

FOURTH DIVISION
November 8, 2012

No. 1-09-1008

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).

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. 04 CR 2160
)	
DAVID WYNTER,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant failed to establish a colorable need for a verbatim trial transcript when the record contained a bystander's report filed pursuant to Supreme Court Rule 323(c) (eff. Dec. 13, 2005). Defendant was proven guilty beyond a reasonable doubt of residential burglary and possession of burglary tools when he was taken into custody while in possession of items taken from the victim's home and discarded a screwdriver and knife while fleeing from police officers.

¶ 2 After a bench trial, defendant David Wynter was found guilty of residential burglary and possession of burglary tools. He was sentenced to 15 years in prison for the residential burglary

conviction and to a concurrent 3-year sentence for possession of burglary tools.¹ On appeal, defendant first contends that this cause must be remanded for a new trial because the bystander's report created from the trial court's trial notes is an insufficient substitute for a trial transcript such that "complete" appellate review is impossible. In the alternative, defendant contends that he was not proven guilty beyond a reasonable doubt of residential burglary and possession of burglary tools when, *inter alia*, the evidence against him was circumstantial and the State failed to link the knife and screwdriver he discarded to the burglary. We affirm.

¶ 3 Although the record on appeal does not include a transcript of the trial, the following facts are contained in a bystander's report filed pursuant to Supreme Court Rule 323(c) (eff. Dec. 13, 2005), and the common law record.

¶ 4 Defendant's arrest and prosecution arose out of a January 2004 incident during which the home of the victim Sofia Martinez was burglarized. The matter then proceeded to a bench trial.

¶ 5 The victim testified that she lived in the basement apartment at 7381 North Damen with her husband and son. On the day in question the family left the apartment at 7 a.m. At that time, the back door was locked. When they returned home between 11 and 11:30 a.m., the back door was open and broken. The victim looked around and discovered a Sony camera was missing.

¶ 6 About 15-30 minutes later, the victim's son called the police. When the officers arrived, the victim's son acted as her translator. The victim and her husband later went to a police station. There, she told the police that she was missing a camera, two laundry bags and her husband's underwear. While at the police station, the victim was shown items that she did not even know were missing. At trial, the victim identified certain items including, a blue laundry bag, a black laundry bag, underwear, a camera bag, and a camera.

¹ These sentences were to be served concurrent to the sentence imposed in case 03 CR 13659. Defendant was charged as Anthony Brown in that case.

¶ 7 The victim did not know defendant and did not give him permission to possess her items or to enter her home. However, the victim admitted during cross-examination that although she heard a noise, she did not see anyone other than family members in her house. She initially testified that she did not remember telling officers that \$1,500 was missing and indicated that she does not store a lot of cash in the house, but later denied saying that \$1,500 was missing.

¶ 8 Sergeant James Pader testified that he was in an unmarked car with officers Jacobs and Gross around 11:42 a.m., on the morning in question when he noticed defendant. Defendant was carrying a laundry bag. Pader then explained that he reviewed the "hot list" every day. This list included the pictures, ages, races, and builds of about 10 to 20 people with warrants. Defendant resembled a picture of a person who had an outstanding warrant.

¶ 9 After telling the other officers that defendant had a warrant, they stopped the car and Groll said, " ' Chicago police officer—come to the car.' " Defendant, who was on the sidewalk about 10 to 15 feet away, looked in their direction and then ran away. As he ran, defendant threw away a knife and a screwdriver. The screwdriver was 14 inches long and the knife had an 8-inch blade. Pader pursued defendant for 20 to 30 feet before defendant put his hands up. When Pader looked inside the blue laundry bag defendant had been carrying, he saw a green canvas bag containing a camcorder and underwear. Defendant was then taken to a police station. While at the station, Pader heard a flash message regarding the incident at the victim's home which described a camcorder in a green bag. When defendant was asked where he got the camcorder, he stated that he had gotten it two days prior for "two rocks." Defendant also indicated that he had been doing laundry. Defendant's statement was not reduced to writing.

¶ 10 At trial, Pader identified a receipt from Sears for a camera which had been brought to the police station by the victim's husband. He also indicated that 1763 West Howard, where he saw defendant, and 7381 North Damen were about four blocks apart.

