

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).

2013 IL App (4th) 120420-U  
NO. 4-12-0420  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

FILED  
September 12, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
JUSTIN M. KOEHLER,	)	No. 11CF18
Defendant-Appellant.	)	
	)	Honorable
	)	Mark A. Drummond,
	)	Judge Presiding.

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JUSTICE TURNER delivered the judgment of the court.  
Presiding Justice Steigmann and Justice Harris concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The State's evidence was sufficient for a jury to find defendant committed the offense of residential burglary beyond a reasonable doubt.
- ¶ 2 The trial court did not err in sentencing defendant to 10 years' imprisonment.
- ¶ 3 At a July 2011 trial, a jury found defendant, Justin M. Koehler, guilty of residential burglary (720 ILCS 5/19-3(a) (West 2008)) and theft (720 ILCS 5/16-1(a)(4)(A) (West Supp. 2009)). In August 2011, the Adams County circuit court sentenced defendant to 10 years' imprisonment for residential burglary. In September 2011, defendant filed a *pro se* motion for the reduction of his sentence, and defense counsel filed a motion to reconsider defendant's sentence in March 2012. Defense counsel later filed a motion for a new trial, asserting the State failed to prove defendant guilty beyond a reasonable doubt. After a May 2012 hearing, the court

denied all of the pending motions.

¶ 4 Defendant appeals, alleging (1) the State failed to prove him guilty beyond a reasonable doubt of residential burglary and (2) the trial court erred in sentencing him by altering his sentencing range. We affirm.

¶ 5 I. BACKGROUND

¶ 6 On July 11, 2011, the State filed its third-amended information, alleging defendant committed the offenses of (1) residential burglary, in that he knowingly and without authority entered the dwelling place of Tammy Cassady with the intent to commit a theft therein; and (2) theft, in that he knowingly obtained control over Cassady's cellular telephone (cell phone), having a value not in excess of \$300. The theft charge noted defendant had a prior conviction for theft over \$300 (People v. Koehler, No. 10-CF-36 (Cir. Ct. Adams Co.)).

¶ 7 On July 12, 2011, the trial court commenced defendant's jury trial. A summary of the evidence follows. Cassady testified that, on November 20, 2010, she left her home between 4:45 p.m. and 4:50 p.m. to go to church. When she arrived home at 7:30 that evening, she noticed several things missing from her home, including her cell phone with the number ending in 4490. She was also missing several pieces of jewelry and her billfold. Cassady terminated her cell phone service to the stolen phone that evening. The next day, she put her 4490 cell phone number onto a new cell phone. On November 22, 2010, she began receiving text messages from phone numbers ending in 7508 and 3105. Cassady did not know those numbers and had never used the text feature on her cell phone. When Cassady later received her cell-phone bill, she noticed calls made from the missing cell phone from 5:03 p.m. to 8:22 p.m. on November 20, 2010. Cassady did not know defendant.

¶ 8 Andrew Howe was an employee of Symmetry Wireless, the company that subscribed the numbers ending in 7508 and 3105. Howe testified the Symmetry Wireless call log for 3105 showed calls from 4490 at 5:11 p.m., 5:16 p.m., and 8:23 p.m. on November 20, 2010. A text log for the same date showed a series of texts between 7508 and 4490 from 7:17 p.m. to 7:21 p.m.

¶ 9 Erica Johnson testified that, in November 2010, her cell phone number ended in 3105 and identified the call logs from Symmetry Wireless as being for her cell phone. She used to date defendant "off and on." They were not dating on November 20, 2010. Defendant communicated with Johnson through calls and texts using different telephone numbers because he did not have his own cell phone. On November 20, 2010, from 3:35 p.m. to 3:40 p.m., Johnson and defendant exchanged text messages. Defendant was using a number ending in 8893. At 3:47 p.m., defendant called Johnson from the same 8893 number. She recognized defendant's voice, and he was helping her get a ride. The call log for her cell phone indicated she received calls from 4490 (Cassady's number) at 5:11 p.m., 5:12 p.m., 5:16 p.m., and 8:23 p.m., but she did not recall talking to defendant. A little before 8 p.m., Johnson received text messages from the 4490 number. She believed the messages were coming from defendant, but the person denied being defendant.

¶ 10 Dakota Claus testified she had known defendant for about seven years. On November 20, 2010, her cell phone number ended in 7508. At around 7 p.m. on November 20, 2010, she was in her front yard when she saw defendant walk by her house. She and defendant talked, and defendant asked for her cell phone number. Claus gave defendant the 7508 number. Defendant called Claus around 7:19 p.m. from 4490 (Cassady's number). They also exchanged

texts around that time, and defendant used the 4490 number.

