FIFTH DIVISION
October 31, 2014

No. 1-12-2654

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. 11 CR 9936
	)	
MARSHAUN BOYKINS,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Court did not err in denying request to proceed *pro se* shortly before jury trial, where defendant admitted unfamiliarity with case file and implicitly requested a continuance. Other-crimes evidence was properly admitted. Fines and fees order must be corrected.

¶ 2 Following a jury trial, defendant Marshaun Boykins was convicted of residential burglary and sentenced to 14 years' imprisonment. On appeal, he contends that the trial court erred in denying his request to proceed *pro se*. He also contends that the court erred in admitting other-

crimes evidence. Lastly, the parties agree that the order assessing fines and fees against defendant must be corrected.

¶ 3 Defendant was charged with residential burglary for, on or about May 21, 2011, entering the dwelling of Constance Wilson, a 12th-floor apartment at 7345 South South Shore Drive (the South Shore building) in Chicago without authority and with the intent to commit theft therein.

¶ 4 Before trial, the State filed a motion to admit other-crimes evidence to show defendant's *modus operandi*, a common scheme or design, and defendant's intent. The State alleged that on May 23, 2011, defendant committed a residential burglary by forcibly entering the basement apartment of Betty Morris at 4740 South Woodlawn Avenue in Chicago (the Woodlawn building) and removing "a diamond ring, a necklace, a 13-inch flat screen television, and a 31-inch Sanyo flat screen television" and he and an "unknown male co-offender" were seen by a neighbor leaving Morris's apartment with her laundry bag and departing the scene in a white Chevrolet. The State compared this to the instant offense: on May 21, defendant forcibly entered Wilson's apartment and removed a "wallet, a leather jacket, two coats, a camcorder, an MP4 player, twelve dollars, and Advocate Hospital handbag, two game controllers, and an makeup bag containing makeup and curling irons," and he and "unknown male and female co-offenders" were recorded on security video entering the South Shore building and leaving it from the second floor with Wilson's property before leaving the scene in a white Chevrolet Impala. The State argued that the two incidents "occurred within a *mile and a half* [*sic*] and *within two days* from one another" (emphasis in original) and that the other points of similarity were that defendant made forcible entry, did not work alone but with a male in both incidents, took "items of

particular value, such as electronics, fine clothing, and jewelry" and left the scene in a white Chevrolet Impala.

¶ 5 Defendant responded to the other-crimes motion, arguing that there were significant differences between the incidents and that admission of the May 23 incident would be more prejudicial than probative. Defendant argued that burglaries are "not uncommon" in the area of both incidents and that "only the world's worst thieves value worthless items." Defendant noted that the instant offense occurred in the morning (between 10 a.m. and noon) and was an entry to the front door while the May 23 offense occurred in the afternoon (between 2 and 4 p.m.) and was an entry to the rear door. As to prejudice, defendant argued that "assuming *arguendo* that the evidence of the May [23] incident is probative of intent, *modus operandi* and a common scheme or design," it "is extremely prejudicial [as] it would be difficult, if not impossible, for the finder of fact who heard the facts of the May [23] incident not to be, at the very least, strongly inclined to believe that [defendant] had acted similarly in the charged incident a month [*sic*] earlier" so that he "would be convicted because he seemed to be a bad person who deserved punishment" regardless of the evidence.

¶ 6 At the June 14, 2012, hearing on the other-crimes evidence motion, the State sought to introduce additional evidence: (1) that defendant's probation officer saw the security video from the instant offense on the television news, recognized defendant, and reported this to the police, and (2) that defendant was arrested (on May 26, 2011) in a parking lot in or near a white Chevrolet. Counsel objected that any reference to defendant's probation would be unduly prejudicial and reiterated her argument that the instant and May 23 offenses are insufficiently similar. The court allowed the State's evidence while prohibiting the probation officer from

mentioning that he was a probation officer but instead a county employee with regular contact with defendant.

