grocery shopping on January 22, 2008, Fulton arrived home from work around 2:00 p.m. to find a man standing inside his apartment. The man looked Fulton in the eye and said "Hey, what's up?" Fulton stated that he did not know the man but thought he might be an exterminator and responded "Hey." When Fulton went to put his groceries down, the man walked out the front door.

¶ 9 Fulton then looked around his apartment and saw that all of the electronic equipment and some other valuables from the apartment were lined up and stacked in the family room. Fulton stated that the items had not been stacked up in that area when he left for work that morning. He testified that after seeing the items, he heard a noise in the kitchen area. When he investigated, he saw that the kitchen window was open and noted that it was not open when he left, nor would it have been open because it was cold outside. Fulton saw a man, who he identified as defendant, outside holding his hands out and saying "Quick, quick, pass it. Come on. Come on." Fulton ran out the back door and chased defendant down the alley for 100 yards until defendant got into a gold minivan, which drove away.

¶ 10 Fulton testified that while he noticed the minivan had a temporary license plate, he could not see the number. However, he stated that it was daylight and his view of defendant was unobstructed. When he returned to his apartment, Fulton called the police. He then called his landlord to inform him that the lock on the kitchen window had been broken.

¶ 11 The police came to the apartment shortly thereafter. Fulton was interviewed and a police officer completed a report while another officer collected fingerprint lifts from within the

apartment including from the electronic equipment. That evening, when Fulton and his roommate put the electronic equipment back in place, he noticed that some of his credit cards were missing. He canceled the credit cards but never informed the police that they were missing.

¶ 12 Fulton also testified that on February 6, 2008, he was at home around 1:15 p.m. because it was his day off from work. He was in his bedroom at this time and heard a noise in the family room of the apartment. Fulton went into the family room and looked out the window to see two men turn away and walk away from the building. He returned to his bedroom to call the police and his landlord. While talking with the landlord, Fulton again heard a noise from the family room area.

¶ 13 Fulton stated that he went into the family room again to see that the window was open and saw defendant, whom he recognized from the January 22, 2008, incident, attempt to pull himself inside through the window. Fulton yelled "Hey!" and "I'm home!" to no effect. When he yelled again, he saw defendant fall backward into a second person and watched the two men walk quickly away from the building. He looked outside and saw the same minivan as the earlier incident, but this time he was able to see and write down the temporary license plate number. The police again came to Fulton's apartment, interviewed Fulton, collected more fingerprint lifts, and completed another police report.

¶ 14 On March 23, 2008, a police officer returned to Fulton's apartment to show him a photo array. The police officer informed Fulton that the offender may or may not be in the photo array and indicated to Fulton that if he was uncertain, he did not have to identify any photograph as that of a suspect. Fulton stated that defendant's picture was in the photo array. Fulton told the officer that he recognized defendant as the man who was outside during the first incident and as the man trying to enter through the window in the second incident.

¶ 15 Fulton testified that he did not hear from the police again until July 24, 2009, when he received a request to go to the police station to view a lineup. Fulton met Detective Sofrenovic at the station and viewed a lineup. Fulton recognized defendant in the lineup and pointed him out to the detective. Fulton looked through another photo array, but was unable to identify the second man involved in the two incidents.

¶ 16 Detective Milorad Sofrenovic of the Chicago police department testified that on January 26, 2008, he was assigned to investigate the January 22, 2008, residential burglary at 2022 West Division Street, Chicago, Illinois. Sofrenovic conducted a telephone interview of Fulton and prepared a "case supplementary report" dated January 30, 2008. On February 9, 2008, Sofrenovic was assigned to investigate the February 6, 2008, burglary and he again interviewed Fulton. Sofrenovic was given the temporary license plate number to the vehicle involved in the incident and identified defendant as the owner.

¶ 17 On March 23, 2008, Sofrenovic went to Fulton's apartment to show him a photo array that included a picture of defendant. Sofrenovic testified that he informed Fulton that defendant may not be in the photo array and that Fulton was not required to make an identification. Fulton identified defendant as involved in both incidents.

