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2015 IL App (3d) 130541-U

Order filed October 6, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-13-0541
)	Circuit No. 12-CF-1077
LIONEL D. ROBINSON,)	
)	Honorable
Defendant-Appellant.)	Kevin W. Lyons,
)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Schmidt dissented.

ORDER

- ¶ 1 *Held:* Trial court erred by imposing an extended-term sentence where defendant was convicted of committing a burglary against Best Buy rather than a specific individual.
- ¶ 2 The jury found defendant, Lionel D. Robinson, guilty of burglary (720 ILCS 5/19-1(a) (West 2012)) and unlawful use of a credit card (720 ILCS 5/17-36 (West 2012)). The trial court entered judgment only on the charge of burglary, and sentenced defendant to a term of 14 years' imprisonment. Defendant appeals, arguing that he was not eligible for extended-term sentencing

on the charge of burglary because that offense was not committed against a person over the age of 60. We agree, and remand so the trial court may resentence defendant within the nonextended range for a Class 2 felony.

¶ 3

FACTS

¶ 4

The State charged defendant by indictment with burglary (720 ILCS 5/19-1(a) (West 2012)) and unlawful use of a credit card (720 ILCS 5/17-36 (West 2012)). With respect to the charge of unlawful use of a credit card, the indictment alleged that defendant knowingly and unlawfully used the credit card of Eleanor Miller—a person over 60 years of age—without her consent. As to the burglary charge, the indictment alleged that defendant knowingly entered a Peoria Best Buy with the intent to commit a felony therein—that felony being unlawful use of a credit card.

¶ 5

The evidence introduced during defendant's jury trial established that defendant entered a Best Buy on October 3, 2012, and purchased a car stereo with a global positioning satellite system (GPS) unit which he scheduled for installation the next day. Subsequently, the credit card statement of Harry and Eleanor Miller revealed two unauthorized purchases at Best Buy with Eleanor's card took place on October 3, 2012. The evidence also established Eleanor was in her late eighties and did not authorize defendant to possess or charge purchases on her credit card. Officer Stuart Ingersoll spoke to the Millers where they resided at Rosewood Care Center on October 4, 2012. Following this conversation, he contacted a security officer at Best Buy, as well as a representative from the Millers' bank.

¶ 6

Detective Denise White received a telephone call from Best Buy on October 4, 2012, reporting possession of a stolen credit card. After arriving at Best Buy, Detective White met with defendant and placed him under arrest.

¶ 7 Detective Jason Leigh testified that defendant indicated that "the property was in his car" before consenting to allow the officers to search his vehicle. Once the search took place, a GPS navigation system was discovered in defendant's car along with a receipt indicating charges of \$133.12 to Eleanor's credit card.

¶ 8 The jury found defendant guilty on both counts. At sentencing, the State asked the court to only enter a conviction for the more serious offense of burglary. The State suggested that defendant was eligible for extended-term sentencing on that charge based upon Eleanor's advanced age, which the jury had found to be over 60. Defendant did not contest that he was extended-term eligible on the burglary charge.

¶ 9 When imposing defendant's punishment, the court found that "[d]efendant committed the offense against a person 60 years of age or older or that person's property." The court further stated that, based on the jury's finding that Eleanor was over the age of 60, defendant was eligible for an extended-term sentence. The court sentenced defendant to a term of 14 years' imprisonment. The court's written sentencing order indicates that conviction and sentence were entered only upon the charge of burglary.

¶ 10 Defendant subsequently filed a motion to reconsider sentence in which he alleged, *inter alia*, that "[t]he Court erred in considering the victim's age as an aggravating factor when the age of the victim had already been used to extend the potential sentencing range from 3-7 years to 3-14 years, thereby using said factor as a double enhancement." At a hearing on the motion to reconsider sentence, the court clarified that Eleanor was "sort of an ultimate victim in the case," but that it had not considered her age as an aggravating factor. The court denied the motion, noting that the age of the victim made defendant extended-term eligible "under operation of law."

¶ 11

ANALYSIS

¶ 12

On appeal, defendant contends that he was not eligible for a Class 2 extended-term sentence, and that his sentence of 14 years' imprisonment for burglary is thus outside of the statutory range and void. In support of this argument, defendant maintains that the burglary offense was committed against Best Buy, rather than Eleanor. Consequently, defendant argues the court's reliance upon Eleanor's age to trigger extended-term eligibility was improper.

¶ 13

Initially, we note that defendant failed to preserve this issue for appeal. To preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). While defendant arguably raised the issue of the trial court's consideration of Eleanor's age in his motion to reconsider sentence, he acquiesced to the State's assertion at sentencing that he was extended-term eligible, thus failing to satisfy the requirement of a contemporaneous objection. However, a trial court is without authority to impose a sentence that does not conform to statutory guidelines and any unauthorized sentence is illegal and void. *People v. White*, 2011 IL 109616, ¶ 20. The State has not raised any contention of forfeiture, presumably because the issue of a void sentence is not subject to forfeiture, and may be raised at any time. *People v. Thompson*, 209 Ill. 2d 19, 25 (2004).

¶ 14

Section 5-5-3.2(b) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.2(b) (West 2012)) sets forth the factors that may be considered by a court as a reason to impose an extended-term sentence. The only factor relevant to this appeal provides that a defendant may receive an extended-term sentence where he "is convicted of any felony committed against: *** (ii) a person 60 years of age or older at the time of the offense or such person's property." 730 ILCS 5/5-5-3.2(b)(3)(ii) (West 2012).

¶ 15 A burglary is committed where a person, without authority, "knowingly enters or without authority remains within a building *** with intent to commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2012). It is well-settled that the intended felony or theft that underlies burglary need not actually be completed in order for a burglary to be committed. See, e.g., *People v. Clark*, 30 Ill. 2d 216, 219 (1964). Indeed, the offense of burglary is complete once a person enters a building with felonious intent. *Id.*; *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶ 16 Here, defendant was sentenced for an offense, burglary, which occurred when defendant unlawfully entered a building with criminal intent to commit a felony offense, but this burglarized building was not linked to Eleanor in any way. The trial court opined that Eleanor was "sort of an ultimate victim in the case." This position, however, neglects the consistent position of our supreme court that a burglary is complete the moment a person enters the building with felonious intent. See *Beauchamp*, 241 Ill. 2d at 8. Further, the Code does not contemplate a broad consideration of who the "ultimate victim" of a burglary offense may be. See 730 ILCS 5/5-5-3.2(b)(3)(ii) (West 2012).

¶ 17 The dissent, similar to the trial court, points out that Eleanor "is properly considered a victim." We agree, but observe that Eleanor was the victim of the Class 4 felony offense of unlawful use of a credit card, which was not the most serious offense defendant was convicted of committing. See 720 ILCS 5/17-36 (West 2012). Unless Eleanor was the victim of the most serious felony, we conclude the court could not impose an extended-term sentence based on her age. See *Thompson*, 209 Ill. 2d at 23 ("[W]hen a defendant has been convicted of multiple offenses of differing classes, an extended-term sentence may be imposed only on the conviction within the most serious class.").

¶ 18 The offense of burglary is a Class 2 felony, for which the standard sentencing range is between three and seven years' imprisonment. 720 ILCS 5/19-1(b) (West 2012); 730 ILCS 5/5-4.5-35(a) (West 2012). The sentence of imprisonment for an extended-term Class 2 felony is a term not less than 7 years and not more than 14 years. 730 ILCS 5/5-4.5-35(a) (West 2012). Defendant's sentencing within the extended range was thus outside of the statutory range and void.

¶ 19 Accordingly, we vacate the order of the trial court sentencing defendant to a term of 14 years' imprisonment and remand the matter with instructions that the court impose a sentence of between 3 and 7 years' imprisonment, the standard range for the Class 2 felony of burglary.

¶ 20 CONCLUSION

¶ 21 The sentencing order of the circuit court of Peoria County is vacated and the matter is remanded for resentencing.

¶ 22 Sentence vacated; remanded with directions.

¶ 23 JUSTICE SCHMIDT, dissenting.

¶ 24 I respectfully dissent. I am unaware of any case and neither defendant nor the majority point to any authority holding that the only victim of a burglary can be the owner of the building where entry is made. If this is the law, then under Supreme Court Rule 23, this should be an opinion as no court has said this before.

¶ 25 It is clear the evidence established that defendant entered a building owned by Best Buy, armed with a credit card stolen from Eleanor Miller, with the intent to steal Eleanor Miller's property by buying a car stereo using her card.

¶ 26 Because there is neither logic nor statutory language that suggests there cannot be more than one victim of a burglary, and because the evidence establishes that defendant entered the

Best Buy store with the intent to steal Eleanor's property, I believe that she is properly considered a victim of the burglary and, therefore, her age can be considered in sentencing. The intent element of the burglary was to steal Eleanor's property and Best Buy's property. The fact that defendant was also convicted of illegal use of Eleanor's property is irrelevant to the issue of whether she was a victim of the burglary. She was the victim of at least two crimes, including the burglary and illegal use of her credit card. I would affirm the trial court.