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## I. BACKGROUND

¶ 5 On September 22, 2010, the State charged defendant by information with one count of burglary (720 ILCS 5/19-1(a) (West 2010)) and one count of unlawful use of a credit card (720 ILCS 250/8 (West 2010)), alleging defendant entered a Walgreens store on September 16, 2010, with the intent to purchase cigarettes and Rogaine hair product using the credit card of Janine Toth without her permission. On February 22, 2011, the State charged defendant with two additional counts of burglary (720 ILCS 5/19-1(a) (West 2010)), alleging on September 16, 2010, defendant (1) entered the Center for Prevention Development with the intent to commit a theft therein and (2) entered a McDonald's restaurant with the intent to commit the unlawful use of a debit card.

¶ 6 In August 2011, the case proceeded to jury trial on the three counts of burglary. Janine Toth testified she was a research coordinator for the Center for Prevention Research and Development at the University of Illinois. On September 16, 2010, Toth left several personal items, including her wallet containing a debit card, in her office while she attended a meeting. Upon her return, she discovered her wallet was missing. Toth initially thought her wallet had fallen from her bag and conducted an unsuccessful search for it. The next day, she discovered her debit card had been used without her authorization to make purchases at Walgreens (\$96.96) and McDonald's (\$48.62).

¶ 7 Andrew Preston, Toth's coworker, testified the front doors to the office were typically unlocked, but the building was not frequented by the public. On September 16, 2010, he observed a man, later identified as defendant, walking approximately 30 feet from Toth's office. Alice Miller, the owner and operator of the McDonald's restaurant verified Toth's credit

card was used to purchase 10 Big Macs, 5 large french fries, and a large Coke on September 16, 2010. Linda Placido, a cashier at Walgreens, testified defendant entered the store on September 16, 2010, and attracted her attention because the smell of french fries emanated from a large McDonald's bag defendant was carrying. According to Placido, defendant approached her register and attempted to make purchases for items such as Rogaine, cigarettes, and a prepaid phone card using Toth's credit card. When defendant refused to produce identification for the purchase, Placido called a manager over to delete the sale that took place when defendant swiped the card without showing any identification. Defendant left the store after unsuccessfully attempting to grab the prepaid phone card from Placido's hand. A surveillance video from Walgreens recorded the incident.

¶ 8 Defendant also testified, denying he stole or used Toth's credit card. Following deliberations, the jury returned guilty verdicts on the three counts of burglary.

¶ 9 The trial court held a sentencing hearing in July 2012, following a significant delay during which time defendant was placed with the Department of Health and Human Services (Department) due to a finding of unfitness. Based on defendant's prior criminal history, defendant had to be sentenced as a Class X offender for the Class 2 burglary offenses, which subjected him to a sentencing range of 6 to 30 years in DOC on each count. 730 ILCS 5/5-4.5-95(b) (West 2010).

¶ 10 At the sentencing hearing, the parties presented no evidence in aggravation or mitigation. The State recommended a sentence of 10 years in DOC while defendant recommended a sentence of 6 years in DOC.

¶ 11 The presentence investigation report outlined defendant's criminal history,

consisting of (1) multiple convictions for theft, burglary, and disorderly conduct dating back to the 1970s; (2) 9 prior felony convictions, with 8 of those cases resulting in DOC sentences; (3) an 8-year DOC sentence for a 2003 burglary offense; and (4) 5 prior burglary convictions. On several occasions, defendant failed to successfully complete probation and was resentenced to DOC. The initial presentence report, filed in November 2011, noted defendant appeared to be suffering from "delusions" during the interview, which prompted an evaluation and a finding of unfitness.

¶ 12 Prior to sentencing, defendant was in the custody of the Department for several months to determine if he could be restored to fitness. The final report from the Department indicated defendant was malingering, or feigning, the extent of his mental illness.