¶ 18 Sofrenovic testified that, with respect to the January 22, 2008, incident Fulton told him that he saw defendant standing outside his window and reaching his hands out saying "pass it down, pass it down." When he saw Fulton, defendant "freaked and fled." Fulton told Sofrenovic that on February 6, 2008, he saw defendant pushing himself through the window of the apartment and that part of his body had crossed the threshold of the window frame. Sofrenovic testified that Fulton stated that when defendant saw him, defendant "kind of like freaked out again and jumped back, and there was another person and they both ran away."

¶ 19 Sofrenovic testified that on July 24, 2009, defendant was arrested and placed in a lineup. Sofrenovic called Fulton and arranged for him to view the lineup. That night, Fulton viewed the lineup and positively identified defendant as the man he had seen in both incidents.

¶ 20 On cross-examination, Sofrenovic was questioned concerning his conversations with Fulton and his case supplementary report. Sofrenovic was unable to recall exactly what questions he asked and what answers Fulton provided. He admitted that his report did not indicate that Fulton reported that defendant said "Quick, quick, pass it down" or that Fulton chased the men down the alley. Sofrenovic offered the explanation that the report was a summary and if Fulton told him that the man outside said pass it down, he "might have put it down. I might not have."

¶ 21 On redirect examination, the State asked Sofrenovic if he had prepared a number of reports related to the two burglaries. Sofrenovic indicated that he did produce different reports. The State presented a supplemental report prepared by Sofrenovic that quoted Fulton as saying defendant stated "pass it down" to an unknown offender in the apartment. Sofrenovic testified on recross that this report was prepared in March 2010.

¶ 22 After the State rested, the trial court denied defendant's motion for a directed verdict. Defendant presented the testimony of police officer William Labern. Labern testified that he investigated the scene and interviewed Fulton on February 6, 2008. Labern indicated that Fulton stated the window had been pried open only a few inches. Labern admitted that the report did not include reference to Fulton stating that he saw defendant's hands inside the window or that the person was pulling himself inside the window.

¶ 23 The parties stipulated to the physical evidence gathered from the crime scene including latent fingerprints that matched those of an Alex Garcia. The jury found defendant guilty of residential burglary related to the January 22, 2008, incident. However, the jury was unable to reach a unanimous verdict on the February 6, 2008, residential burglary count and the court declared a mistrial as to that count. Defendant's amended posttrial motion was denied and the trial court held a sentencing hearing.

¶ 24 Following a hearing in aggravation and mitigation, defendant was sentenced. Although he committed a Class 1 felony, based on his criminal history, pursuant to the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2010), defendant was sentenced as a Class X offender with a sentence range of 6 to 30 years and an attendant 3-year MSR term. In imposing the sentence, the trial court found the case of the February 6, 2008, burglary to be "appropriate and important information and evidence in aggravation." The trial court continued to explain this decision, stating:

"In my conversations with the jury, which are not of record, they were also convinced that it was Steven Garcia. This again is not on the record. Their concern was a factual one. They were concerned about the angle of the complaining witness's observation of Mr. Garcia and based upon what he professed to be his head-on look at Mr. Garcia, where he couldn't testify. He testified very credibly and honestly about not being able to say whether Mr. Garcia's head had crossed the threshold of the window. The testimony the State proceeded on was, therefore, that his hands were inside the window.

And the jury in exercising the standard beyond a reasonable doubt decided

if he couldn't be sure about the man's head coming in, maybe he couldn't be sure about his fingers. So they too were convinced that it was Steven Garcia but based upon that factual hang up they could not reach a decision in that case.

So again there is nothing about their deliberation that would lead me to find that it is inappropriate to consider that case in aggravation. And I am considering it in aggravation."

¶ 25 The trial court proceeded to discuss the factors in mitigation and aggravation including the presentence investigation report, particularly defendant's long criminal history, and imposed a sentence of 20 years' imprisonment with an MSR term of 3 years. Defendant filed a motion for a new trial and an amended motion for a new trial as well as a motion to reconsider sentence. The trial court denied the motions. With respect to the motion to reconsider sentence, the court noted that the sentence was significant, but was only two years over the midpoint of the statutory range and was supported by defendant's extensive criminal history. This appeal followed.

