NOTICE
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2014 IL App (5th) 120414-U

NO. 5-12-0414

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 11-CF-1557
	)	
LEE EDDIE BARNES,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Stewart and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not abuse its discretion when it sentenced defendant to seven years' imprisonment, and the State Appellate Defender's motion to withdraw as counsel on appeal is granted where there is no meritorious argument to the contrary.

¶ 2 Defendant, Lee Eddie Barnes, appeals the circuit court's denial of his motion to reconsider his sentence. The Office of State Appellate Defender has been appointed to represent him. The State Appellate Defender has filed a motion with an attached memorandum pursuant to *Anders v. California*, 386 U.S. 738 (1967), alleging that there is no merit to the appeal and requesting leave to withdraw as counsel. See *McCoy v. Court of Appeals*, 486 U.S. 429 (1988). Defendant was given proper notice and was

granted an extension of time to file briefs, objections, or any other documents supporting his appeal. He has not filed a response. We have considered the State Appellate Defender's motion to withdraw and the attached memorandum and examined the entire record on appeal and find no error or potential grounds for appeal. For the following reasons, we now grant the State Appellate Defender's motion to withdraw as counsel, and we affirm the judgment of the circuit court of St. Clair County.

¶ 3 BACKGROUND

¶ 4 On October 23, 2011, defendant was charged by information with one count of burglary. A jury trial was held on April 23, 2012.

¶ 5 At the trial, Detective Coleman of the East St. Louis police department testified that on October 23, 2011, he was a patrol officer and received a dispatch about a burglary in progress at a laundromat in East St. Louis. When Coleman arrived at the building, he observed that the rear door of the building was partially open. He could hear people inside the building, talking, and he also heard a metal banging sound. At that point, another officer with the East St. Louis police department, Officer Hill, arrived at the building. When Coleman and Hill entered the building, they observed three people, one of whom fled to an adjacent room inside the building. Coleman identified defendant in open court and testified that defendant was one of the people inside the building. Coleman testified that many of the machines in the building were dismantled from previous burglaries, but that defendant and his codefendants were found by a furnace that was being dismantled, and copper wiring was exposed. The State submitted into evidence photographs of the laundromat. Coleman further testified that he did not see

any signs of a forced entry. Coleman testified that the owner of the laundromat arrived at the scene and told Coleman that he had not given any of the suspects permission to be in the building.

¶ 6 On cross-examination, Coleman testified that he knew the laundromat was vacant prior to October 23, 2011. The owner of the building told Coleman that the building had been broken into on several previous occasions. Coleman did not personally see anyone break into the building or anyone dismantling the machines, but just saw that the back door was partially open and heard banging when he arrived.

¶ 7 Next, Detective Berry testified for the State. Berry was assigned to interview defendant following defendant's arrest at the laundromat. Berry identified defendant in open court. Berry testified that the interview with defendant was videotaped. The videotape was entered into evidence and was played for the jury. In the interview on the videotape, defendant stated that he and his codefendants had been walking down an alley when they observed that the door of the laundromat was open and they saw piles of aluminum sitting inside. They entered the building in order to gather the rest of the aluminum, and they were "thinking about money." Defendant denied that they broke into the building or that they dismantled any of the machines. He admitted that he and his codefendants did not have permission from the owner to enter the building and that he knew the aluminum was not theirs.

¶ 8 On cross-examination, Detective Berry admitted that when he interviewed defendant, he told defendant that defendant's fingerprints were "all over everything" in the laundromat, but in reality, no prints were ever collected. He also admitted that

defendant said he had not broken into the building and that defendant found the door partially open when he entered the building.

¶ 9 The next witness to testify for the State was the owner of the building, Dennis Jackson. Jackson testified that he owned the property where the alleged incident took place. It was formerly a laundromat but had been vacant for three years. On October 23, 2011, Jackson went to the building after having received a call that someone was in the building without his permission. When he arrived at the building, a police officer asked Jackson if he had given anyone permission to be in the building. Jackson replied that he had not. Jackson specifically stated, when asked, that he did not know defendant and had not given him permission to be in the laundromat. When Jackson was at the building the previous week, he had locked all of the points of entry into the building. The last time the building was broken into was more than a year ago. The damage he saw following defendant's alleged break-in was not there previously.

¶ 10 On cross-examination, Jackson testified that there had been burglaries to the building prior to the alleged burglary in question. As a result, he had taken steps to secure the building. He admitted that he had not been in the building for a week prior to the incident and that he did not personally see defendant in the building the day it was burglarized.

¶ 11 Defendant did not testify and did not present any testimony or other evidence. At the jury instructions conference, defense counsel requested a lesser-included offense instruction on criminal trespass. The court determined that in light of defendant's videotaped interview where he told police that he entered the laundromat to take the

aluminum, there was no evidence from which the jury could conclude that he did not intend to commit a theft when he entered the building. Following the close of all the evidence, defense counsel made an oral motion for a directed verdict, arguing that the State failed to meet its burden of proof. The circuit court denied the motion. After closing arguments, the jury deliberated and found defendant guilty of one count of burglary.

