

No. 1-11-2703

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. 10 CR 19021
)	
WOODSON LONG,)	Honorable
)	Jorge Luis Alonso,
Defendant-Appellant.)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's convictions for burglary and possession of burglary tools are affirmed over defendant's contention that he was denied effective assistance of counsel. Defendant's extended term sentence for possession of burglary tools is improper where the burglary and possession of burglary tools were not unrelated courses of conduct. Defendant was properly subject to the three-year term of mandatory supervised release, but we modify the fines and fees order.

¶ 2 Following a bench trial, defendant Woodson Long was convicted of burglary and possession of burglary tools. He was sentenced, as a Class X offender, to eight years' imprisonment for burglary, and an extended term of six years' imprisonment for possession of burglary tools, to be served concurrently. In addition, defendant received a three-year term of mandatory supervised release (MSR). On appeal, defendant contends that he was denied

effective assistance of counsel because counsel conceded his guilt to burglary by arguing that he entered a residence with the intent to purchase cocaine. Defendant also contends that the trial court erred in sentencing him to an extended term on the less serious count of possession of burglary tools because extended term sentences may only be imposed on the most serious felony. Defendant further asserts that his MSR term should be reduced from three to two years, and challenges certain pecuniary penalties imposed by the court.

¶ 3 The record shows that on October 12, 2010, police observed defendant carrying several items, including a bag and a bundle of metal piping and tubing, out of an apartment building at 1406 South Homan Avenue in Chicago. After a short chase, during which defendant dropped a bag, piping, and tubing, defendant was apprehended by police at 1439 South Trumbull Avenue where he was found lying on the porch with a bag of burglary tools next to him and copper pipe fittings on his person.

¶ 4 During opening statements, defense counsel argued that defendant was a drug addict and went to the address in question to buy drugs, but not to commit a theft. Counsel thus maintained that defendant did not have the requisite intent to be found guilty of burglary.

¶ 5 At trial, Officer Pratscher testified that at about 2 a.m. on October 12, 2010, he and his partner Officer Ronenberg were dispatched to 1406 South Homan Avenue. When they arrived, Pratscher observed that the apartment building had three levels with four apartments on each level. The officers entered the building and Pratscher saw defendant walking out of the building with several items, including a black bag and a big bundle of metal piping and tubing. Pratscher chased defendant, and, while defendant was running away, he dropped a bag, piping, tubing, faucet fixtures, and fittings which were later recovered by Ronenberg. Defendant ran into a yard at 1439 South Trumbull Avenue where Pratscher found him lying on the porch sweating and breathing heavily. Pratscher arrested defendant and recovered a bag containing a pry bar, wire

cutters, tin snips, and screwdrivers, which was laying next to defendant. Pratscher also recovered a bag of copper pipe fittings on defendant after performing a custodial search of him. Pratscher returned to the apartment building and observed that unit 302, which was vacant and being rehabbed, was pried open. When he looked inside, Pratscher observed that the baseboards to the heaters were dismantled, copper piping in the kitchen and bathroom sinks was missing, and fixtures were missing.

¶ 6 The parties stipulated that Lieon Williams, an agent for the victim HJ Russell & Company (HJ), would testify that HJ owned the apartment in question and that the last time it was inspected prior to October 12, 2010, it was locked, being rehabbed, and there was no damage to the door. He inspected the apartment after 2 a.m. on October 12, and observed that the baseboard heaters had been dismantled, and piping and plumbing fixtures had been removed from the kitchen and bathroom. Williams would further testify that he was shown the recovered piping, metal, and plumbing fixtures, and that he identified that property as belonging to apartment 302.