¶ 26

II. ANALYSIS

¶ 27

A. Sentencing Hearing

¶ 28 Defendant contends that this court should vacate his sentence and remand for resentencing. He argues that the trial court relied on improper aggravating factors in sentencing him by considering his discussions with the jurors concerning the resulting mistrial on one of the two counts of residential burglary. Defendant concedes that trial counsel failed to object to the court's challenged actions or raise these claims in his motion to reconsider sentence, therefore, he forfeited this argument. He asserts that this court may nonetheless review his claims under the plain-error doctrine or based on ineffective assistance of counsel for counsel's failure to object to

the trial court's statement.

¶ 29 To preserve a claim of sentencing error for appeal, both a contemporaneous objection and a written postsentencing motion raising the issue are required. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). A reviewing court may consider unpreserved error in sentencing under the plain-error doctrine when either (1) the evidence at the sentencing hearing was closely balanced or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *Id.* at 545. The defendant has the burden of persuasion on both of these issues and the failure to meet that burden results in forfeiture of the argument. *Id.*

¶ 30 The first step in conducting plain-error review is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). For an appellate court to remand for resentencing, the defendant must show that the trial court considered an improper factor during sentencing and that the court relied on that improper factor when imposing its sentence. *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007). Generally, a reviewing court may only disturb a sentence that falls within the statutory range for the offense of which the defendant has been convicted if the trial court has abused its discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). The State asserts that this court has held that the abuse of discretion standard applies in cases such as this because the trial court is in the best position to determine the circumstances of the case and weigh the credibility of the witnesses. *People v. Burdine*, 362 Ill. App. 3d 19, 26 (2005).

¶ 31 However, defendant notes that this court applies a *de novo* standard of review to the question of whether the sentencing court relied on evidence outside of the record as a question of law. *People v. Dameron*, 1986 Ill. 2d 156, 171 (2001). Thus, we must consider *de novo* whether

the trial court considered an improper factor. Then, we may consider the effect of the allegedly improper factor on the court's ultimate sentencing decision was so egregious as to deny defendant a fair sentencing hearing.

¶ 32 Defendant argues that the trial court's *ex parte* conversation with the jury was in error because the jury could have been misled about the significance of that discussion as it occurred after the verdict was entered, but before sentencing. *Wolfe v. Menard, Inc.*, 364 Ill. App. 3d 338, 358 (2006). Defendant asserts that *People v. Mote*, 255 Ill. App. 3d 757 (1994), where the trial court's private interview with the victim and her parents outside of the presence of the defendant and counsel prior to sentencing was found improper, supports reversal. He also contends that *Dameron* is instructive because the judge's error deprived him of his right to due process. In *Dameron*, the trial court conducted its own research and investigation into prisons and social issues and relied extensively on that research in imposing the death penalty. *Dameron*, 196 Ill. 2d at 171-74.

¶ 33 Unlike these cases, in the instant matter there was no influence on the jury's decision-making process and there was not undue reliance on improper factors. As noted above, the trial court is granted broad discretion in considering factors in imposing a sentence. Evidence of criminal conduct can be considered when imposing a sentence even if it involves an acquittal for a charge. *People v. Jackson*, 149 Ill. 2d 540, 549-50 (1992). Where the trier of fact may not find all elements proven beyond a reasonable doubt, the sentencing court is entitled to take those actions into account in sentencing when relevant. *People v. Deleon*, 227 Ill. 2d 322, 340 (2008).

¶ 34 In this case, the trial court first noted that it had spoken to the jurors, who indicated that they believed defendant was involved but were unable to find him guilty of the February 6, 2008,

burglary beyond a reasonable doubt due to the uncertainty how far, if at all, defendant was in the window. The court added that it found that Fulton provided credible detailed and certain testimony that defendant was involved, but could not definitively say defendant was inside the apartment. Therefore, the court opined that the statements of the jury, when considered with Fulton's testimony, made it appropriate to consider the second incident in aggravation despite the mistrial on that count.

