FOURTH DIVISION
May 21, 2015

No. 1-13-1554

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. 10 CR 5947
	)	
MICHAEL JOHNSON,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE, delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: The fair market value of the camcorder taken from the victim was established through the victim's testimony comparing the camcorder and its features to one that he purchased. The trial court did not abuse its discretion when it ordered defendant to pay restitution to the victim although the victim was not the owner of the property taken when restitution may be ordered in favor of the victim named in the charge or any other victim harmed by a defendant's actions. Defendant has forfeited review of his challenge the trial court's failure to set a payment schedule because he failed to object to the restitution order in the trial court.

¶ 2 Following a bench trial, defendant Michael Johnson was found guilty of theft and sentenced to 24 months of probation. On appeal, he contends that his conviction must be reduced to a Class A misdemeanor and remanded for resentencing because the State failed to prove beyond a reasonable doubt that the stolen property had a fair market value of more than $300. He further contends that the trial court erred in ordering him to pay restitution when the victim did not suffer any out-of-pocket losses. He finally contests the imposition of certain fines and fees. We affirm defendant's conviction and correct the mittimus.

¶ 3 Defendant's arrest and prosecution arose out of a March 2010 incident during which a camcorder was taken from the victim Tianniu Lei.

¶ 4 At trial, the victim testified that he was standing on a train platform with a camera bag containing his camcorder and a backpack containing a friend's camcorder when defendant approached and asked for a lighter. The victim indicated that he did not have one. Both men then got into a train car. After the train started moving, defendant pulled open the emergency door and started smoking. He asked why the victim was "there." The victim explained that he was in the neighborhood for a school project. He tried to "dodge" defendant's questions because his parents taught him not to speak to strangers. At a subsequent stop, a couple entered and sat down.

¶ 5 At this point, defendant asked the victim to take a picture of defendant with this couple. The victim hesitated because he did want to show his "properties," that is, the camcorders. Defendant asked the victim 10-20 times, in a very "demanding" voice, to take a photo. At one point, defendant backed up and said "Federal right here" while opening his jacket, displaying what the victim believed was a handgun. At trial, the victim admitted that he could not see

clearly at the time because he did not have his glasses on. He complied the next time that defendant asked him to take a picture because he felt "there might be danger." The victim took four or five photographs with his friend's camcorder. Defendant then asked to see the photos. The victim hesitated, but when defendant asked a second time, he reached out so defendant could see the photos. Defendant took the camcorder, looked at the pictures, and when the door opened at the next stop, he left with the camcorder. The victim got off the train at the Roosevelt stop and informed CTA staff that he had been "robbed." When the police arrived, the victim gave a description of the person who took the camcorder, and later identified defendant.

¶ 6 The State showed the victim a picture which the victim described as the same, "if not similar model of the camcorder" that was taken. His friend's "digital camcorder" was a Sony XR500. He clarified that his friend's camcorder was a more updated version of his camcorder, and included a GPS function. The victim purchased his camcorder in China for "roughly" $900.

¶ 7 Sergeant Maciejewski testified that after speaking to the victim, he went to the 43rd Street train station. When he saw defendant, who matched the description given by the victim, he detained defendant until the victim arrived and identified defendant. A custodial search of defendant recovered $50.

¶ 8 Detective Amanda Smith testified that defendant stated, during a subsequent conversation at a police station, that he chatted with the victim on the train, pointed out a window while stating "Federal right here, you are in the hood now," and exited the train with the camcorder. Defendant further stated that he sold the camcorder because he needed money to attend a family funeral. Defendant denied having a gun.

¶ 9 The defense then moved for a directed verdict, arguing that the State failed to prove that the camcorder's value was in excess of $300 when the victim testified that he bought his camcorder in China for $900, but the victim's camcorder was not the camcorder at issue. The State responded that the victim paid $900 for his camcorder and testified that it was almost the same model as the one taken, absent the "upgrade" of a GPS. The trial court denied the motion.

¶ 10 In ultimately finding defendant guilty of theft, the trial court stated that the victim testified that the camcorder taken was identical to his, with the exception of the GPS, and that the victim's camcorder was purchased for $900 in China. Consequently, the value of the item taken was more than $300. The trial court subsequently sentenced defendant to 24 months of probation and ordered him to pay $900 in restitution.

¶ 11 On appeal, defendant first contends that his conviction for theft must be reduced to a Class A misdemeanor and the cause remanded for resentencing when the State failed to prove beyond a reasonable doubt that the camcorder had a fair market value exceeding $300 at the time of the incident.

¶ 12 In assessing the sufficiency of the evidence, this court must determine whether any rational trier of fact, after viewing the evidence in the light most favorable to the prosecution, could have found the elements of the offense proved beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. "Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State." *Id.* This court is prohibited from substituting its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). A criminal conviction will not be reversed based upon insufficient evidence unless the evidence is so improbable or unsatisfactory

that it creates a reasonable doubt as to the defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 13 Here, defendant was charged with, *inter alia*, the Class 3 felony of theft of property with a value exceeding $300 but less than $10,000. See 720 ILCS 5/16-1(a)(1), (b)(4) (West 2008). " 'When a charge of theft of property exceeding a specified value is brought, the value of the property involved is an element of the offense to be resolved by the trier of fact as either exceeding or not exceeding the specified value.' " *People v. Perry*, 224 Ill. 2d 312, 320 (2007), quoting 720 ILCS 5/16-1(c) (West 2000); see also *People v. Rowell*, 229 Ill. 2d 82, 91 (2008) (the value of the property is an element of the offense to be resolved by the trier of fact). In this case, the question on appeal is whether the State proved beyond a reasonable doubt the value of the camcorder taken by defendant was more than $300. See *People v. Furby*, 138 Ill. 2d 434, 446 (1990) (an element of an offense must be proved beyond a reasonable doubt).

¶ 14 Defendant argues that the victim's testimony that he purchased a camcorder of the "same make" on "some unspecified date" in China for approximately $900 was insufficient to establish the fair market value of the camcorder at issue on the date of the theft. The State responds that absent contrary evidence, testimony as to the worth of property is sufficient proof of its value (see *People v. DePaolo*, 317 Ill. App. 3d 301, 308 (2000)), and here, the victim testified that the camcorder taken by defendant was similar to the camcorder that he purchased for $900 but had the additional upgrade of a GPS function.

¶ 15 Although defendant is correct "that the value of stolen property is the fair cash market value at the time and place of the theft" (*Perry*, 224 Ill. 2d at 336), the cost of an item combined with proof of condition, quality or "modernness" may be sufficient to show that item's value

(*People v. Brown*, 36 Ill. App. 3d 416, 421 (1976)). Here, the victim, who owned a camcorder that was similar to the one at issue, testified as to the purchase price of his camcorder. See *People v. Foster*, 199 Ill. App. 3d 372, 392 (1990)(a consumer who is familiar with the stolen property is competent to testify as to the property's value). Although defendant admitted that he sold the camcorder for $50, no evidence was presentenced that this amount was equivalent to its fair market value. After hearing that the camcorder had a GPS function and was in working order, *i.e.*, the victim testified that he used it to take pictures immediately before it was taken, the trial court determined that the value of the camcorder was more than $300. In other words, there was sufficient evidence of value based on the quality, features, and price of a similar, but less advanced, camcorder for a reasonable fact finder to conclude beyond a reasonable doubt the camcorder taken by defendant was worth more than $300. See *Brown*, 36 Ill. App. 3d at 421 (although proof as to the cost of an item is not sufficient to prove fair market value "cost together with other proof, relating to condition, quality and modernness ***, may afford the basis for a valid finding as to value").

¶ 16 In the case at bar, a witness with knowledge regarding the retail value of the camcorder, testified that he had purchased a less advanced model for $900 and that the one taken by defendant was in working order but had the upgrade of a GPS; defendant did not present any evidence contradicting the victim's testimony. See *DePaulo*, 317 Ill. App. 3d at 308. Accordingly, a rational trier of fact could find (*Baskerville*, 2012 IL 111056, ¶ 31), applying common sense and considering the cost to replace the camcorder, that the value of the camcorder was at least $300 thereby supporting a Class 3 felony conviction. See *People v. Cobetto*, 66 Ill.