¶ 12 On May 1, 2012, defendant filed a motion for a judgment notwithstanding the verdict, or in the alternative, for a new trial. On May 29, 2012, the court held a hearing on the motion. The court denied the motion, and a sentencing hearing followed.

¶ 13 At the sentencing hearing, it was determined that defendant was subject to mandatory Class X sentencing pursuant to section 5-4.5-95(a)(4)(B) of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(a)(4)(B) (West 2012)), due to his criminal history. In 1992, defendant pled guilty to a Class 2 burglary, and in 2000, he pled guilty to attempted first-degree murder, a Class X felony. When sentencing defendant, the court noted that the factors it considered in aggravation were defendant's criminal history, which included convictions for violent crimes, and the need to deter others from scrapping metal in the community. In mitigation, the court considered that this particular crime was not a crime of violence, that defendant did not intend to harm anyone, and that defendant had children who would benefit from his presence. The court sentenced defendant to seven years in prison and three years of mandatory supervised release.

¶ 14 On June 7, 2012, defendant filed a motion to reduce and/or modify his sentence, arguing that the sentence did not reflect his history of criminality, occupational or

personal habits, mental history, family situation, economic status, or education. Defendant argued that the sentence was unduly harsh. On August 28, 2012, the court denied defendant's motion to reconsider his sentence. Defendant appeals.

¶ 15 ANALYSIS

¶ 16 In its motion to withdraw as counsel on appeal, the State Appellate Defender lists four possible issues that could be presented on appeal, but contends that those issues are without merit. We review those issues below.

¶ 17 The first potential issue identified by the State Appellate Defender is whether the State proved defendant guilty beyond a reasonable doubt. When presented with a challenge as to the sufficiency of the evidence, the question we must answer is whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *People v. Williams*, 2014 IL App (3d) 120240, ¶ 10. A conviction will only be overturned where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Id.* To prove burglary, the State must prove that the defendant knowingly entered a building, without authority, with the intent to commit a felony or theft. 720 ILCS 5/19-1(a) (West 2012).

¶ 18 Here, defendant admitted that he entered the laundromat and Officer Coleman testified that defendant was present at the laundromat when he arrived. The owner of the laundromat, Jackson, testified that he had not given defendant permission to be in the laundromat. In his videotaped interview, defendant said that he and his codefendants entered the laundromat because they saw piles of aluminum and that they were "thinking about money." The jury could have reasonably found that defendant entered the

laundromat to commit a theft. Therefore, arguing that the State did not prove defendant guilty beyond a reasonable doubt would be frivolous.

¶ 19 The next potential issue identified by the State Appellate Defender is whether defendant was prejudiced by Officer Coleman's hearsay testimony that he responded to a burglary in progress.

¶ 20 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *People v. Theis*, 2011 IL App (2d) 091080, ¶ 30. Hearsay is generally inadmissible unless it falls within an exception to the hearsay rule. *People v. Johnson*, 2013 IL App (1st) 111317, ¶ 46. If a statement is offered to explain the actions or steps that a police officer subsequently took during the course of an investigation, then the statement is not hearsay. *People v. Richardson*, 2011 IL App (5th) 090663, ¶ 22. The officer's testimony must be limited to show how the investigation was conducted and not to place into evidence the substance of out-of-court statements or conversations for the purpose of establishing the truth of their contents. *People v. Feazell*, 386 Ill. App. 3d 55, 66 (2007). Officers cannot testify as to the substance of such statements. In *People v. Warlick*, the First District held that a police radio dispatch of a "burglary in progress" was inadmissible hearsay in a burglary prosecution. *People v. Warlick*, 302 Ill. App. 3d 595, 600 (1998). Thus, it could be argued that Officer Coleman's testimony that he responded to a radio dispatch about a burglary in progress was inadmissible hearsay. As the *Warlick* court noted, however, "[e]rroneous admission of hearsay will not be held reversible if there is no reasonable probability the jury would have acquitted the defendant had the hearsay been excluded." *Id.* at 601 (citing *People v. West*, 234 Ill. App. 3d 578, 590

(1992)). Here, there is no reasonable probability that the jury would have acquitted defendant had Coleman's hearsay testimony been excluded. Defendant admitted that he was in the laundromat. Officers who responded to the scene found defendant in the laundromat. Furthermore, defendant admitted in his videotaped interview to the police that he had entered the laundromat to collect the aluminum that he and his codefendants saw piled up inside. This information would have come out at trial regardless of whether the inadmissible hearsay statements had been introduced. Therefore, the admission of the hearsay evidence did not constitute reversible error.