¶ 7 Defendant, who had experience rehabbing apartments and admitted he was a drug addict, testified that on the date in question he was on the back porch of his grandfather's residence at 1439 South Trumbull Avenue when he received a phone call from a drug dealer. Defendant walked over to 1406 Homan Avenue to buy drugs, entered the back entrance on the ground floor, and bought drugs from his contact. Defendant stated that he did not enter the building at 1406 South Homan Avenue to break-in or steal anything. Following the drug transaction, defendant noticed a bag on the floor. He waited for his contact to go upstairs, and then grabbed a black bag of copper pipes and a bundle of tubing and exited the building. As defendant exited, he noticed a police car and ran toward 1439 South Trumbull Avenue, discarding the items he was carrying and the drugs he just purchased. When he reached that address, he pretended to be asleep

because he did not want to get caught buying drugs. Shortly thereafter, the police arrested defendant. Defendant admitted that he took the rehab material in order to sell it and buy more drugs.

¶ 8 On cross-examination, defendant denied having a bag on the back porch of 1439 South Trumbull Avenue with him just before police arrived, and further denied that any of the items recovered on the back porch belonged to him. Defendant also stated that he only decided to run from police because he did not want to get caught with drugs in his possession.

¶ 9 In rebuttal, the parties stipulated that if Detective Rose was called to testify he would state that he met with defendant at the police station at about 5:49 a.m. on October 12, 2010. He would further testify that after reading defendant his rights, defendant waived them and stated that the tools recovered next to him at the time of his arrest belonged to him.

¶ 10 During closing arguments, defense counsel asserted that defendant had no intent to go inside the building in question and commit a theft. Instead, defense counsel maintained that defendant was a drug addict who went to the building to buy drugs. Counsel further argued that the burglary tools police found on the back porch laying next to defendant had no connection to the alleged burglary and were not found on defendant's person. In rebuttal, the State maintained that the burglary tools recovered next to defendant could have been used to remove the items in apartment 302.

¶ 11 Following closing arguments, the trial court found defendant guilty of burglary and possession of burglary tools. In doing so, the court stated that if it believed defendant's account of the events, it would be a defense to the burglary charge. However, the trial court indicated that it agreed with the State that defendant's account was "ridiculous" and that he lied. In contrast, the trial court found that Officer Pratscher testified credibly about the events in question, and the circumstantial evidence showed that the items defendant was carrying came from apartment 302.

The court concluded by stating that based on all the evidence, defendant went into the apartment with the intent to commit a theft therein, committed that theft, and that he was in possession of burglary tools.

¶ 12 At sentencing, the court stated, and the parties correctly agreed, that defendant's criminal background, which included eight felony convictions, made him a Class X offender. The court then sentenced defendant to eight years' imprisonment for burglary, a Class 2 felony, and an extended term of six years' imprisonment for possession of burglary tools, a Class 4 felony, to be served concurrently.

¶ 13 On appeal, defendant contends that he was denied effective assistance of counsel where counsel conceded his guilt to burglary. Defendant specifically maintains that counsel conceded his guilt by arguing during opening and closing statements, and eliciting testimony from him at trial, that defendant entered the building with the intent to buy and possess drugs, and such intent, in turn, negated any authority to enter.

¶ 14 The question of whether defense counsel provided ineffective assistance requires a bifurcated standard of review. *People v. Harris*, 389 Ill. App. 3d 107, 131 (2009). We defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but make a *de novo* assessment of the ultimate legal issue regarding whether counsel's actions support an ineffective assistance claim. *Harris*, 389 Ill. App. 3d at 131.

¶ 15 In order to establish ineffective assistance of counsel, defendant must allege facts which demonstrate that counsel's representation fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Prejudice is demonstrated where there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. The failure to satisfy either prong of the *Strickland* test precludes a

finding of ineffective assistance of counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000), citing *Strickland*, 466 U.S. at 697. In applying the two-part *Strickland* test, we reject defendant's argument, which relies on *United States v. Cronin*, 466 U.S. 648 (1984), that prejudice is presumed in this case because defense counsel failed to subject the prosecution's case to meaningful adversarial testing.