2d 488, 491(1977) (common sense may also be considered in determining the value of stolen property). We therefore affirm defendant's conviction.

¶ 17 Defendant next contends that the trial court erred in ordering him to pay the victim $900 in restitution because the victim did not suffer any out-of-pocket losses. In the alternative, defendant contends that the trial court failed to comply with the requirements of section 5-5-6(f) of the Unified Code of Corrections (the Code) (730 ILCS 5/5-5-6(f) (West 2010)), when the court failed to set forth the time frame and manner in which defendant was to pay restitution. The State responds that defendant has forfeited review of these claims on appeal because he failed to raise them in a motion to reconsider sentence. Defendant admits that he failed to raise these issues in a motion to reconsider sentence, but argues that an order of restitution in excess of a victim's out-of-pocket losses is void and may be challenged at any time. See *People v. Graham*, 406 Ill. App. 3d 1183, 1193 (2011). In the alternative, he asks this court to review the restitution order for plain error as it is his fundamental right to be fairly sentenced. He finally contends that he was denied the effective assistance of trial counsel because counsel failed to object to the restitution order.

¶ 18 The plain error doctrine permits this court to address forfeited errors "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). The first step to determine whether the plain error doctrine applies is to determine whether any error occurred. *People v. Patterson*, 217 Ill. 2d 407, 444 (2005). Absent error, there can be no plain error. *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 19 "Any portion of a sentence that is not statutorily authorized is void." *People v. Day*, 2011 IL App (2d) 091358, ¶ 48. When a trial court exceeds its sentencing authority by entering an order that a statute does not allow, the order will be deemed void, and the defendant may challenge it on appeal even if he did not properly preserve that issue for appeal. *Id*. ¶¶ 48-49. However, if the order is improper because of a mistake in the law or the facts, it is voidable, not void, and the failure to challenge a voidable order can result in the forfeiture of that issue on appeal. *Id*. ¶ 48. Whether a sentence, or a portion of it, is void presents a question of law that we review *de novo*. *People v. Donelson*, 2011 IL App (1st) 092594, ¶ 7, *aff'd* 2013 IL 113603.

¶ 20 The trial court may order a defendant convicted of a criminal offense that resulted in damages to pay restitution for those damages. 730 ILCS 5/5-5-6 (West 2010). In determining the amount of restitution to be paid, "the court shall assess the actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim named in the charge and any other victims who may also have suffered out-of-pocket expenses *** caused by the same conduct." 730 ILCS 5/5-5-6(b) (West 2010). "Alleged losses which are unsupported by the evidence must not be used as a basis for awarding restitution." *People v. Jones*, 206 Ill. App. 3d 477, 482 (1990). In other words, when determining the actual costs to the victim, the court must not guess. *People v. Dickey*, 2011 IL App (3d) 100397, ¶ 25. The trial court's calculation as to the proper amount of restitution to be paid by a defendant will not be overturned absent an abuse of discretion. *People v. Fitzgerald*, 313 Ill. App. 3d 76, 81 (2000); *In re Shatavia S.*, 403 Ill. App. 3d 414, 418 (2010) (a trial court' s restitution order will not be disturbed unless there is no evidentiary or factual basis for the court's finding in the record).

¶ 21 Here, the victim testified that the camera taken by defendant belonged to his friend and although it had the upgraded feature of a GPS, it was similar to a camera that the victim purchased for roughly $900. Thus, the record contains a factual basis for the trial court's determination of the restitution amount of $900. See *In re Shatavia S.*, 403 Ill. App. 3d at 418. To the extent that defendant argues the trial court's order was rendered void by the fact that it was to be paid to the victim rather than to the actual owner of the camera we disagree. Pursuant to section 5-5-6(b) of the Code, the trial court may assess the actual out-of-pocket expenses or losses suffered by the victim named in the charge or any other victims who may also have suffered out-of-pocket expenses caused by the same conduct. 730 ILCS 5/5-5-6(b) (West 2010). In other words, a defendant found guilty of the theft of an item that was owned by someone other than the person he took it from is not exempt from paying restitution.

¶ 22 We are unpersuaded by defendant's reliance on *People v. McClard*, 359 Ill. App. 3d 914 (2005). In that case, although the defendant was found guilty of forgery, he did not receive any funds from the forged check at issue. *McClard*, 359 Ill. App. 3d at 916. Accordingly, the court vacated the trial court's restitution order because the victim did not suffer any losses as a result of the offense for which the defendant was convicted. *Id.* In the case at bar, however, the evidence at trial established, and defendant does not dispute on appeal, that defendant walked off the train with the camcorder and later sold it for $50. Thus, the owner of the camcorder did suffer a loss as a result of the offense for which defendant was found guilty, that is, the loss of the camcorder.

¶ 23 Ultimately, here, the record contains sufficient evidence to support the trial court's restitution order, and, therefore, this court will not disturb the court's finding. See *In re Shatavia*

S., 403 Ill. App. 3d at 418. As the trial court did not err, there can be no plain error and defendant's argument must fail. See *Williams*, 193 Ill. 2d at 349.

¶ 24 In the alternative, defendant contends that he was denied the effective assistance of counsel by counsel's failure to object to the trial court's restitution order.

¶ 25 To show an attorney's representation was ineffective, a defendant must establish (1) the attorney's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). As discussed above, the trial court did not abuse its discretion when it entered the restitution order, and trial counsel is not ineffective simply because she does not object to the trial court's proper exercise of its discretion. Because defendant cannot establish how counsel's performance fell below an objective standard of reasonableness, his claim of ineffective assistance must fail. See *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (failure to satisfy either prong of the *Strickland* test defeats an ineffective assistance claim).

¶ 26 Defendant next contends that the restitution order void because the trial court failed to assess his ability to pay and did not set a payment schedule prior to imposing the order in violation of section 5-5-6(f) of the Code. The State responds that the court was not required to set the time and manner of repayment, and, in any event, defendant has forfeited this claim as he never challenged the restitution order in the trial court.

¶ 27 Section 5-5-6(f) of the Code (730 ILCS 5/5-5-6(f) (West 2010)), provides that, “[t]aking into consideration the ability of the defendant to pay, including any real or personal property or any other assets of the defendant, the court shall determine whether restitution shall be paid in a

single payment or in installments, and shall fix a period of time ***, within which payment of restitution is to be paid in full."

¶ 28 Contrary to defendant's argument on appeal, restitution orders that are entered without the trial court first considering a defendant's ability to pay or creating a payment schedule are not void. See, *e.g.*, *Graham*, 406 Ill. App. 3d at 1194 (rejecting the defendant's argument on appeal that "the trial court's restitution order should be set aside because the court failed to consider his ability to pay restitution and failed to specify, *inter alia*, a payment schedule, [when] these objections have been forfeited by the defendant's failure to raise them at his sentencing hearing"). This is because the statute as currently written does not require the trial court to review a defendant's ability to pay restitution and set a payment schedule before ordering restitution. See *People v. Gray*, 234 Ill. App. 3d 441, 444 (1992) (section 5-5-6 "does not require any preliminary determination of defendant's financial capacity before ordering defendant to pay restitution" when that "requirement was eliminated by statutory amendment in 1983"). Therefore, a restitution order entered without compliance with the statute is voidable, and subject to forfeiture, because section 5-5-6(f) only pertains to the time frame and method of payment by " 'which restitution shall be made after restitution has been ordered' " *People v. Higgins*, 2014 IL App (2d) 120888, ¶ 10, quoting *Gray*, 234 Ill. App. 3d at 444. Accordingly, we agree with the State that defendant has forfeited review of this claim when he failed to object to the restitution order in the trial court. *Higgins*, 2014 IL App (2d) 120888, ¶ 10.

¶ 29 Defendant next contends, and the State concedes, that his mittimus must be corrected to reflect 100 days of presentence custody credit when defendant was arrested on March 14, 2010, and posted bond on June 21, 2010. We agree, and pursuant to our power to correct a mittimus

without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), order the clerk of the circuit court to correct defendant's mittimus to reflect 100 days of presentence custody credit.

¶ 30 Defendant also contends, and the State agrees, that pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010), he is entitled to a $500 credit based on 100 days of presentence custody. The parties agree that defendant was assessed certain fines that may be offset by the presentence custody credit: the $10 Mental Health Court fine (55 ILCS 5/5-1101(d5) (West 2010)); the $5 Youth Diversion/Peer Court fine (55 ILCS 5/5-1101(e) (West 2010)); the $5 Drug Court fine (55 ILCS 5/5-1101(f) (West 2010)); and the $30 Children's Advocacy Center fine (55 ILCS 5/51101(f-5) (West 2010)). Therefore, pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order that the $10 Mental Health Court fine, the $5 Youth Diversion/Peer Court fine, $5 Drug Court fine, and the $30 Children's Advocacy Center fine be offset by defendant's presentence custody credit.

¶ 31 Defendant next contends that his presentence custody credit should be also be used to offset the $4 fine assessed pursuant to section 5-9-1(a) of the Code (730 ILCS 5/5-9-1(a) (West 2010)). The State, on the other hand, argues that the $4 was assessed pursuant to section 5-9-1(c) of the Code and cannot be offset by presentence custody credit. See 730 ILCS 5/5-9-1(c) (West 2010) ("[s]uch additional penalty shall not be considered a part of the fine for purposes of any reduction in the fine for time served either before or after sentencing).

¶ 32 A review of the record, however, reveals that the $4 fine, which was included in the section of the fines and fees order listing fines to be offset by the presentence custody credit was labeled "ST/PD" and did not include a statutory citation. Additionally, the trial court did not specifically mention or explain this assessment at sentencing. Absent statutory citation, this court

cannot determine the basis for the assessment and pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to vacate the assessment.

¶ 33 Defendant finally argues that he is entitled to offset the $50 Court System fee with his presentence custody credit. The State responds that presentence custody credit may be used only for the payment of fines, not fees, and that the court system cost is a fee.

¶ 34 Section 5-1101(c) of the Counties Code states that for a felony conviction, a defendant shall pay a fee of $50. 55 ILCS 5/5-1101(c)(1) (West 2010). The State maintains that the use of the term "fee" indicates that the assessment should be categorized as a fee. However, in *People v. Graves*, 235 Ill. 2d 244, 253 (2009), our supreme court held that the charges in section 5-1101 of the Counties Code represent "monetary penalties to be paid by a defendant" who pleads to or is found guilty of certain offenses. The court concluded that because the costs assessed pursuant to section 5-1101 are not intended to compensate the State for the prosecution of any particular defendant, they are fines. *Graves*, 235 Ill. 2d at 252-53, accord *People v. Smith*, 2013 IL App (2d) 120691, ¶ 21; *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 17; *People v. Smith*, 2014 IL App (4th) 121118, ¶ 54; *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30. Although the State maintains that *Smith* and *Akerman* were wrongly decided, those cases relied upon the holding of our supreme court in *Graves*. Accordingly, we find that $50 Court System fee was a fine that defendant may offset with his presentence custody credit.

¶ 35 Accordingly, pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct defendant's mittimus to reflect (1) 100 days of presentence custody credit, (2) a $500 credit based on 100 days of presentence custody credit, (3) that the $10 Mental Health Court fine, the $5 Youth Diversion/Peer Court fine, the $5 Drug Court fine, the

$30 Children's Advocacy Center fine, and the $50 Court System fee are offset by defendant's presentence custody credit, and (4) the vacation of the $4 "ST/PD" assessment for a new total due of $575. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 36 Affirmed; mittimus corrected.