¶ 11 Detective Kathleen Hayes testified that the victim's husband told her that \$1,500, and certain coins were missing from the family home.

¶ 12 Juan Reyes, the victim's husband, testified that he told a male police officer that approximately \$200 in coins was missing. He also told officers that a camera was missing, but did not mention the bag. However, Reyes did not recall speaking to a female police officer and denied telling anyone that \$1,500 was missing.

¶ 13 In finding defendant guilty, the court noted that he had been taken into custody after attempting to flee from officers, blocks from the victim's apartment while in possession of items taken from the apartment. The court also noted that defendant was in possession of burglary tools and lied to the police about how he acquired the property at issue. Ultimately, the trial court found defendant guilty of residential burglary and possession of burglary tools.

¶ 14 Posttrial, defendant raised issues regarding trial counsel's effectiveness and indicated his desire to proceed *pro se*. After admonishing defendant regarding the ramifications of proceeding without an attorney, the court permitted trial counsel to withdraw. Although defendant filed a *pro se* motion for a new trial, he later requested, and was appointed, new counsel.

¶ 15 At that point, posttrial counsel indicated that she was unable to acquire a copy of the trial transcript because the court reporter's disk had been corrupted and the paper copy had been destroyed. In response, the trial court gave copies of its "copious" trial notes to the parties. Posttrial counsel then filed an amended motion for a new trial. However, defendant was later again granted permission to proceed *pro se*.

¶ 16 At a subsequent hearing held pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), the trial court acknowledged that it had provided its trial notes to the parties. The court clarified, however, that its notes were of the direct and cross-examination of trial witnesses and did not include objections or summarize arguments. In other words, the notes were "[s]imply the

testimony of the witnesses." Ultimately, the court denied defendant a new trial and sentenced him to 15 years in prison for the residential burglary conviction and to a concurrent 3-year prison sentence for possession of burglary tools.

¶ 17 On appeal, defendant contends that he cannot receive meaningful appellate review due to the incomplete nature of the record on appeal. He argues that because the bystander's report created from the trial court's notes is an insufficient substitute for a verbatim trial transcript, this cause must be remanded for a new trial.

¶ 18 Generally, any doubts raised by the insufficiency of the record must be resolved against the appellant who has the burden to present a reviewing court with a sufficiently complete record of the trial court proceedings to support his claims of error, and, absent such a record, it will be presumed that the trial court heard sufficient evidence and argument to support its decision. See, e.g., *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); *People v. Lopez*, 229 Ill. 2d 322, 344 (2008). This rule has been relaxed in those circumstances where a defendant has established a lack of fault in providing the incomplete record and that the missing portion of the record is material to a meaningful review of the defendant's contentions on appeal. See *People v. Sims*, 403 Ill. App. 3d 9, 15 (2010). That is not to say, however, that the mere fact that a transcript or other evidence from a defendant's trial or sentencing is not included in the record on appeal automatically entitles a defendant to a new trial. *Sims*, 403 Ill. App. 3d at 15 (collecting cases); see also Supreme Court Rule 323(c) (eff. Dec. 13, 2005) (outlining other ways to obtain a report of the proceedings, including the creation of a bystander's report "from the best available sources, including recollection"). In those cases where the defendant is not at fault and the evidence is material, a reviewing court considers whether other means are available to afford the defendant adequate appellate review. *Sims*, 403 Ill. App. 3d at 15. The determination of whether a

defendant has been denied meaningful appellate review because of an incomplete record is a question of law which this court reviews *de novo*. *Sims*, 403 Ill. App. 3d at 16.

¶ 19 The record on appeal in the instant case does not include a trial transcript because the disk was corrupted and the paper copy destroyed. Although defendant correctly argues that he bears no fault for the missing trial transcript, he has failed to establish that the missing trial transcript is material to a meaningful review of his contentions on appeal. Here, the record reveals that when the court was informed that the court reporter could not provide a transcript, the trial court made its trial notes available to the parties. In so doing the court acknowledged that its notes did not contain objections or summarize argument; rather, the notes contained the testimony of the witnesses that testified at trial. It was these notes that the trial court relied upon in finding defendant guilty, the parties relied upon when arguing defendant's motion for a new trial, and from which a bystander's report was created pursuant to Supreme Court Rule 323(c).

