SIXTH DIVISION
January 16, 2015

No. 1-13-1320

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. 12 CR 11946
	)	
TRACY KIMBLER,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER.

¶ 1 *Held*: We reversed defendant's conviction of burglary where the State failed to prove him guilty beyond a reasonable doubt. Pursuant to the parties' agreement that defendant's extended sentence for theft was void, we vacated this sentence and remanded for resentencing. We also vacated the order requiring defendant to reimburse Cook County $500 for the cost of court-appointed counsel, and remanded for a new hearing on defendant's ability to pay.

¶ 2 Following a bench trial, the trial court convicted defendant, Tracy Kimbler, of one count of burglary and one count of theft and sentenced him to two concurrent terms of 10 years' imprisonment followed by three years of mandatory supervised release (MSR). The trial court subsequently ordered defendant to pay $500 to reimburse Cook County for the Public Defender's legal representation. On appeal, defendant contends: (1) the State failed to prove him guilty of burglary beyond a reasonable doubt; (2) his sentence for theft is void; and (3) the trial court

failed to conduct an appropriate hearing under section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/113-3.1(a) (West 2012)), before ordering him to pay $500 for the services of court-appointed counsel. We reverse defendant's conviction of burglary, vacate his sentence for theft and remand for resentencing, and vacate the $500 recoupment order and remand for a new hearing under section 113-3.1(a).

¶ 3 Defendant was charged with burglary for knowingly and without authority entering Zlata Susa's building at 5957 West Lawrence Avenue with the intent to commit therein a theft. 720 ILCS 5/19-1(a) (West 2012). Defendant also was charged with theft for knowingly obtaining control over Zlata Susa's purse and the contents thereof (collectively purse), knowing the purse to have been stolen or under circumstances as would reasonably induce him to believe the purse to be stolen, intending to deprive Zlata permanently of the use or benefit thereof. 720 ILCS 5/16-1(a)(4)(A) (West 2012).

¶ 4 At trial, Zlata Susa testified that on June 18, 2012, she lived alone in a second-floor apartment at 5957 West Lawrence Avenue in Chicago. During the summer, she liked to keep her door open to increase the airflow, but she covered the doorway entrance with a curtain to prevent people from looking inside. At about 11 a.m. on June 18, 2012, Zlata decided to go downstairs and pick up her mail. She left behind her purse, described as a little black handbag containing her wallet, money, lottery tickets, and I.D. card on her bed. As she left the apartment, she pulled the door closed behind the curtain but did not lock it.

¶ 5 When Zlata stepped into the hallway, she was followed by a young lady who lived in an apartment down the hall. Zlata went downstairs, retrieved her mail, and then went back upstairs to her apartment. When she returned, the purse was gone. Zlata did not call the police.

¶ 6 Later that morning, a police officer came to her apartment and returned her purse to her. Zlata testified she never gave defendant, or anyone else, permission to take her purse out of her apartment on June 18.

¶ 7 Officer John Givelina testified that at about 11 a.m. on June 18, 2012, he was on patrol with two other officers in an unmarked police car, wearing civilian dress. He was in the front passenger seat. As they traveled northbound on Austin Avenue approaching Gunnison Street, he heard a woman, later learned to be Heather Buckley, yell "police." Office Givelina looked in the woman's direction and saw her near a man, later identified as defendant, who was sitting at a bus stop and "fingering through a small handbag."

¶ 8 The officers immediately made a U-turn and pulled up on the same side of the street as defendant. Officer Givelina exited the police car and saw defendant attempting to "conceal the purse underneath his leg." Officer Givelina asked defendant if the purse belonged to him; defendant made no reply. Officer Givelina asked defendant for the purse, and defendant handed it over. Officer Givelina opened the purse and discovered Zlata's driver's license.

¶ 9 Officer Givelina went to Zlata's apartment at 5957 West Lawrence Avenue, which was about 30 to 40 feet from the bus stop where defendant was sitting. Officer Givelina explained that 5957 West Lawrence Avenue was a storefront building with several apartments aligned in a row along a small hallway on the second floor. A rear door led to a staircase that led to an alley adjacent to the bus stop at which defendant was found going through the purse.