¶ 35 However, the trial court did not place too much reliance on this. In fact, the court followed those comments by detailing defendant's extensive and continuous criminal record as a juvenile and an adult. The court noted that defendant did not have a drug habit or addiction, but repeatedly committed armed robberies and burglaries because he wanted money. The court did not mention the February 6, 2008, incident again, but made clear that it considered defendant's recidivism strongly supported a sentence beyond the minimum. In mitigation, the court indicated that defendant's 9 year-old son and the desire for them to have a relationship were important factors, but defendant's repeated violations of the law outweighed those factors and it imposed a term of 20 years' imprisonment. This sentence falls within the statutory limits of 6 and 30 years. Accordingly, the trial court did not improperly rely on any *ex parte* communication, but considered the jury's comments to assure it was proper to consider the February 6, 2008, incident as one of the several aggravating factors. Therefore, the trial court did not err in considering this information in aggravation. Plain error review is not supported and defendant's first argument fails.

¶ 36 B. Mandatory Supervised Release Term

¶ 37 Defendant also asserts that the trial court erred in attaching a three-year MSR term as a

Class X offender. He contends that he committed a Class 1 offense that requires only a two-year term of MSR and the three-year term violates our supreme court's reasoning in *People v. Pullen*, 192 Ill. 2d 36 (2000). Defendant argues that this court must correct the mittimus to reflect the proper two years' MSR term. We disagree with defendant's application of *Pullen* and agree with the State that defendant was properly sentenced.

¶ 38 In *Pullen*, the defendant entered a negotiated plea to five counts of burglary, a Class 2 offense. Because of his prior convictions, the defendant was sentenced as a Class X offender to 15 years' imprisonment for each count, with the first two terms and the second three terms running concurrently. However, the grouped concurrent sentences were to run consecutively for an aggregate term of 30 years' imprisonment. This was two years' greater than the sum of maximum permissible extended-term sentences for two Class 2 offenses. *Id.* at 42-43.

¶ 39 There was no dispute that the defendant was to be sentenced as a Class X offender, but the issue was whether the maximum was the sum of the maximum permissible extended-term sentences for Class X or Class 2 offenses. The *Pullen* court concluded that the offense was explicitly defined as a Class 2 felony and the character and classification of those offenses remained, regardless of whether the defendant was subject to the sentence enhancement or not. Therefore, since the sentence imposed exceeded the maximum aggregate term for Class 2 felonies, the sentence was void. *Id.* at 46.

¶ 40 Unlike in *Pullen*, this case does not involve the character and classification of the convictions. This case is in line with the host of decisions of this court on this issue. See *People v. Davis*, 2012 IL App (5th) 100044, ¶44 citing *People v. Lampley*, 405 Ill. App. 3d 1, 14 (2010); *People v. Anderson*, 272 Ill. App. 3d 537 (1995); *People v. Smart*, 311 Ill. App. 3d 415 (2000);

People v. Watkins, 387 Ill. App. 3d 764 (2009); *People v. Lee*, 397 Ill. App. 3d 1067 (2010).

Each of these cases found that the plain language of the MSR statute indicates that the MSR term is part of the sentence. As such, this court has repeatedly rejected defendant's argument here that *Pullen* mandates a change in his MSR term. *Id.* Therefore, as in this case, when subject to the enhancement, the MSR term for Class X offenses attaches to the sentence imposed and the trial court properly imposed an MSR term of three years.

¶ 41 C. Ineffective Assistance of Counsel

¶ 42 Finally, defendant argues that he suffered ineffective assistance of trial counsel. A claim of ineffective assistance of counsel is reviewed under the standard announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Under *Strickland*, to determine whether there has been a violation of the defendant's sixth amendment right to effective assistance of counsel, the defendant must show: (1) that his counsel's "representation fell below an objective standard of reasonableness;" and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *People v. Shatner*, 174 Ill. 2d 133, 144 (1996). A strong presumption exists that counsel's conduct fell within the range of reasonable professional conduct. *Id.* at 689. If the second prong cannot be satisfied, a reviewing court need not consider the first prong. *Id.* at 697.