¶ 11 Quincy police officer Ryan Witt testified that, around 8:12 p.m. on November 20, 2010, he responded to Cassady's report of a residential burglary. No fingerprints were recovered from Cassady's home. On December 28, 2010, Officer Witt interviewed defendant. He asked defendant if he had possessed a cell phone with the number 4490. Defendant responded he was unsure or could not remember. After showing defendant the call and text logs for 3105 and 7508, defendant admitted possessing the cell phone with the number 4490. Defendant stated he had purchased the cell phone from someone and knew it was stolen when he purchased it. Defendant refused to say from whom he purchased the cell phone.

¶ 12 At the conclusion of the trial, the jury found defendant guilty of both charges. On August 30, 2011, the trial court sentenced defendant to 10 years' imprisonment for residential burglary to run consecutive to defendant's sentences in Adams County case Nos. 10-CF-36, 10-CF-71, and 10-CM-69. The court did not sentence defendant on the theft charge based on the one-act, one-crime rule. See *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 845 (1977). In sentencing defendant, the trial court stated the following:

"The one rule I've always followed is that I never go down in the amount of time. The last sentence was on burglary, and it was a period of five years. I will follow the State's lead and be sentencing only on the residential burglary, and the sentencing range available to me is up to—from 4 to 15 years.

So, sir, I'm doubling the amount of time you received the last time. I'm sentencing you to ten years in the Department of

Corrections."

¶ 13 Defendant filed a *pro se* motion for a reduction of his sentence, which the circuit clerk file-stamped September 30, 2011. The motion asserted defendant's sentence was excessive and "not in keeping with alternatives available to the court to assist the Defendant in his rehabilitation." In March 2012, defense counsel filed a motion to reconsider defendant's sentence. Defense counsel later filed a motion for a new trial, asserting the State failed to prove defendant guilty beyond a reasonable doubt. After a May 3, 2012, hearing, the trial court denied all of the pending motions.

¶ 14 According to his notarized "proof/certificate of service," defendant placed his motion for a reduction of his sentence in the institutional mail on September 11, 2011, and addressed it to the Adams County circuit court. The notarization on the document was dated September 20, 2011. The 30-day period for filing a postjudgment motion expired on September 29, 2011. Thus, we find defendant's postsentencing motion was timely filed. See *People v. Smith*, 2011 IL App (4th) 100430, ¶ 13, 960 N.E.2d 595 ("A court will consider an incarcerated defendant's postplea motion timely filed if the defendant placed it in the prison mail system within the 30-day period, regardless of the date on which the clerk's office received or file-stamped it."). As noted, the trial court denied that motion and all other pending motions on May 3, 2012. On May 7, 2012, defendant filed his timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009), and thus this court has jurisdiction under Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 15

## II. ANALYSIS

¶ 16

### A. Sufficiency of the Evidence

¶ 17 Defendant first asserts the State failed to prove him guilty beyond a reasonable doubt of residential burglary because the only evidence that connected defendant to the burglary was his recent possession of a stolen cell phone.

¶ 18 When presented with a challenge to the sufficiency of the evidence, a reviewing court's function is not to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). Rather, we consider " 'whether, after 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.' " (Emphasis in original.) *People v. Davison*, 233 Ill. 2d 30, 43, 906 N.E.2d 545, 553 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under that standard, a reviewing court must draw all reasonable inferences from the record in the prosecution's favor. *Davison*, 233 Ill. 2d at 43, 906 N.E.2d at 553. Further, we note a reviewing court will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Givens*, 237 Ill. 2d at 334, 934 N.E.2d at 484.

¶ 19 To convict defendant of the residential-burglary charge in this case, the State had to prove defendant knowingly and without authority entered Cassady's dwelling place with the intent to commit a theft therein. 720 ILCS 5/19-3(a) (West 2008). Defendant notes our supreme court's language in *People v. Housby*, 84 Ill. 2d 415, 423, 420 N.E.2d 151, 155 (1981), that found the defendant's possession of recently stolen property, standing alone, did not provide sufficient evidence to sustain a burglary conviction. Thus, he contends his conviction cannot stand because the State's evidence proved only his recent possession of stolen property. However, our supreme court later explained its *Housby* decision as follows:

"*Housby* and the United States Supreme Court cases on which it is based (*Sandstrom v. Montana* (1979), 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450; *County Court v. Allen* (1979), 442 U.S. 140, 60 L. Ed. 2d 777, 99 S. Ct. 2213), involved jury instructions which encouraged the jury to draw inferences. The *Housby* test applies only to instructions which advise a jury of inferences it may draw; it insures that the jury applies the reasonable-doubt test." *People v. Richardson*, 104 Ill. 2d 8, 11-12, 470 N.E.2d 1024, 1026 (1984).