¶ 7 Defendant expressed exasperation that "so much evidence [has] been getting admitted into this case" and the court admonished him that he should "rely on the expertise and the competence of your attorney." During the disposition of other matters, the court reminded the parties that the case was scheduled for jury trial on June 18. Complaining that counsel had not shown him discovery or other documents, defendant demanded to proceed *pro se* and waived his right to counsel. When the court reminded him that "this matter has been set for trial," defendant replied "I would like to stop my trial, your Honor, because I'm not seeing none of my paperwork" and "I don't want to go to trial with a blindfold on." When the court told defendant that "I first have to determine whether or not you're making a request to represent yourself because you want to represent yourself or you want to delay the trial," defendant denied having said that he wanted to stop the trial. The court denied the request to proceed *pro se*, finding that defendant's assertion that he wanted to stop the trial was not a proper basis for waiver and noting that "by your own words, you said you haven't seen any of the reports or anything" so that "you will not be ready to go to trial." The court reminded defendant that he could raise ineffective assistance claims post-trial if he was convicted but counsel has "represented you competently, and it is not a reason for you to ask to represent yourself on the very eve of trial." Defendant denied that his waiver was "because of the time."

¶ 8 At trial, commencing June 18 as scheduled, defendant's opening statement was to the effect that evidence may show that he entered the South Shore building but no evidence would place him inside Wilson's apartment.

¶ 9 Constance Wilson testified that she lived in a 12th-floor apartment in the South Shore building and left home at about 9 a.m. on May 21, 2011, after locking her apartment door. When she returned about two hours later, both locks on her apartment door were "torn out" of the door and the wood debris of the door was just inside the door. When she entered with a neighbor, she found the contents of her apartment in disarray. A camcorder was missing from her bedroom and three coats – a leather jacket, a winter coat, and a leather and fur jacket – were missing from the hall closet. Wilson called the police and conducted an inventory of her apartment, finding that an MP4 player, sunglasses, game controller wallet, and book bag marked "Advocate Trinity" were also missing. On the 23rd, the South Shore building janitor showed her the building's security video, and she saw two men and a woman (the group) leaving the building "carrying my stuff and carrying my Advocate Trinity book bag" to a car and then driving away. The video was shown to Wilson and the jury, and it depicted the group leaving the building by a door that usually requires a key to open but was propped open on the video. She recognized her book bag and two of her coats in the group's possession as they were on the second floor near the parking lot. Wilson did not recognize anyone in the group as another building resident, and she had not given any of them permission to enter the building or her apartment, but on cross-examination admitted that she did not know all the residents of the South Shore building and that other residents can admit guests to the building. Wilson later provided a copy of the security video to a television station "because I wanted to put it on TV so they could be caught," and the video was shown on the news.

¶ 10 Leszak Nowak, the South Shore building janitor, testified that the 20-story building has no security cameras above the second floor. On the day in question, he saw the broken locks on

Wilson's apartment door. When Nowak viewed the security video from that day, he saw people he did not recognize from the building and therefore showed the video to Wilson.

¶ 11 Nateba Montgomery, a county employee, testified that her duties included meeting regularly with defendant and keeping a record of his residential address. Defendant had not identified either the South Shore building or the Woodlawn address as his residence. On May 25, 2011, she viewed a video and recognized defendant.

¶ 12 Before the following witnesses, and without objection by either party, the court instructed the jury that:

> "The next two witnesses will testify as to involvement in an offense other than that which is charged in the indictment. The evidence is going to be received on the issues of the defendant's identification, his motive and his intent, and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that other offense and, if so, what weight should be given to this evidence on the issues of identification, motive and intent."

¶ 13 Betty Morris testified that she lived in an apartment at the Woodlawn building as of May 23, 2011. She left home at about 2 p.m. that day, locking her front door first. When she returned at about 5 p.m., she found the front door open, and on entering the apartment found that it was "ransacked" with a television missing and the back door pried open. She found other property was also missing from the apartment, including a black Rubbermaid "tub" or container that itself contained other property. She called the police and spoke with the neighbors including Rocky Willis. She did not know defendant nor give him or anyone else permission to enter her apartment or remove anything.

¶ 14 Rocky Willis testified that on the afternoon of May 23 he was at a building across from the Woodlawn building when he saw defendant and another man leaving the Woodlawn building; defendant was carrying a black Rubbermaid container and the other man was carrying a wrapped object the size of a painting or television. The two men left in a white Chevrolet Impala driven by defendant. Because "people move in and out all the time over there," Willis was not suspicious until he learned that Morris's apartment was burglarized. On May 25, Willis saw the television newscast of the security video from the South Shore building and recognized "the same two guys" from the Woodlawn building. Willis spoke with Morris and then the police, and he viewed an array of five photographs from which he identified defendant as the man who carried the Rubbermaid container.