¶ 16 We initially observe that the evidence against defendant was overwhelming. After being dispatched to 1406 South Homan Avenue, Officer Pratscher saw defendant walking out of the apartment building carrying copper piping and tubing. Pratscher chased defendant, who dropped the items he was carrying, and found defendant lying on his grandfather's porch with a bag of burglary tools next to him and a bag of copper pipe fittings on his person. After arresting defendant, Pratscher returned to the apartment building and observed that unit 302 was pried open. When he looked inside, Pratscher saw that the baseboards to the heaters were dismantled, copper piping in the kitchen and bathroom sinks were missing, and fixtures were missing. The stipulated testimony of Lieon Williams showed that the recovered piping, metal, and plumbing fixtures belonged to apartment 302. Furthermore, defendant admitted that while he was at the building in question to buy drugs, he took a bag of copper piping located on the ground floor with the intent to sell the contents and buy more drugs with the proceeds.

¶ 17 The overwhelming evidence of defendant's guilt did not allow a truly viable defense for his actions. "A weak or insufficient defense does not indicate ineffectiveness of counsel in a case where a defendant has no defense." *People v. Ganus*, 148 Ill. 2d 466, 474 (1992). Under these circumstances, we disagree with defendant's present contention that counsel's attempt to argue that he did not go to the apartment building to commit a theft, but rather with the intent to commit a different felony, *i.e.*, the purchase and possession of a controlled substance, showed that he misunderstood the requirements of burglary. Rather, it appears that it was an outside

attempt to provide some justification or explanation for defendant's acts. More importantly, it is clear on this record that defendant was not prejudiced by counsel's decision to argue that defendant was present at the scene to buy drugs and not commit a theft, and thus defendant failed to establish a claim of ineffective assistance of trial counsel under *Strickland*.

¶ 18 In reaching this conclusion, we find defendant's reliance on *People v. Chandler*, 129 Ill. 2d 233 (1989), *People v. Baines*, 399 Ill. App. 3d 881 (2010), and *People v. Lemke*, 349 Ill. App. 3d 391 (2004), misplaced. In *Chandler*, 129 Ill. 2d at 246-49, defense counsel was ineffective where he made no attempt to refute the evidence that defendant was present at the scene of the murder, did not cross-examine several witnesses, failed to present any witnesses for the defense, and failed to call the defendant to testify despite the fact that counsel told the jury during opening statements he would testify. In *Baines*, 399 Ill. App. 3d at 899, defense counsel was ineffective where he impeached his own client and where the trial court frequently intervened at the jury trial to guide counsel through rudimentary trial procedures and correct counsel's mistakes. In *Lemke*, 349 Ill. App. 3d at 399, 402, defense counsel was ineffective where his failure to present the possibility of a conviction for involuntary manslaughter could only have been based on a misapprehension of the law, and his deficient performance prejudiced the defendant. Here, unlike *Chandler*, *Baines*, and *Lemke*, counsel cross-examined the State's witness, called defendant to testify, did not contradict defendant's testimony, and did not prejudice defendant with his strategy.

¶ 19 Defendant next contends that the trial court erred when it imposed an extended term sentence on his possession of burglary tools conviction because it was not the most serious class offense. The State responds that the extended term sentence was proper because the possession of burglary tools conviction was a separate course of conduct from the burglary. We agree with defendant.

¶ 20 Extended term sentences are authorized by section 5-8-2 of the Unified Code of Corrections (730 ILCS 5/5-8-2 (West 2010)). Our supreme court has held that the plain language of this statute limits the imposition of extended term sentences to only the most serious class of offenses. *People v. Jordan*, 103 Ill. 2d 192, 205-06 (1984). However, an exception to this rule applies when the extended term sentence is imposed "on separately charged, differing class offenses that arise from unrelated courses of conduct." *People v. Bell*, 196 Ill. 2d 343, 350 (2001), quoting *People v. Coleman*, 166 Ill. 2d 247, 257 (1995). To determine whether two offenses were part of unrelated courses of conduct, courts apply the "substantial change in the nature of the defendant's criminal objective" test. *Bell*, 196 Ill. 2d at 351.