Here, defendant does not challenge any jury instructions, and the jury did not receive the instruction at issue in *Housby*. See *Housby*, 84 Ill. 2d at 419, 420 N.E.2d at 153. Thus, the *Housby* test is inapplicable to defendant's case.

¶ 20 Construing the evidence in the State's favor, the evidence in this case showed the burglary occurred sometime after 4:50 p.m., and defendant was calling a former girlfriend with the cell phone taken from the burglarized home at 5:11 p.m. When first asked by Officer Witt whether he had possessed a cell phone with the number 4490, defendant responded he was unsure or did not remember. After Officer Witt showed him the text and call logs for 3105 and 7508, defendant admitted possessing the cell phone. Defendant stated he had purchased the cell phone from someone and knew the cell phone was stolen when he purchased it. When further questioned about the purchase, defendant indicated he knew from whom he got the cell phone, but he refused to tell Officer Witt.

¶ 21 We find defendant's possession of the stolen cell phone so extremely close to the

time of the burglary coupled with defendant's implausible explanation for his possession of it sufficient for a jury to find beyond a reasonable doubt defendant committed the residential burglary.

¶ 22

#### B. Defendant's Sentence

¶ 23

Defendant also asserts the trial court erred in sentencing him to 10 years' imprisonment for residential burglary because the court noted it would not sentence defendant to a term lesser than his prior prison term. Defendant acknowledges he has forfeited this issue as he did not raise the matter in his motion to reconsider his sentence (see *People v. Ahlers*, 402 Ill. App. 3d 726, 731-32, 931 N.E.2d 1249, 1254 (2010)) but asserts we should review it under (1) the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)) or (2) a claim of ineffective assistance of counsel based on counsel's failure to raise it in the motion to reconsider. Under either option, our review begins by determining whether any error occurred. See *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010) (explaining plain-error analysis); *People v. Mahaffey*, 194 Ill. 2d 154, 173, 742 N.E.2d 251, 262 (2000) (noting the prejudice prong of the ineffective-assistance-of-counsel test cannot be established when no error has occurred), *overruled on other grounds in People v. Wrice*, 2012 IL 111860, ¶ 75, 962 N.E.2d 934.

¶ 24

In criminal cases, the trial court has the duty to find and balance the relevant factors and come to a reasoned decision as to the appropriate punishment for the defendant. *People v. Garibay*, 366 Ill. App. 3d 1103, 1108, 853 N.E.2d 893, 898 (2006). The court possesses " 'wide latitude in sentencing a defendant, so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation.' " *People v. Flores*, 404 Ill. App. 3d 155, 157, 935 N.E.2d 1151, 1154 (2010) (quoting *People v. Roberts*, 338 Ill. App. 3d

245, 251, 788 N.E.2d 782, 787 (2003)). Residential burglary is a Class 1 felony (720 ILCS 5/19-3(b) (West 2008)), and the sentencing range for a Class 1 felony is 4 to 15 years' imprisonment (730 ILCS 5/5-4.5-30(a) (West 2010)). Since defendant was on probation when he committed the offense at issue, he was not eligible for probation. See 730 ILCS 5/5-4.5-30(d) (West 2010).

¶ 25 Defendant contends the trial court's "personal policy" meant the court did not apply the correct sentencing range. Defendant focuses a lot of his argument on probation being the default or presumptive sentence. A reading of the court's entire statements in sentencing defendant shows the court did address probation. The court explained why defendant would not likely comply with probation and why a message needed to be made to deter others because defendant had continued to commit other crimes while on probation. The court noted that, while some mitigating factors were shown, defendant's criminal and delinquency history, the need to deter others, and the fact defendant committed the crime while on probation were aggravating factors. Although the court stated its personal policy, the record shows the court considered the proper mitigating and aggravating factors, recognized the statutory sentencing range, and discussed why probation was an inappropriate sentence even though defendant was ineligible for it. Accordingly, we do not find the trial court's announcement of its "personal policy" had any effect on defendant's 10-year sentence, and thus no error occurred.

¶ 26 Additionally, we note that, even if the trial court's "personal policy" meant it did not consider any sentence below defendant's prior five-year sentence, defendant has not shown how the court's failure to consider a four-year prison term rose to the level of plain error or established prejudice under *Strickland* given defendant's significant criminal history.

¶ 27

### III. CONCLUSION

¶ 28 For the reasons stated, we affirm the judgment of the Adams County circuit court. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed.