

FIRST DIVISION
January 5, 2015

No. 1-12-3584

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. 11 C4 40512
)	
VITO SPIEZIO,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's conviction and sentence are affirmed where his trial counsel did not provide ineffective assistance in failing to request that the trial court answer the jury's questions, and the trial court properly considered both aggravating and mitigating factors in sentencing him to 10 years' imprisonment.
- ¶ 2 Defendant, Vito Spiezio, appeals his conviction of theft after a jury trial and his sentence of 10 years' imprisonment. On appeal, defendant contends (1) his trial counsel provided

ineffective assistance when the jury, during deliberations, asked two questions indicating its confusion about how to evaluate the value of the stolen property and whether defendant had to know the value of the stolen property. His counsel stated that no answers were required; and (2) his sentence was excessive considering the minor nature of the offense and his potential for rehabilitation. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court sentenced defendant on November 20, 2012. He filed a notice of appeal on November 20, 2012. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 603 (eff. Oct. 1, 2010); R. 606 (eff. Mar. 20, 2009).

¶ 5 BACKGROUND

¶ 6 Defendant was charged with two counts of theft. Prior to the trial, defendant requested a Treatment Alternatives for Safe Communities (TASC) evaluation. Although he was statutorily eligible, TASC determined that defendant was not an acceptable candidate for treatment. It noted that defendant had a 43 year history of substance abuse and found that he had "been in and out of the Criminal Justice System since a juvenile and reported no work history," nor had he ever "attempted to participate in any programs for substance abuse treatment." It also found that defendant had "a history of non-compliance with the Criminal Justice System Parole." Therefore, the likelihood for his rehabilitation was poor. During a SCR 402 conference, defense counsel argued that although defendant had not sought treatment in the past, he feels he now needs help given his health problems, his age, and his desire to be with his family.

¶ 7 At the jury trial, Walter Jones, Jr., testified that on March 5, 2011, he arrived home in the early morning hours to find that his front door had been "jimmied" and forced open. Jones discovered that his Nikon D90 camera, camera bag, and accessories were missing, and he filed a police report. He testified that he purchased the camera in 2010 for \$1,200. That same day, defendant entered Chicago Pawn and Jewelers, owned by Daniel Lebovitz. Lebovitz testified that he and defendant had previously done business together. Defendant presented a Nikon D90 camera, and Lebovitz paid him \$240 for the camera and everything in the camera bag. Lebovitz testified, however, that he expected to sell the merchandise for at least \$500-\$600. His estimate of the camera's value was based on twenty years of personal experience, prior dealings, and the internet.

¶ 8 Detective Seth DeYoung testified that after the police report had been filed, he entered the camera's serial number into their system and it generated a hit. Detective DeYoung went to Chicago Pawn and Jewelers to speak with Lebovitz, who identified defendant as the person who brought the camera into the shop. The serial number of the camera matched the serial number reported by Jones. After obtaining the camera's pawn ticket containing defendant's personal information, Detective DeYoung located defendant and brought him to the police station. The stolen items were subsequently returned to Jones.

¶ 9 After being read his *Miranda* rights, defendant agreed to speak with Detective DeYoung. Defendant told the detective that he went to a place "full of drug fiends" selling stolen property so that he could buy something to "sell later for a profit." He stated that he bought the camera from an unknown person who sold "boosted goods." Defendant paid \$125, although he knew that "it was valued at much more than that." During his investigation, Detective DeYoung determined that the value of the camera was \$1,119.

¶ 10 Defendant testified that on March 5, 2011, he had cashed his \$371 social security check and was approached by someone who wanted to sell him a camera. He paid the person \$125 for the camera. Defendant stated that he did not ask whether the camera was stolen. After the defense rested, the parties stipulated to defendant's prior conviction for felony retail theft.

¶ 11 The jury was instructed on two separate counts of theft by obtaining control over stolen property. One concerned property with a value exceeding \$500 but not exceeding \$10,000. The other instruction concerned property with a value not exceeding \$500. During deliberations, the jury asked two questions: (1) "How do we assess the value of property? Value as new? Value as used?" and (2) "Did the defendant have to be aware of the value for this proposition?" Defense counsel responded that "the only answer they can get, Judge, is they have everything they have before them." The judge proposed, and the parties agreed, to give the jury the following response: "You have the evidence. Keep on deliberating."

¶ 12 The jury found defendant guilty of theft by obtaining control over stolen property with a value exceeding \$500 but not exceeding \$10,000. Defendant filed a motion to reconsider which the trial court denied. At the sentencing hearing, defense counsel argued in mitigation that defendant should be sentenced to two or three years' imprisonment because "it's a case about a camera" and that defendant's extensive criminal history was due to his substance abuse. Defendant also requested treatment. The trial court agreed that defendant should receive treatment, but questioned defendant's credibility because "all the time that he was in the penitentiary all these years, he certainly could have requested treatment." After reviewing defendant's criminal history, the trial court found that defendant "spent basically his entire life in and out of the penitentiary," and that two cases involved physical injury. It noted that many of his cases involved theft or burglary, and stated that "he's just a menace. He's a menace to

everyone; and while I understand it's just a camera, based upon that background the court feels that the defendant deserves the max because it will keep him away from the public for the longest period of time." The trial court imposed an extended term of ten years' imprisonment because defendant had been on parole for retail theft when he committed the charged offense. Defendant filed a motion to reconsider his sentence which the trial court denied. Defendant filed this timely appeal.

¶ 13

ANALYSIS

¶ 14 Defendant first contends that his trial counsel provided ineffective assistance when he failed to request that the trial court answer two questions the jury had during deliberation. To prevail in his ineffective assistance of counsel claim, defendant must prove that (1) counsel's performance fell below an objective standard of reasonableness; and (2) he was prejudiced by his counsel's substandard performance. *People v. Boyd*, 363 Ill. App. 3d 1027, 1034 (2006). Defendant must satisfy both prongs in order to prevail on his ineffective assistance of counsel claim. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). Defendant is entitled to competent, not perfect, representation and mistakes in trial strategy or judgment do not necessarily result in ineffective assistance. *People v. Calhoun*, 404 Ill. App. 3d 362, 383 (2010). To prevail, he must overcome the strong presumption that the challenged action was the product of sound trial strategy. *People v Evans*, 186 Ill. 2d 83, 93 (1999).

¶ 15 Initially we note, and defendant acknowledges, that he did not raise objections in the court below nor did he include this issue in a post trial motion. Therefore, he has waived review of this issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Regardless, if any error occurred here, it was harmless error. In general, the trial court must provide instruction when a jury poses a question or requests clarification on a point of law indicating its

doubt or confusion. *People v. Childs*, 159 Ill. 2d 217, 228-29 (1994). The trial court, however, has discretion to decline answering a jury question where "the jury instructions are readily understandable and sufficiently explain the relevant law," additional instructions would serve no useful purpose or would mislead the jury, it involves a question of fact, or answering the question "would cause the trial court to express an opinion likely directing a verdict one way or the other." *People v. Averett*, 237 Ill. 2d 1, 24 (2010).

¶ 16 During deliberations, the jury asked, (1) "How do we assess the value of the property? Value as new? Value as used?" and (2) "Did the defendant have to be aware of the value for this proposition?" Defense counsel was present, and stated that "the only answer they can get, Judge, is they have everything they have before them" and the prosecutor agreed. The trial court then sent the jury the following response: "You have the evidence. Keep on deliberating."

¶ 17 Defendant argues that regarding the first question, the jury was confused about an essential element of the offense and the trial court should have clarified that the value of the property meant fair market value. The jury was instructed on two separate counts of theft: one for "stolen property not exceeding \$500.00" and the other for "stolen property exceeding \$500.00 but not exceeding \$10,000.00." He claims he was prejudiced by counsel's failure to request a clarification because evidence was presented that he pawned the camera for \$240, which is less than \$500. Thus, the jury could have convicted him of the lesser offense of theft involving property valued at less than \$500.

¶ 18 We disagree. If any error occurred, such error did not prejudice defendant. "In the absence of contrary evidence, testimony as to the value of property alleged to be stolen is proper proof of value." *People v. DePaolo*, 317 Ill. App. 3d 301, 308 (2000). Here, witnesses with knowledge regarding the retail value of the camera testified on the issue. The owner of the

camera testified that one year before the theft, he purchased the camera for \$1,200. In his investigation of the case, Detective De Young determined that the camera allegedly stolen by defendant had a present value of \$1,119. The owner of the pawn shop where defendant brought the camera testified that although he paid defendant \$240 for it, he believed the value of the camera was at least \$500-\$600 based on his extensive experience as a vendor. Even though defendant pawned the camera for \$240, there is no evidence that a property's pawned value is equivalent to its fair market value. Therefore, testimony as to the camera's fair market value ranged from \$500-\$600 to approximately \$1,200. Since the evidence before the jury showed that the camera's value was more than \$500, it would have convicted defendant of the greater offense anyway. Any error in failing to instruct the jury that value meant fair market value of the property was harmless.

¶ 19 Defendant also argues that the trial court should have answered the jury's second question because it showed the jury's confusion about whether the State had to prove that defendant knew the camera's value at the time of the offense. Defendant alleges that the State must prove his knowledge of the camera's value and evidence in the case showed that he did not know its value. However, according to section 16-1(c) of the Criminal Code of 1961 (Code) (720 ILCS 5/16-1(c) (West 2010)), where a defendant is charged with theft of property exceeding a specified value, the property's value is an element of the offense that the State must prove beyond a reasonable doubt. The statute does not require proof that defendant had knowledge of the property's value. If the statutory language is clear, courts will not read into it exceptions, conditions, or limitations that the legislature did not express. *In re Christopher K.*, 217 Ill. 2d 348, 364 (2005). The jury was properly instructed as to the State's burden of proving the value of the camera as an element of the offense; therefore, the trial court's response to "keep deliberating" without further

instruction was not error. Since the trial court committed either no error or harmless error in responding to the jury's questions, defense counsel was not ineffective for failing to request further instructions to the jury. *People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000) (counsel is not obligated to advance meritless arguments to avoid claims of ineffective assistance).

¶ 20 Defendant next argues that the trial court's sentence of 10 years' imprisonment is excessive given the minor nature of the offense, and it did not properly consider in mitigation defendant's substance abuse problem and his potential for rehabilitation. The trial court has great discretion in determining the proper sentence. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). Where the trial court's sentence falls within the statutory range permitted for the offense, a reviewing court will not overturn the trial court's decision absent an abuse of discretion. *Id.*

¶ 21 At the sentencing hearing, the State presented defendant's extensive criminal history dating back to 1969. This evidence showed that defendant had been convicted of numerous offenses including theft, armed robbery, possession of a stolen vehicle, attempted murder, aggravated assault, and possession of a controlled substance. Defense counsel presented evidence in mitigation, arguing that the present offense involved only a camera which was eventually returned, undamaged, to its owner. Defendant also stated that he wanted to seek treatment for substance abuse and that he never had an opportunity to receive treatment in the past. The trial court responded that defendant could receive treatment, but questioned defendant's credibility, because "all the time that he was in the penitentiary all these years, he certainly could have requested treatment." The trial court then stated that defendant "spent basically his entire life in and out of the penitentiary, and on a few of these cases two involve physical injury, many of them are theft cases, burglary cases, but he's just a menace. He's just a

menace to everyone; and while I understand it's just a camera, based upon that background the Court feels that the Defendant deserves the max because it will keep him away from the public for the longest period of time."

¶ 22 The parties presented aggravating and mitigating evidence to the trial court, and we may presume, without evidence to the contrary, that the trial court properly considered the evidence in determining defendant's sentence. *People v. Jones*, 376 Ill. App. 3d 372, 393 (2007). Furthermore, the trial court need not explicitly state its consideration of mitigating factors. *Id.* Here, however, the trial court did address defendant's desire to seek treatment for substance abuse and rehabilitation, but it questioned his credibility given that defendant had opportunities to seek treatment in the past but did not do so. Instead, the trial court found defendant's extensive criminal history more significant and it sentenced him to the statutory maximum. The trial court is in the best position to determine an appropriate sentence, because it can observe factors such as "the defendant's credibility, demeanor, general moral character, mentality, social environments, habits, and age. [Citations.]" *People v. Streit*, 142 Ill. 2d 13, 19 (1991). This court will not reweigh these sentencing factors or substitute our judgment for that of the sentencing court, merely because we would or could have weighed the factors differently. *Id.* at 394. The trial court did not abuse its discretion in sentencing defendant to 10 years' imprisonment.

¶ 23 Defendant disagrees, citing *People v. Maggette*, 195 Ill. 2d 336 (2001), and *People v. Center*, 198 Ill. App. 3d 1025 (1990), as support. *Maggette* was primarily a criminal sexual assault case where the defendant was also sentenced on a count of residential burglary, and the supreme court reduced his sentence on the burglary count from 10 years to 5 years. *Maggette*, 195 Ill. 2d at 355. In *Center*, the defendant had graduated high school and was gainfully

employed, and this court found that his sentence of 15 years' imprisonment for burglary was excessive given that he served only as a lookout and no proceeds were taken from the attempt. *Center*, 198 Ill. App. 3d at 1034-35. These cases are factually distinguishable from the case at bar. Furthermore, our supreme court has rejected the use of comparative sentencing to show that the trial court abused its discretion. See *People v. Fern*, 189 Ill. 2d 48, 62 (1999) ("[i]f a sentence is appropriate given the particular facts of that case, it may not be attacked on the ground that a lesser sentence was imposed in a similar, but unrelated, case"). We are not persuaded that *Center* and *Magette* support defendant's contention that his sentence was excessive.

¶ 24 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 25 Affirmed.