¶ 43 Defendant contends that trial counsel was ineffective for failing to object to the introduction of a prior consistent statement to rehabilitate the testimony of the State's main witness, Matthew Fulton. Specifically, defendant states that Fulton's testimony was impeached by his failure to tell the investigating officers that the offender outside his window for the

January 22, 2008, burglary said "Quick, quick, pass it.", or that he chased the burglars down the alleyway, as he testified to at trial. Defendant asserts that Fulton's testimony was impeached through Detective Sofrenovic's testimony. Sofrenovic admitted that his report did not include any reference to Fulton chasing the burglars or that the suspect outside the window said anything.

¶ 44 Defendant argues that trial counsel was ineffective when, on redirect examination of Detective Sofrenovic, he failed to object to the State's introduction of Sofrenovic's March 2010 police report. In that report, Sofrenovic indicated that Fulton told him the man outside said "Pass it down, pass it down." Defendant claims that introduction of this report was erroneous because it was a prior consistent statement with Fulton's impeached trial testimony. He contends that there was no charge of fabricated testimony or motive to lie to rebut with the admission of the report. Therefore, defendant concludes, trial counsel's failure to object to the introduction of this evidence improperly bolstered key testimony by Fulton, the only eyewitness to the crimes.

¶ 45 We agree with the State that the testimony was properly admitted and counsel cannot be considered ineffective for failing to object to the introduction of the March 2010 report during the redirect examination of Sofrenovic. Statements made prior to trial are generally inadmissible as proof of corroboration of trial testimony. *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005). However, subject to the requirements of relevance and materiality, "[i]t is well established that where a witness has been impeached by proof that he has made prior inconsistent statements, he may bring out all of the prior consistent statements to qualify or explain the inconsistency and rehabilitate the witness." *People v. Harris*, 123 Ill. 2d 113, 142 (1988). This exception applies where there has been a suggestion that the witness recently fabricated the testimony or had motive to lie. *Cuadrado*, 214 Ill. 2d at 90. Prior consistent statements may not be admitted

simply to bolster a witness's discredited testimony or rebut a charge of mistake, poor recollection, or inaccuracy. *People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010).

¶ 46 In this case, defense counsel questioned Detective Sofrenovic extensively concerning his interview of Fulton and the contents of his report dated January 30, 2008. Therefore, in redirect, the State questioned Sofrenovic regarding the March 2010 report to rebut the allegation that Fulton and Sofrenovic fabricated their testimony. Defendant argues on appeal that trial counsel simply impeached Fulton's credibility with his prior inconsistent statements to Sofrenovic and that no charge of recent fabrication or motive to lie was raised to allow rebuttal with the prior consistent statement.

¶ 47 Defendant argues that Fulton was impeached by omission and admitting the prior consistent statement from the March 2010 report was improper. Further, defendant contends that Fulton's statement was made right after the January 22, 2008, incident and the March 2010 report did not pre-date any motive to fabricate, and therefore could not have any rehabilitative effect. *Id.* at 642. In *McWhite*, this court found it improper for the State to introduce prior consistent statements of a testifying police officer from grand jury testimony to rehabilitate his impeachment by omission of details from a written report. *Id.* at 639-40. The court found this improper because defense counsel never asserted nor implied any charge of recent fabrication or motive to lie and the prior consistent statements did not pre-date the officer's report, and any motive to fabricate that would have existed at that time. *Id.* at 642. Likewise, in *People v. Smith*, 139 Ill. App. 3d 21, 33 (1985), also cited for support by defendant, reversible error was found because there was no charge of recent fabrication and no motive for fabrication could be gleaned from the testimony.

¶ 48 In this case, Fulton's testimony was impeached by omission through the testimony of Sofrenovic. The questioning of Sofrenovic clearly evidences a strategy of developing an implied inference of fabrication. This conclusion is supported by trial counsel's closing argument, where counsel stated that the information that was missing in the report contained the essential facts Fulton should have reported. Counsel repeatedly asserted that the witnesses were not reliable and they conspired to fabricate additional testimony in order to convict defendant. This, unlike *McWhite* and *Smith*, is a proper scenario in which to apply the exception to the prior consistent statement rule. Accordingly, because the State's introduction of the prior consistent statement was proper, trial counsel was not ineffective for failing to object to this line of questioning.

¶ 49

III. CONCLUSION

¶ 50 For the foregoing reasons, we affirm the decision of the trial court.

¶ 51 Affirmed.