2016 IL App (1st) 141188-U

FIFTH DIVISION
September 9, 2016

No. 1-14-1188

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. 13 CR 5223
	)	
JESSIE McGEE,	)	Honorable
	)	Noreen Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Burke concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant was proven guilty, beyond a reasonable doubt, of burglary when the evidence at trial established that he entered two minivans without permission and was then observed moving his arms around "like he was looking for something." The trial court did not abuse its discretion when it sentenced defendant, because of his criminal background, to two concurrent Class X sentences of 10 years in prison.

¶ 2 Following a bench trial, defendant Jessie McGee was found guilty of two counts of burglary. He was sentenced, because of his criminal background, to two concurrent 10-year Class X prison terms. On appeal, defendant contends that the State failed to establish beyond a reasonable doubt that he intended to commit a theft. He further contends that his sentence is excessive because the trial court failed to consider certain mitigating evidence including, *inter alia,* his age and struggles with substance abuse. Defendant finally contests the imposition of certain fines and fees. We affirm and correct the fines and fees order.

¶ 3 At trial, Paul Buchbinder testified that he did not know defendant and did not give defendant permission to enter his 2007 Toyota Sienna minivan. Sarah Munoz also testified that she did not know defendant and did not give him permission to enter her 1999 Toyota Sienna minivan.

¶ 4 Officer Nicholas Velez then testified that on February 18, 2013, he was working a "burglary mission" when he saw defendant. Defendant was dressed in black clothing. Velez watched as defendant walked into lots where vehicles were parked behind businesses and residences. Ultimately, he noticed defendant in a dark-colored minivan behind an auto shop. The driver's side door was open and defendant was leaning inside the vehicle moving his arms around. Velez was approximately 60 feet away from defendant at this time. Velez later learned that this vehicle was a 2007 Toyota Sienna owned by Buchbinder. He "idled" his automobile forward so that he could not be seen by defendant and radioed his partner.

¶ 5 As Velez exited his vehicle he lost sight of defendant. When he saw defendant again, defendant was in a different minivan. Defendant was sitting in the driver's seat with his legs

toward the door. Velez later learned that this 1999 Toyota belonged to Munoz. Velez and his partner instructed defendant to exit the vehicle and took defendant into custody.

¶ 6 Officer TJ Smith testified that when he arrived at the parking lot, defendant was seated in the front driver's seat of a minivan. Defendant's back was toward Smith and defendant was "leaning over moving his arms around like he was looking for something towards [*sic*] the dashboard." Smith was approximately 10 feet away from defendant at this time. He drew his firearm, approached the vehicle, and asked defendant to exit the vehicle and get on the ground.

¶ 7 The trial court found defendant guilty of two counts of burglary. At sentencing, the State argued that defendant was eligible for a Class X sentence because of his criminal background and requested a prison term of 15 years. The defense argued in mitigation that defendant was 60 years old, had substance abuse issues, suffered lasting physical effects from a shooting in 1972, and took medication for seizures. Additionally, he babysat his grandchildren on a weekly basis, "made it to the twelfth grade" and had obtained a certificate in business administration.

¶ 8 Defendant then stated that he should have informed his attorney that he was homeless at the time of the offense, but that he was ashamed. He explained that he only got into the vehicle to "get out of the cold." The trial court responded that there were two vehicles involved. The court further stated that it did not "make a lot of sense" that defendant was homeless, yet he babysat his grandchildren. The court noted that defendant suffered from seizures due to a gunshot wound suffered in 1972, but that these seizures had not stopped defendant from committing crimes, including armed robbery and attempted murder, between 1977 and 2006. The court concluded that defendant had "almost" his entire adult life to make changes, but did

not because "drugs" were a big issue. Ultimately, the trial court sentenced defendant to two concurrent Class X sentences of 10 years in prison.

¶ 9 On appeal, defendant first contends that he was not proven guilty of burglary because the State failed to establish, beyond a reasonable doubt, that he intended to commit a theft inside either minivan. He therefore concludes that his convictions must be reduced to criminal trespass to a vehicle.

¶ 10 When reviewing a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *People v. Bradford*, 2016 IL 118674, ¶ 12 (Mar. 24, 2016). Accordingly, a reviewing court will not substitute its judgment for the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. *Id*. This court reverses a defendant's conviction only where the evidence is so unreasonable, improbable or unsatisfactory that a reasonable doubt of his guilt remains. *Id*.

¶ 11 A person commits the offense of burglary when without authority he knowingly enters a motor vehicle, or any part thereof, with the intent to commit a felony or theft. 720 ILCS 5/19-1(a) (West 2012). Burglary is accomplished the moment an unauthorized entry with the requisite intent occurs regardless of whether a subsequent felony or theft was actually committed. *People v. Poe*, 385 Ill. App. 3d 763, 766 (2008). Absent direct evidence, intent must be proven

circumstantially, and a conviction may be sustained on circumstantial evidence alone. *People v. Johnson*, 28 Ill. 2d 441, 443 (1963). Intent is usually proven through circumstantial evidence, that is, inferences based upon defendant's conduct. *People v. Ybarra*, 156 Ill. App. 3d 996, 1002-03 (1987). "Like other inferences, this one is grounded in human experience, which justifies the assumption that the unlawful entry was not purposeless, and, in the absence of other proof, indicates theft as the most likely purpose." *Johnson*, 28 Ill. 2d at 443.

¶ 12 In the case at bar, defendant does not dispute that he was inside the minivans without the permission of the owners. The testimony of officers Velez and Smith also established that defendant was moving his arms around inside the vehicles "like he was looking for something." The trial court's inference that defendant's entry into the minivans proved his intent to commit a theft therein is completely rational. See *Id.* (human experience justifies the assumption that an unlawful entry is not purposeless, and, in the absence of other proof that theft is the most likely purpose). A trier of fact is not required to disregard the interferences that normally flow from the evidence or to seek out all possible explanations consistent with a defendant's innocence and elevate them to reasonable doubt. See *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Ultimately, viewing the evidence in the light most favorable to the State, we find that the circumstantial evidence presented at trial was sufficient to find defendant guilty of burglary. *Brown*, 2013 IL 114196, ¶ 48.

¶ 13 Defendant, however, contends that the evidence including, the absence of damage to the minivans and the facts that no property from the minivans or burglary tools were found on his person, combined with his cooperation with the police proves that defendant did not intend to

commit a theft. However, burglary is accomplished the moment an unauthorized entry with the requisite intent occurs even if no subsequent felony or theft is committed; there is no requirement that tools be used or damage done to facilitate that entry. See *Poe,* 385 Ill. App. 3d at 766. Therefore, the fact that no items from the minivans were recovered from defendant does not defeat the circumstantial evidence of defendant's intent to commit a theft inside the minivans when he was observed inside the vans moving his arms around "like he was looking for something." We also reject defendant's argument that his cooperation with the police reflects a lack of a consciousness of guilt defeating the inference that he intended to commit a theft. While it is proper to infer that a suspect who flees or attempts to flee has a consciousness of guilt (see, *e.g., People v. Hart,* 214 Ill. 2d 490, 518-19 (2005)), it does not follow that the opposite is automatically true. A trier of fact must still look at the totality of the circumstances, and in this case, an attempt to flee would probably have been futile as two officers were present. Most importantly, it is not this court's job to reweigh the evidence presented at trial, and we decline defendant's invitation to do so in this case. See *Bradford,* 2016 IL 118674, ¶ 12.

¶ 14 Ultimately, this court cannot say that no rational trier of fact could have found defendant guilty when the evidence at trial established that he entered two minivans without permission and was observed moving his arms around once inside in what appeared to be a search for valuables. *Brown,* 2013 IL 114196, ¶ 48. This court reverses a defendant's conviction only where the evidence is so unreasonable or unsatisfactory that a reasonable doubt of his guilt remains (*id.*); this is not one of those cases. Therefore, we affirm defendant's convictions for burglary.

¶ 15 Defendant next contends that his 10-year sentences are excessive in light of the nature of the offense and certain mitigating evidence including his age, medical condition, on-going battle with substance abuse, and homelessness.

¶ 16 The State contends, and defendant acknowledges, that this issue has been forfeited because defendant did not object at the sentencing hearing and raise the issue in a written motion to reconsider sentence. See, *e.g.*, *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, defendant asks this court to review his challenge pursuant to the plain error doctrine. In the alternative, defendant argues that the alleged error is reviewable as a claim of ineffective assistance of counsel based upon counsel's failure to preserve this issue.

¶ 17 Sentencing errors raised for the first time on appeal are reviewable as plain error if (1) the evidence was closely balanced or (2) the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing. *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010). The first step in plain-error review is to determine whether error occurred (*People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)), because absent error there can be no plain error (*People v. Williams*, 193 Ill. 2d 306, 349 (2000)).

¶ 18 A sentence within statutory limits is reviewed on an abuse of discretion standard, so that this court may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. So long as the trial court does not consider improper aggravating factors or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the applicable range. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 56.

¶ 19 When balancing the retributive and rehabilitative aspects of a sentence, a trial court must consider all factors in aggravation and mitigation including, *inter alia*, a defendant's age, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010). The court does not need to expressly outline its reasoning when crafting a sentence, and we presume that it considered all mitigating factors absent some affirmative indication to the contrary other than the sentence itself. *Jones*, 2014 IL App (1st) 120927, ¶ 55. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the severity of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Id*.

¶ 20 In the case at bar, defendant does not dispute that he was subject, because of his criminal background, to a Class X sentence of between 6 and 30 years in prison (see 730 ILCS 5/5-4.5-25(a) (West 2012)).

¶ 21 The record reveals that at sentencing, the parties presented evidence in aggravation and mitigation, including defendant's prior convictions, his substance abuse issues and his medical history. In sentencing defendant to two Class X sentences of 10 years in prison, the trial court stated that it considered, *inter alia*, defendant's medical issues, but noted that these issues did not prevent defendant from committing crimes. Based on our review of the record, this court cannot say that prison terms of 10 years were an abuse of discretion when defendant was sentenced to a

term only four years above the statutory minimum and at the low end of the range of possible sentences. See *Snyder*, 2011 IL 111382, ¶ 36.

¶ 22 Defendant, on the other hand, contends that the trial court failed consider the "considerable" mitigating evidence including, defendant's education, history of substance abuse, and "virtual" homelessness. Defendant further argues that although the trial court "focused" on his criminal history, the trial court failed to note that the "majority" of his criminal history involved the possession of narcotics and was directly related his "struggles" with alcohol and substance abuse.

¶ 23 It is presumed that the trial court properly considered the mitigating factors presented and it is the defendant's burden to show otherwise. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). Here, defendant cannot meet that burden, as the trial court specifically stated at sentencing that it considered defendant's medical condition and the fact that he babysat his grandchildren. We reject defendant's conclusion that the trial court abused its discretion merely by giving the evidence presented in mitigation a different weight than defendant would prefer; the court was not required to impose a minimum sentence merely because mitigation evidence exists (*Jones*, 2014 IL App (1st) 120927, ¶ 55), or view defendant's substance abuse problems as inherently mitigating (see *People v. Holman*, 2014 IL App (3d) 120905, ¶ 75). Ultimately, the trial court did not abuse its discretion when it considered the evidence in mitigation and aggravation (*Jones*, 2014 IL App (1st) 120927, ¶ 56), and sentenced defendant to two concurrent 10-year prison terms (*Snyder*, 2011 IL 111382, ¶ 36).

¶ 24 Because we find no error, there can be no plain error and we must find defendant forfeited this issue. *Williams*, 193 Ill. 2d at 349. Moreover, because there was no error, defendant cannot establish that he was prejudiced by his counsel's failure to raise this claim in a motion to reconsider sentence, and, consequently, his claim of ineffective assistance of counsel must fail. See *People v. Bailey*, 364 Ill. App. 3d 404, 408-09 (2006), citing *Strickland v. Washington*, 466 U. S. 668 (1984) (a defendant establishes ineffective assistance of counsel by showing counsel's representation fell below an objective standard of reasonableness and that the result of the proceeding would have been different but for the complained of error). "An attorney will not be deemed ineffective for a failure to file a futile motion." *People v. Rucker*, 346 Ill. App. 3d 873, 886 (2003).

¶ 25 Defendant finally contests the imposition of certain fines and fees. Although defendant has forfeited review of this claim because he did not challenge the fines and fees order in a postsentencing motion (see *Enoch*, 122 Ill. 2d at 186), he argues that the fees are void and may be challenged at any time. In light of *People v. Castleberry*, 2015 IL 116916, ¶ 19, this rule no longer applies. On appeal, however, a reviewing court may modify the fines and fees order without remanding the case back to the circuit court. See Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999); *People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008). We review the imposition of fines and fees *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 26 Defendant first contends, and the State concedes, that the $250 DNA assessment was improperly assessed against defendant because he was already registered in the DNA databank

due to his prior felony convictions. See *People v. Marshall*, 242 Ill. 2d 285, 301-02 (2011). Accordingly, the $250 assessment must be vacated.

¶ 27 Defendant next 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 2012)), he is entitled to a $2,135 credit based on 427 days of presentence custody.

¶ 28 The parties also agree that defendant was assessed two fines that may be offset by the $5-per-day presentence custody credit, the $50 Court Systems Fee (55 ILCS 5/5-1101(c) (West 2012)), and the $15 State Police Operations Fee (705 ILCS 105/27.3a (1.5) (West 2012)). Therefore, pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order that the $50 Court Systems Fee and the $15 State Police Operations Fee be offset by defendant's presentence custody credit.

¶ 29 The parties, however, dispute whether the $2 Public Defender Records Automation Fee (55 ILCS 5/3-4012 (West 2012)), and the $2 State's Attorney Records Automation Fee (55 ILCS 5/4-2002.1(c) (West 2012)), are actually fines that should be offset by defendant's presentence custody credit.

¶ 30 This court has previously found that the $2 Public Defender Records Automation Fee and the $2 State's Attorney Records Automation Fee are fees to which a defendant cannot apply his presentence custody credit. See *People v. Bowen*, 2015 IL App (1st) 132046 ¶ 65 ("because the statutory language of both the Public Defender and State's Attorney Records Automation fees is identical except for the name of the organization, we find no reason to distinguish between the two statutes, and conclude both charges constitute fees"); *People v. Green*, 2016 IL App (1st)

134011, ¶ 46 (Mar. 7, 2016) (relying on *Bowen*); *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30 (the State's Attorney charge is a fee because it is meant to reimburse the State's Attorney for expenses related to automated record keeping); *People v. Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17 (relying on *Bowen* and *Rogers*). We follow *Rogers* and *Bowen* and likewise find that the Public Defender Records Automation Fee and the State's Attorney Records Automation Fee are fees to which defendant cannot apply his presentence custody credit.

¶ 31 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct defendant's fines and fees order to reflect the vacation of the $250 DNA analysis fee, and that the $50 Court Systems Fee and the $15 State Police Operations Fee are offset by defendant's presentence custody credit, for a new total due of $374. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 32 Affirmed; fines and fees order corrected.