¶ 21 Moreover, defense counsel did not object to the hearsay testimony, and thus did not preserve the issue. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The plain error doctrine allows this court to review forfeited errors if (1) the evidence is so closely balanced that the error threatens to tip the scales of justice against the defendant, or (2) the error is so serious that it affects the fairness of defendant's trial. *People v. Chaban*, 2013 IL App (1st) 112588, ¶ 57. Here, the evidence was not so closely balanced that it would have tipped the scales of justice had defense counsel objected to the hearsay testimony. Defendant admitted that he entered the laundromat to collect the aluminum. Further, allowing the hearsay testimony did not affect the fairness of defendant's trial. He was not prejudiced by this testimony as he admitted that he was going to take the aluminum from the laundromat.

¶ 22 The next potential issue identified by the State Appellate Defender is whether defense counsel was ineffective for failing to object to the hearsay testimony and for withdrawing the request for a lesser-included offense instruction on criminal trespass.

¶ 23 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, (1984), and adopted in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). To prevail under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance so prejudiced the defendant that he was denied a fair trial. *People v. Cordell*, 223 Ill. 2d 380, 385 (2006).

¶ 24 We have already determined that defendant was not prejudiced by defense counsel's failure to object to Officer Coleman's hearsay testimony. Defendant's own statements to police clearly show that the outcome of the case would not have been different had defense counsel objected to the testimony. Consequently, no meritorious argument can be made that counsel's failure to object to this testimony denied defendant the effective assistance of counsel.

¶ 25 Next, it could be argued that defense counsel was ineffective for withdrawing a request for a lesser-included offense jury instruction on criminal trespass. A defendant is entitled to an instruction on a lesser-included offense where there is evidence, even slight evidence, which, if believed by the jury, would reduce the crime to a lesser offense. *People v. Upton*, 230 Ill. App. 3d 365, 377 (1992). Criminal trespass is a lesser-included offense of burglary. *People v. Thomas*, 374 Ill. App. 3d 319, 325 (2007). Defense counsel can be deemed to be ineffective for failing to request a lesser-included jury instruction if the evidence presented at trial supports a lesser-included offense of criminal trespass. *People v. Gallagher*, 2012 IL App (1st) 101772, ¶ 19.

¶ 26 Defense counsel's theory of the case was that defendant did indeed enter the laundromat, but that defendant did not intend to commit a theft once he was inside. As such, defense counsel informed the court that he would be requesting a lesser-included offense instruction on the offense of criminal trespass to property. The court concluded that, in light of defendant's videotaped interview where he admitted that he entered the laundromat to take the aluminum, there was no evidence from which a jury could find that defendant did not possess the intent to commit a theft. The court ruled that unless defendant testified, it was not going to give the criminal trespass instruction to the jury. Defendant indicated that he was not going to testify, and thereafter defense counsel withdrew his request for the criminal trespass instruction.

¶ 27 The evidence did not support a request for a lesser-included offense of criminal trespass. In light of defendant's videotaped statement, there was no evidence presented from which the jury could conclude that defendant did not enter the laundromat with the intent to commit a theft. Defense counsel's withdrawal of the request did not prejudice defendant because there was evidence, by way of defendant's own statements, that he intended to commit a theft when he entered the laundromat. Thus, defense counsel was not ineffective for withdrawing the request for a lesser-included offense instruction.

¶ 28 The final potential issue identified by the State Appellate Defender is whether the circuit court abused its discretion when it sentenced defendant to seven years of imprisonment. The circuit court has considerable discretion when imposing a sentence, and such decisions will not be overturned unless there has been an abuse of discretion. *People v. Wilson*, 143 Ill. 2d 236, 250-51 (1991). Indeed, the circuit court is in the best

position to determine an appropriate sentence. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). As the circuit court is in the best position to determine an appropriate sentence, a reviewing court may not substitute its own judgment for that of the circuit court. *Id.* Further, "[e]ven where there is evidence in mitigation, the court is not obligated to impose the minimum sentence." *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010) (citing *People v. Madura*, 257 Ill. App. 3d 735, 740-41 (1994)). When a sentence falls within the statutory sentencing range, the circuit court has not abused its discretion unless the sentence is manifestly disproportionate to the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007).

¶ 29 Burglary is a Class 2 felony. 720 ILCS 5/19-1(b) (West 2012). The State established that defendant had a prior criminal history that included five felony convictions, which would subject defendant to mandatory Class X sentencing. See 730 ILCS 5/5-4.5-95(b) (West 2012). The Class X sentencing range is from 6 years' to 30 years' imprisonment. 730 ILCS 5/5-4.5-95(a) (West 2012). The court was required to sentence defendant to at least six years' imprisonment. When setting out defendant's sentence, the court noted the factors in aggravation, namely, that some of defendant's prior felonies were for violent crimes, and that scrapping metals was a serious problem in the community and thus deterrence was important. The court noted in mitigation that defendant did not intend to harm anyone, and that he had children who would benefit from his presence. The court's determination that defendant should be sentenced to seven years' imprisonment was well-reasoned, and the court did not abuse its discretion when it sentenced defendant to seven years' imprisonment.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the motion of the State Appellate Defender to withdraw as counsel on appeal is granted, and the judgment of the circuit court of St. Clair County is affirmed.

¶ 32 Motion granted; judgment affirmed.