¶ 21 The State argues that there was a substantial change in defendant's criminal objective "because the burglary tools found in defendant's possession could have been used by defendant to commit additional offenses unrelated to the instant burglary." However, as defendant points out in his reply brief, the State used the presence of these burglary tools to argue that defendant was guilty of burglary in this case. The State specifically argued during closing statements that:

"all of these burglary tools could be used to remove the items that were recovered [in the apartment]. Judge, that is what happened on October 12, 2010. The defendant, not anyone else, went into that apartment with his little rehabbing experience, knowing he could take those items and sell them quickly for drugs. He is the one who went in there and took those items. We would ask that you find him guilty of burglary as well as the possession of burglary tools."

¶ 22 Based on the above statements linking the burglary at issue to the possession of burglary tools, the State cannot now change course and argue that the burglary tools were part of an

unrelated course of conduct. Under the invited error doctrine, a party may not ask the trial court to proceed in a particular manner, and then contend on appeal that the suggested course of action was erroneous. *People v. Carter*, 208 Ill. 2d 309, 319 (2003); see also *People v. Rokita*, 316 Ill. App. 3d 292, 299 (2000).

¶ 23 Furthermore, the evidence at trial showed how closely related the burglary was to the possession of burglary tools charge. The police witnessed defendant exiting an apartment building and then immediately chased him. The incident lasted mere moments, and when defendant was apprehended, he was still breathing heavily and sweating with the burglary tools directly beside him. Therefore, there was a short time and distance between the commission of the burglary and the discovery of the burglary tools in defendant's possession, such that there was no substantial change in defendant's criminal objective.

¶ 24 As a remedy, defendant correctly requests that we reduce his sentence to the maximum non-extended term. When an extended term sentence is improper, but it is clear from the record that the trial court intended to impose the maximum available sentence, we may use our power under Supreme Court Rule 615(b)(4)(eff. Aug. 27, 1999), to reduce the sentence to the maximum non-extended term sentence. See *People v. Taylor*, 368 Ill. App. 3d 703, 709 (2006). Therefore, we vacate the extended term portion of defendant's sentence and reduce his sentence from six years to the maximum non-extended term for a Class 4 felony, three years. See 730 ILCS 5/5-4.5-45(a) (West 2010).

¶ 25 Defendant also maintains that the three-year term of MSR that attached to his Class X sentence is void and should be reduced to two years because he was convicted of a Class 2 offense. Although a void sentence can be challenged at any time, we review the sentence to assess whether it is actually void. *People v. Balle*, 379 Ill. App. 3d 146, 151 (2008). For the reasons that follow, we find that it is not.

¶ 26 Defendant does not dispute his status as a Class X offender (730 ILCS 5/5-4.5-95(b) (West 2010)), because he was previously convicted of eight felonies, including two Class 2 or greater class felonies.

¶ 27 A Class X felony warrants a three-year MSR term and a Class 2 felony requires a two-year MSR term. 730 ILCS 5/5-8-1(d) (West 2010). Defendant observes that the language in the Class X offender statute does not change the classification of his underlying Class 2 felony offense and, therefore, argues that the two-year MSR term for the Class 2 felony should apply. However, our court has reached the contrary conclusion and held that a defendant sentenced as a Class X offender is subject to the Class X three-year term of MSR. See, e.g., *People v. Brisco*, 2012 IL App (1st) 101612, ¶¶ 59-60; *People v. Lampley*, 2011 IL App (1st)090661-B, ¶¶ 47-49; *People v. Watkins*, 387 Ill. App. 3d 764, 767 (2009); *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000); *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1995).