¶ 13 The presentence report also indicated defendant (1) was single with no children; (2) previously reported that he had obtained his general equivalency degree (GED); (3) was unemployed but receiving disability payments from the government; (4) had been diagnosed as schizophrenic, requiring sporadic hospitalization throughout his life; and (5) denied abusing alcohol or illegal substances, though he indicated in a previous report that he engaged in illegal drug use but had never received treatment.

¶ 14 In reaching its sentencing decision, the trial court indicated it relied upon (1) the presentence investigation report, (2) the recommendations of counsel, (3) the psychiatric reports from the department, and (4) the statutory factors in aggravation and mitigation. The court began by noting it found defendant's mental health and diagnosis of schizophrenia to be mitigating factors. The court found the most egregious aggravating factor to be defendant's lengthy criminal history. Although the majority of defendant's convictions were property offenses, the court stated

it wanted to sentence defendant in such a way that would deter others from committing property offenses, explaining,

"[t]o the extent that incarcerating him for an extended period of time would be a burden on the taxpayers, 22 criminal convictions is also a burden on the taxpayers. It's a burden on the citizens of Champaign County. It's a burden on the merchants and individuals who have property stolen."

¶ 15 Additionally, the trial court expressed concern over defendant's attempt to manipulate the criminal justice system by feigning the extent of his mental illness to avoid sentencing. After determining a sentence above the minimum was appropriate for defendant, the court sentenced defendant to 15 years in DOC on each count of burglary, ordering the sentences to run concurrently. Defense counsel did not file a motion to reconsider sentence.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant asserts defense counsel's failure to file a motion to reconsider sentence constitutes ineffective assistance of counsel.

¶ 19 To prove ineffective assistance of counsel, defendant must demonstrate (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance resulted in prejudice to the defendant such that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If a defendant fails to prove either prong of the *Strickland* test, his claim for ineffective assistance of counsel must fail. *People v. Sanchez*, 169 Ill. 2d 472, 487, 662 N.E.2d

1199, 1208 (1996). In a case such as this where the trial court has made no determinations regarding defense counsel's effectiveness, the question of whether an attorney provided ineffective assistance of counsel is reviewed *de novo*. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25, 960 N.E.2d 27.

¶ 20 In cases where we can dispose of an ineffective assistance of counsel claim because defendant suffered no prejudice, we need not address whether defense counsel's performance was objectively unreasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457, 943 N.E.2d 303, 317 (2011). Thus, we will first address whether defendant suffered prejudice from defense counsel's failure to file a motion to reconsider sentence. To meet the second prong of *Strickland* in this case, defendant must show a reasonable probability or likelihood the motion defense counsel failed to file would have been granted. *People v. Steels*, 277 Ill. App. 3d 123, 128, 660 N.E.2d 24, 28 (1995). Accordingly, we must first determine whether the outcome of the case would have been different had defense counsel filed a motion to reconsider sentence.

¶ 21 Due to his criminal history, defendant was subject to Class X sentencing within the range of 6 to 30 years in DOC. 730 ILCS 5/5-4.5-95(b) (West 2010). The trial court ultimately imposed a midrange sentence of 15 years in DOC, which was higher than the 10-year sentence recommended by the State. Defendant argues a motion to reconsider sentence would have been successful, either before the trial court or on appeal challenging defendant's sentence; thus, defendant contends he has met the second prong of *Strickland*.