¶ 10 Officer Givelina knocked on Zlata's door and showed her the driver's license he had recovered from the purse. Zlata stated that it belonged to her. Then he showed Zlata the purse, which she also identified as belonging to her. Defendant was then placed into custody.

¶ 11 Officer Givelina testified he subsequently learned that neither defendant nor Heather Buckley lived at 5957 West Lawrence Avenue.

¶ 12 The State rested. Defendant made a motion for a directed finding, which the trial court denied. Defendant then rested without calling any witnesses.

¶ 13 In finding defendant guilty of one count of theft and one count of burglary, the trial court stated:

> "The police officer, Givelina, indicates he's *** riding on Lawrence with his partner *** when*** they hear officer, police, police and it's the female that is with [defendant] that is directing them to [defendant] and at that point the officers conduct a U-turn and see [defendant] going through a female purse. He tries to hide it underneath his legs, so actually there is a lack of cooperation. There is an intent to permanently deprive. It's been proven because he certainly hid it and it did not belong to him.
>
> I'm surmising that Miss Buckley was probably the lookout. He took it, he didn't share with her, and that's how he got the police called over by Miss Buckley is what I'm surmising.
>
> It's clear here that [Zlata] did not give [defendant] permission to (a) be in her apartment, to have it. He clearly intended to deprive it as it was underneath his leg. He had no intent of returning it, and the police were directed to him.
>
> It is a finding of guilty as to both charges."

¶ 14 Following the sentencing hearing, the trial court sentenced defendant to two concurrent terms of 10 years' imprisonment followed by three years of MSR.

¶ 15 The trial court then addressed the State's motion for reimbursement from defendant for the cost of court-appointed counsel. The court engaged in the following exchange with defendant:

"THE COURT: Mr. Kimbler, you need to support yourself and stop stealing from other people. Raise your right hand.

[Defendant sworn in].

THE COURT: Do you have any type of assets or savings accounts or anything like that?

DEFENDANT: No, I don't.

THE COURT: I will assess a $500 attorney fee."

¶ 16 Defendant filed this timely appeal.

¶ 17 First, defendant contends the State failed to prove him guilty of burglary beyond a reasonable doubt; defendant does not challenge his conviction of theft.

¶ 18 "When a defendant challenges the sufficiency of the evidence, we must determine whether the evidence, when viewed in the light most favorable to the prosecution, allows any rational trier of fact to find the essential elements of the offense beyond a reasonable doubt. [Citation.] This standard of review applies in all criminal cases whether the evidence is direct or circumstantial. [Citation.] It is the function of the trier of fact to determine the inferences to be drawn from the evidence, assess the credibility of the witnesses, decide the weight to be given their testimony, and resolve any evidentiary conflicts. [Citation.] We will not substitute our judgment for that of the trier of fact on questions involving the weight to be assigned the evidence or the credibility of witnesses." *People v. Baugh*, 358 Ill. App. 3d 718, 736 (2005).

¶ 19 To convict defendant of burglary here, the State was required to prove beyond a reasonable doubt that defendant knowingly and without authority entered Zlata's apartment at 5957 West Lawrence Avenue with the intent to commit therein a theft. 720 ILCS 5/19-1(a) (West 2012).

¶ 20 The only evidence introduced by the State linking defendant to the burglary is defendant's possession of Zlata's purse at the bus stop 30 to 40 feet from Zlata's apartment. Our supreme court has held, though, that exclusive and unexplained possession of recently stolen property is not sufficient, standing alone and without corroborating evidence of guilt, for conviction of burglary. *People v. Housby*, 84 Ill. 2d 415, 423 (1981). Our supreme court noted: "The person in exclusive possession may be the burglar, to be sure, but he might also be a receiver of stolen property, guilty of theft but not burglary, an innocent purchaser without knowledge that the item is stolen, or even an innocent victim of circumstances." *Id.* The supreme court concluded that a jury could presume guilt based on exclusive possession of recently stolen property only if three requirements were met: (1) there was a rational connection between defendant's recent possession of property stolen in the burglary and his participation in the burglary; (2) his guilt of burglary is "more likely than not to flow from his recent, unexplained and exclusive possession of burglary proceeds"; and (3) there was evidence corroborating defendant's guilt. *Id*. at 424.