¶ 15 Defendant made a motion for a directed verdict, arguing that defendant is not seen on the South Shore building security video carrying anything so that he was merely "present at the scene" in the lobby with the burglars. The court denied the motion, noting that the video showed defendant "was the one that drove this car to the scene and back."

¶ 16 Defendant chose to refrain from testifying and the defense rested its case. Defendant unsuccessfully sought a lesser-included offense instruction on criminal trespass to residence and a non-pattern instruction on "mere presence." The instructions given included that:

> "Evidence has been received that the defendant has been involved in an offense other than that charged in the indictment. This evidence has been received on the issues of the defendant's identification, motive and intent and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that

offense and, if so, what weight should be given to this evidence on the issues of identification, motive and intent."

During closing argument, defendant argued that the security video showed "someone matching the general description" of defendant and that the jury should doubt Willis's identification. Following deliberation, the jury found defendant guilty of residential burglary.

¶ 17 The counsel-filed post-trial motion argued in relevant part that the admission of other-crimes evidence was erroneous. Defendant made an oral post-trial motion arguing in relevant part the denial of his waiver of counsel. The court denied both motions, finding that defendant had admitted being unready for trial and "wanted a continuance." Following arguments in aggravation and mitigation, defendant was sentenced to 14 years' imprisonment with fines and fees. This appeal timely followed.

¶ 18 On appeal, defendant first contends that the trial court erred in denying his request to proceed *pro se*.

¶ 19 While a defendant has a right to proceed *pro se*, he must knowingly and intelligently relinquish his right to counsel. *People v. Baez*, 241 Ill. 2d 44, 115-16 (2011). Waiver of counsel must be clear and unequivocal, not ambiguous, so that a defendant waives his right to self-representation unless he articulately and unmistakably demands to proceed *pro se*. *Id.* In determining whether a defendant's statement is clear and unequivocal, a court must determine whether the defendant truly desires to represent himself and has definitively invoked his right of self-representation. *Id.* We must indulge every reasonable presumption against waiver of the right to counsel. *Id.* The purpose of requiring that a defendant make an unequivocal request to waive counsel is to prevent him from (1) appealing the denial of his right to self-representation

or the denial of his right to counsel, and specifically (2) manipulating or abusing the criminal justice system by vacillating between requesting counsel and requesting to proceed *pro se*. *Id.* The court may reject a request to proceed *pro se* where it "come[s] so late in the proceedings that to grant it would be disruptive of the orderly schedule of proceedings" or where a defendant "engages in serious and obstructionist misconduct." *People v. Woodson*, 2011 IL App (4th) 100223, ¶ 24. "A number of courts have held that a defendant's request is untimely where it is first made just before the commencement of trial, after trial begins, or after meaningful proceedings have begun." *People v. Burton*, 184 Ill. 2d 1, 24 (1998). The determination of whether there has been a proper waiver of the right to counsel depends upon the facts and circumstances of the case, including the background, experience, and conduct of the defendant. *Baez*, 241 Ill. 2d at 115-16. We review the trial court's determination for abuse of discretion. *Id.*

¶ 20 Here, defendant argues that the court erred in denying his waiver of counsel because his decision to proceed *pro se* was not dilatory but the result of his dissatisfaction with trial counsel. The record indeed reflects defendant's issues with counsel before the June 14 hearing. However, disruptive delay and intentional obstruction are separate and distinct grounds for denying self-representation, and intent is not an element of the former; the trial court may find a waiver to be objectively so late as to disrupt proceedings even if the defendant has no subjective intent to obstruct proceedings. Here, the basis for defendant's waiver request was that counsel was not familiarizing him with the potential evidence. In that light, his statement that he wanted to "stop my trial" because of his unfamiliarity with the case file – to the point where he felt he would be metaphorically blindfolded at trial – was an implicit request for time to prepare for trial. *Woodson*, 2011 IL App (4th) 100223, ¶ 24 (a pre-trial request to proceed *pro se* should generally

be deemed timely if it is not accompanied by a "request for additional time to prepare"); *People v. Rasho*, 398 Ill. App. 3d 1035, 1042 (2010)(denying waiver on the day of trial "accompanied by an implicit motion for a continuance" as the defendant "complained that he wanted to procure additional documents and call witnesses who were not present the day of trial"). A waiver of counsel just before a jury trial, by a defendant admitting unfamiliarity with the potential evidence in his case, could hardly be anything but a disruptive delay of proceedings. We find that the court did not abuse its discretion in denying defendant's waiver of counsel under such circumstances.

¶ 21 Defendant also contends that the court erred in admitting other-crimes evidence.

¶ 22 Evidence that a defendant has committed crimes other than the one for which he is on trial may not be admitted for the purpose of demonstrating his propensity to commit crimes but may be admitted for a proper purpose such as proving *modus operandi*, intent, identity, motive, or absence of mistake. *People v. Chapman*, 2012 IL 111896, ¶ 19. Even if relevant to a proper purpose, evidence of other crimes may be excluded if its probative value is outweighed by its prejudicial effect. *Id*. The admissibility of evidence at trial is a matter within the sound discretion of the trial court so that we will not overturn its decision absent a clear abuse of discretion. *Id*. Even the erroneous admission of other-crimes evidence is reversible error only if it was a material factor in the conviction; that is, the verdict would likely have been different absent the erroneous evidence. *People v. Adkins*, 239 Ill. 2d 1, 23 (2010).

¶ 23 Here, we consider the May 23 offense sufficiently similar to the instant offense and probative of issues in proper dispute – identification and intent – that the trial court did not abuse its discretion in admitting it.

¶ 24 Defendant's first and threshold contention is that the instant and May 23 offenses are "substantially different." We disagree. There are indeed various unremarkable (not distinctly a similarity or difference) factors: many burglars make forcible entry through doors and most take valuable property as that is usually the object of the offense, and neither the time-of-day nor general proximity of the two offenses is remarkable. However, there are significant points of similarity: the instant and May 23 offenses were committed only two days apart, defendant did not work alone but with a male accomplice identified by Willis in both offenses, and defendant left both scenes in a white Chevrolet Impala. For the reasons stated below, we consider the latter two points of similarity key to the purposes of the other-crimes evidence and the weighing of probativeness against prejudice.

¶ 25 The State moved to admit evidence of the May 23 offense for intent, *modus operandi* and a common scheme or design. The jury was twice instructed that the evidence was to be considered only for the purposes of identification, motive and intent, notably not *modus operandi* or common scheme as was argued *in limine*. Defendant did not object to this partial change in purposes at trial, and identification and intent are sufficient proper bases for admitting other-crimes evidence. On this record we find that the evidence of the May 23 burglary was introduced and admitted to show identification and intent rather than merely to show defendant's propensity for crime. We also find that the other-crimes evidence was highly probative of hotly- and legitimately-disputed issues and was not introduced by the State to show defendant as generally "a bad person deserving of punishment" as he contends.

¶ 26 Defendant argued during trial that there was no evidence in the instant burglary that he was more than "merely present at the scene" in the South Shore building lobby at the same time

as the burglars carrying Wilson's property. He tried to further this lack-of-intent argument with jury instructions on the lesser-included offense of trespass and on mere presence. To the jury, defendant argued misidentification. The evidence of the May 23 offense was probative of these issues of identification and intent. Willis's dual identification – seeing the May 23 burglars in person at the Woodlawn building and on video regarding the instant burglary – corroborated the jury's ability to view the security video to make its own identification, and *vice versa*. The May 23 offense, linked to the instant offense by the white Impala and Willis's dual identification, refuted the mere-presence argument as defendant was seen carrying identifiable stolen property in the May 23 burglary. We conclude that the other-crimes evidence here was introduced for proper purposes and was more probative of those issues than prejudicial, and we therefore find no error by the trial court in admitting this evidence.

¶ 27 Lastly, defendant contends, and the State correctly agrees, that we must correct his order assessing fines and fees. His $5 court system fee (55 ILCS 5/1101(a) (West 2012)) applies only to vehicular offenses and must be vacated. He should receive presentencing detention credit against his $80 in fines: the $30 fine to fund juvenile expungement, $30 children's advocacy center assessment, $10 mental health court assessment, $5 youth diversion/peer court assessment, and $5 drug court assessment. 55 ILCS 5/1101(d-5) - (f-5); 725 ILCS 5/110-14; 730 ILCS 5/5-9-1.17 (West 2012); *People v. Graves*, 235 Ill. 2d 244 (2009); *People v. Larue*, 2014 IL App (4th) 120595, ¶ 56.

¶ 28 Accordingly, we vacate the $5 court system fee. Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct the order

assessing fines and fees to reflect said vacatur and $80 presentencing detention credit. The judgment of the circuit court is otherwise affirmed.

¶ 29 Affirmed in part, vacated in part, and order corrected.