¶ 22 Defendant first asserts counsel's failure to file a motion to reconsider sentence deprived him of his constitutional right to appellate review, thereby demonstrating prejudice, citing *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In *Flores-Ortega*, the Supreme Court

determined the failure of the defendant's counsel to file a notice of appeal was presumptively ineffective because it deprived the defendant of appellate review. *Flores-Ortega*, 528 U.S. at 484. The *Flores-Ortega* court went on to find that due to defendant being wholly deprived of an appeal proceeding, defendant had demonstrated prejudice as required under the second prong of *Strickland*. This case does not present a situation in which defense counsel's actions have forfeited defendant's right to an appeal. As defense counsel requested a timely notice of appeal, this court has the authority to review unpreserved or forfeited issues for plain error. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). A plain error analysis requires this court to determine whether a clear or obvious error occurred, such as, in this case, whether the trial court abused its discretion in sentencing a criminal defendant, and whether that error affected the fundamental fairness of the trial. See *People v. Ahlers*, 402 Ill. App. 3d 726, 734, 931 N.E.2d 1249, 1256 (2010) (plain error review of an error is appropriate where (1) the evidence is closely balanced or (2) when the error was sufficiently grave as to deprive defendant of a fair sentencing hearing). Therefore, we find unpersuasive defendant's argument that defense counsel's failure to file a motion to reconsider sentence foreclosed his ability to appeal his sentence.

¶ 23           Second, with regard to whether the motion would have been successful in the trial court, nothing in the record indicates the court would have reduced defendant's sentence, especially since the court found only one mitigating factor—defendant's mental health—amongst multiple aggravating factors that included defendant's extensive prior criminal history. Finally, nothing in the record indicates defendant expressed a desire to appeal his sentence or that his motion would have presented any new evidence to the court. The record instead indicates defendant merely wanted the court to change its mind regarding defendant's sentence. Hence, we

conclude a motion to reconsider sentence would not have had a likelihood of success before the trial court.

¶ 24 The question then turns to whether, on appeal, defendant would have successfully challenged his sentence. A reviewing court will not overturn a trial court's decision regarding sentencing absent an abuse of discretion. *People v. Perruquet*, 68 Ill. 2d 149, 153, 368 N.E.2d 882, 883 (1977).

¶ 25 In this case, defendant was a habitual offender with a lengthy criminal history. Defendant had learned how to manipulate both the criminal justice system and mental health system to avoid sentencing, as reflected in the Department's report that defendant was malingering. Despite defendant's frequent hospitalization throughout his life for mental health issues, he has not been able to maintain treatment in such a way that allows him to function in society. Instead, he exploited his condition by exaggerating his symptoms in an attempt to avoid sentencing. Even when defendant had opportunities to complete probation, he failed and was resented to DOC.

¶ 26 This case presents a situation in which the trial court could have reasonably determined the balance tipped in favor of deterrence and punishment instead of rehabilitation. See 730 ILCS 5/5-5-3.2(a)(7) (West 2010); *People v. Miller*, 254 Ill. App. 3d 997, 1018, 626 N.E.2d 1350, 1366 (1993) (in sentencing, the trial court must balance the retributive and rehabilitative purposes of incarceration). It logically follows that when little evidence of rehabilitative potential exists, the balance shifts to the retributive purpose of incarceration. As the trial court noted, though defendant's crimes are largely nonviolent, those crimes are not victimless. Defendant continues to commit acts of theft and burglary, and a lengthy prison

sentence is appropriate to protect the community and deter other offenders. Contrary to defendant's argument, it was not an abuse of discretion for the court to exceed the State's sentencing recommendation in this case. See *People v. Streit*, 142 Ill. 2d 13, 21-22, 566 N.E.2d 1351, 1354 (1991) (the court is not bound by the sentencing recommendations of the parties).

¶ 27 Under the circumstances, defendant's lengthy criminal history and lack of rehabilitative potential justified the court's sentence of 15 years in DOC. Accordingly, we would not find the court abused its discretion in sentencing defendant to 15 years in prison. We conclude a motion to reconsider sentence would not have been successful, either in the trial court or on appeal; therefore, defendant cannot establish prejudice as required to meet the second prong of *Strickland*.

¶ 28 Because we conclude defendant has not been prejudiced by defense counsel's failure to file a motion to reconsider sentence, we need not consider whether counsel's failure to file the motion was objectively reasonable.

¶ 29 III. CONCLUSION

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

¶ 31 Affirmed.