¶ 21 The first prong of the *Housby* test was met because defendant's possession of Zlata's purse was proximate to both the time and place of the burglary. See *People v. Gonzalez*, 292 Ill. App. 3d 280, 288-89 (1997) (holding that when a defendant's possession of stolen property is proximate to both the time and place of the burglary, a rational connection exists satisfying the first prong of the *Housby* test).

¶ 22 The second prong of the *Housby* test requires more than a "rational connection" between the possession of the purse and the burglary; it requires some evidence that defendant's guilt of burglary "more likely than not" flowed from his recent, unexplained and exclusive possession of Zlata's purse. This prong was not met, as defendant's mere possession of Zlata's purse in close proximity in time and place to the burglary does not indicate defendant was "more likely than not" the burglar; it is equally as likely that defendant was the receiver of the stolen purse, or guilty of theft but not burglary. *Housby*, 84 Ill. 2d at 423.

¶ 23 The third prong of the *Housby* test also was not met, as there was no evidence corroborating defendant's guilt of burglary. No witnesses testified to seeing defendant commit the burglary, no physical evidence (such as fingerprints) tied defendant to the burglary of Zlata's apartment, and defendant made no confession.

¶ 24 The State argues that "[c]orroborating evidence is present in [Heather's] directive for police to approach defendant." We note that when rendering its verdict, the trial court stated it was "surmising" that Heather was the lookout, and that she called out for the police when defendant refused to share the proceeds of the burglary with her. However, there was absolutely no evidence presented at trial as to Heather's role, if any, as a lookout for the burglary, nor was there any evidence that she called for the police because defendant had burgled Zlata's apartment and refused to share the spoils of the burglary with her. The evidence that Heather called out to the passing police car and directed them to defendant does not corroborate that defendant had committed a burglary of Zlata's apartment.

¶ 25 The State argues that "corroborating evidence was present in defendant's evasiveness when he attempted to hide [Zlata's] purse under his leg when Officer Givelina approached and [in] defendant's unwillingness to respond to Officer Givelina's inquiries with regard to the owner

of the purse." Defendant's evasive and uncooperative behavior toward Officer Givelina was evidence that he had knowingly obtained unauthorized control of Zlata's purse and intended to permanently deprive her of the use thereof and, thus, was proof of theft (see 720 ILCS 5/16-1(a)(4)(A) (West 2012)); however, defendant's evasive and uncooperative behavior did not indicate *how* he had obtained control of the purse, *i.e.*, it did not indicate he had burglarized Zlata's apartment as opposed to receiving the purse from a third party or finding it at the bus stop.

¶ 26 This case is similar to *People v. Natal*, 368 Ill. App. 3d 262 (2006). In *Natal*, the burglary victim testified he came upon his burgled apartment, went to his patio, and saw Natal standing on the sidewalk about 20 feet away looking into two pillowcases that had been removed from the apartment. *Id*. at 263-64. The victim confronted Natal, who retreated and dropped a glove belonging to the victim. *Id*. at 264. Natal was arrested shortly thereafter, and the police found in his pocket a padlock that had been in the victim's apartment. *Id*. Natal testified that he found the glove, pillowcases, and other items on the ground, and had picked them up. *Id*. at 265. Natal's fingerprints were not found at the scene of the burglary. *Id*.

¶ 27 The trial court found Natal guilty of residential burglary, finding that his unexplained possession of the property was the "most powerful evidence" of guilt. *Id*. at 266. The appellate court reversed, stating:

> "The trial court's decision shows that the judge inferred the burglary merely from [Natal's] possession of the stolen property and ignored the admonition of *Housby* that unexplained possession, standing alone, is not sufficient to convict. In its decision the trial court did not discuss the three requirements set forth in *Housby* for a court to presume guilt based on the exclusive possession of recently stolen property.