¶ 28 Defendant takes issue with these holdings and cites to *People v. Pullen*, 192 Ill. 2d 36 (2000), for support. In that case, the supreme court held that defendant's maximum consecutive sentence is determined by the classification of the underlying felonies. *Pullen*, 192 Ill. 2d at 46. Reviewing courts that have considered the application of *Pullen* in similar situations have concluded, contrary to defendant's position, that a defendant sentenced as a Class X offender is subject to a three-year term of MSR. See *People v. Wade*, 2013 IL App (1st) 112547, ¶¶ 36-38; *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Lee*, 397 Ill. App. 3d 1067, 1073 (2010); and *People v. McKinney*, 399 Ill. App. 3d 77, 83 (2010).

¶ 29 We also reject defendant's argument based on statutory construction. Defendant observes that the legislature amended section 5-8-1(d)(2) of the Unified Code of Corrections (730 ILCS 5/5-8-1(d)(2) (West 2010)), which states that Class 1 and Class 2 felonies are subject to two-year terms of MSR, effective in 2009 to provide increased MSR terms for certain criminal sexual

offenses. Based on the amendment, defendant argues that he was subject to the normal two-year MSR term for his underlying Class 2 felony of burglary because the legislature could have, but did not, add similar language in the amendment to cover offenders who were being sentenced at a Class X level due to recidivism.

¶ 30 However, as the prior discussion explained, the legislature intended "to punish recidivist criminals more harshly than first-time offenders" under the Class X offender statute. *People v. Lee*, 397 Ill. App. 3d 1067, 1071 (2010). Moreover, as the State points out, this court has stated that "statutes that concern the same subject are governed by a single policy and one spirit, and the [legislature] intended the statutes to be consistent and harmonious." *Lee*, 397 Ill. App. 3d at 1070. Both the Class X offender statute and the general MSR statute deal with the same subject matter, *i.e.*, the imposition of a term of MSR. Both statutes provide for an increased MSR term where applicable. These provisions should be read to give effect to the clear legislative intent as established in the plain language of the statutes and to give them the harmonious effect represented by the legislature in punishing certain offenders more harshly.

¶ 31 We thus adhere to our prior decisions and find that defendant, who is a Class X offender, was properly subject to a three-year term of MSR. In so finding, we further note that defendant's argument that the doctrine of lenity requires that he be sentenced to the two-year MSR term has also been rejected by this court. See *People v. Allen*, 409 Ill. App. 3d 1058, 1078 (2011).

¶ 32 In addition, defendant contends, and the State agrees, that we must vacate the \$5 court system fee (55 ILCS 5/5-1101(a) (West 2010)), because he was not convicted of a vehicular violation and the plain language of the statute shows that the fee may be imposed only for violations of provisions that are not at issue here. See *People v. Williams*, 394 Ill. App. 3d 480, 483 (2009) (finding the court system fee applies only to vehicle offenses and vacating its imposition where the defendant was convicted of being an armed habitual offender). We agree.

¶ 33 Defendant finally contends, and the State agrees, that he spent time in custody before sentencing and 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 2010). Here, the fines imposed against defendant included a \$10 mental health court assessment, and a \$30 children's advocacy assessment. 55 ILCS 5/5-1101(d-5),(f-5) (West 2010). 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. Defendant served more than eight days in pre-sentencing custody, and thus his \$10 mental health court assessment, and the \$30 children's advocacy assessment, is offset against defendant's credit. Accordingly, pursuant to our power to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we direct the circuit court clerk to order the mittimus to reflect a total assessment of \$415, which includes the assessments not vacated or offset by the presentence credit.

¶ 34 For the foregoing reasons, we vacate the \$5 court system fee; find that defendant is entitled to a \$5 per-day custody credit to offset the \$10 mental health court assessment and \$30 children's advocacy assessment; correct defendant's mittimus to accurately reflect a total assessment of \$415; and affirm defendant's convictions for burglary and possession of burglary tools, but vacate the extended term portion of defendant's possession of burglary tools sentence and reduce that sentence to three years' imprisonment.

¶ 35 Affirmed in part; vacated in part; fines and fees order corrected.