> Other than [Natal's] possession of the property, there was no corroborating evidence of [his] guilt. In fact, quite to the contrary, fingerprint samples that were taken at the scene did not match [Natal's]. This is evidence that supports the position that [Natal] was not the burglar. Although the trial court found incredible [Natal's] testimony that someone else had merely dropped the items on the street, or left them in a pillowcase, that testimony and the fact that [Natal] had possession of items taken in the burglary cannot support a guilty verdict of burglary beyond a reasonable doubt without some corroborating evidence." *Id*. at 269.

¶ 28 In the present case, as in *Natal*, there was no corroborating evidence tying defendant to the burglary of Zlata's apartment-no fingerprints, no eyewitnesses, and no confession. In the absence of any corroborating evidence, defendant's mere possession of Zlata's purse in close time and proximity to the burglary is insufficient to support his burglary conviction. Accordingly, we reverse defendant's conviction of burglary.

¶ 29 Next, defendant argues, and the State agrees, that under the applicable sentencing statutes (720 ILCS 5/16-1(b)(2) (West 2012); 730 ILCS 5/5-4.5-45(a) (West 2012); and 730 ILCS 5/5-8-2(a) (West 2012)), he was not eligible for the extended 10-year term of imprisonment and 3-year MSR imposed on him for his theft conviction and, therefore, that this sentence was void. As the parties agree that the sentence of 10 years' imprisonment and 3 years' MSR was void, we vacate this sentence and remand for resentencing.

¶ 30 Finally, defendant contends the trial court erred by requiring him to pay $500 for the services of court-appointed counsel after a hearing under section 113-3.1(a) of the Code. Section 113-3.1(a) of the Code states:

> "Whenever under either Section 113-3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant, the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties." 725 ILCS 5/113-3.1(a) (West 2012).

"To comply with the statute, the court may not simply impose the fee in a perfunctory manner. [Citation.] Rather, the court must give the defendant notice that it is considering imposing the fee, and the defendant must be given the opportunity to present evidence regarding his or her ability to pay and any other relevant circumstances. [Citation.] The hearing must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay. [Citation.] The trial court must consider, among other evidence, the defendant's financial affidavit." *People v. Somers*, 2013 IL 114054, ¶ 14.

¶ 31 The hearing held by the trial court here consisted of one question asking defendant if he had "any type of assets or savings accounts or anything like that," and defendant's response, "No, I don't." The trial court did not inquire of defendant whether he had any evidence he wished to present regarding his ability to pay, such as his employment prospects or lack thereof, nor was any inquiry made as to the costs of the representation. The record does not show the court considered defendant's financial affidavit. Clearly, then, the one-question hearing conducted by the court did not comply with the statute. See *e.g.*, *People v. Bass*, 351 Ill. App. 3d 1064 (2004) (appellate court remanded for a new hearing where the trial court did not comply with section

113-3.1(a) of the Code when it only asked defendant three questions regarding whether he was employed, the name of his employer, and his monthly earnings); *Somers*, 2013 IL 114054 (supreme court affirmed a remand for a new hearing when the trial court did not comply with section 113-3.1(a) of the Code by only asking defendant three questions regarding whether defendant thought he could get a job, whether he would use that job to pay his fines and costs, and whether there was any physical reason why he could not work).

¶ 32 Defendant argues that we should vacate the $500 recoupment order. However, where a recoupment order is entered following an inadequate section 113-3.1(a) hearing, the proper recourse is to vacate the recoupment order *and* remand for a new hearing in which the court gives defendant notice it is considering imposing the fee, defendant is given the opportunity to present evidence regarding his ability to pay and any other relevant circumstances, and the court considers defendant's financial affidavit. See *Bass* and *Somers*. Defendant argues that the recoupment order may be vacated without remandment pursuant to *People v. Barbosa*, 365 Ill. App. 3d 297 (2006). However, careful review of *Barbosa* indicates that after finding that the section 113-3.1(a) hearing in that case was inadequate, the appellate court vacated the recoupment order and remanded for a new hearing. *Id*. at 302. Pursuant to *Bass*, *Somers* and *Barbosa*, we vacate the $500 recoupment order and remand for a new section 113-3.1(a) hearing on defendant's ability to pay for court-appointed counsel.

¶ 33 Reversed in part; vacated in part; cause remanded with directions.