¶ 20 This court is unpersuaded by defendant's reliance on *People v. Ramos*, 295 Ill. App. 3d 522 (1998). In that case the defendant's appeal was filed three years after her conviction. At that point, the court reporter could not locate her notes and neither the attorneys nor the trial court had a recollection of witness testimony and objections sufficient to reconstruct the trial proceedings. Thus, the defendant was unable to supply a bystander's report pursuant to Supreme Court Rule 323(c). *Ramos*, 295 Ill. App. 3d at 524. Therefore, in the absence of both a transcript and a bystander's report, the defendant could not be afforded effective appellate review and the cause was remanded for a new trial. *Ramos*, 295 Ill. App. 3d at 526-27. In the instant case, unlike *Ramos*, the trial court's notes were used to create a bystander's report pursuant to Rule 323(c), which detailed the testimony of the witnesses at trial, and permits review of defendant's contentions on appeal.

¶ 21 Although defendant contends that the bystander's report is an "insufficient substitute" for the actual transcript because it lacks "sufficient detail," this court rejects defendant's invitation to assume that with the addition of more details, *i.e.*, a verbatim transcript, his claims on appeal would be successful. There is no requirement that the record needs to contain "every word spoken in the proceedings below;" rather, the record only needs to be complete enough to provide for a full consideration of the facts and circumstances involved in the defendant's appeal. *People v. Largent*, 337 Ill. App. 3d 835, 841 (2003). While defendant may be correct in that a verbatim transcript may have permitted him to raise other claims on appeal, this court " ' will not engage in blatant conjecture as to some possible value' " that the actual trial transcript would have provided to defendant. *Sims*, 403 Ill. App. 3d at 17 (quoting *People v. Wilson*, 32 Ill. App. 3d 57, 61 (1975), *rev'd on other grounds*, 66 Ill. 2d 346 (1977)). In this case the lack of a trial transcript does not prevent a meaningful review of defendant's claims because the record on appeal contains a bystander's report created from the trial court's notes. *Sims*, 403 Ill. App. 3d at 15.

¶ 22 Turning now to the merits of defendant's contentions on appeal, defendant contends that he was not proven guilty beyond a reasonable doubt of either residential burglary or possession of burglary tools.

¶ 23 In assessing the sufficiency of the evidence, the relevant inquiry is whether, considering 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. Ross*, 229 Ill. 2d 255, 272 (2008). This court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *Ross*, 229 Ill. 2d at 272; see also *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006) (it is the trier of fact's responsibility to determine the appropriate weight to afford each witness's testimony, resolve conflicts or

inconsistencies in the evidence, and draw reasonable inferences from testimony). A defendant's conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 24 Defendant first argues that he was not proven guilty beyond a reasonable doubt of residential burglary because the evidence against him was circumstantial, there were differing accounts of what was actually taken from the victim's home, and he was discovered with only some of the proceeds of the burglary.

¶ 25 To sustain a conviction for residential burglary, the State must establish beyond a reasonable doubt that the defendant knowingly entered the dwelling of another without authority and with an intent to commit a theft or felony therein. 720 ILCS 5/19-3(a) (West 2004).

¶ 26 Initially, this court rejects defendant's contention that he was not proven guilty beyond a reasonable doubt because the case against him was entirely circumstantial. Circumstantial evidence is sufficient to sustain a criminal conviction so long as the elements of the crime have been proven beyond a reasonable doubt. See *People v. Hall*, 194 Ill. 2d 305, 330 (2000). The evidence in this case, although circumstantial, was of such a character to prove defendant guilty of the crime of residential burglary.

¶ 27 Generally, in cases involving a defendant's exclusive possession of recently stolen property, the question of whether the State sustained its burden of proving the defendant guilty depends on whether it was proper for the trier of fact to infer guilt from the defendant's possession of the recently stolen property. As our supreme court determined *People v. Housby*, 84 Ill. 2d 415, 424 (1981), that inference is proper when: (1) there is a rational connection between defendant's recent possession of the property stolen in the burglary and his participation in the burglary; (2) the defendant's guilt more likely than not flows from his unexplained exclusive possession of burglary proceeds; and (3) there is evidence corroborating the defendant's

guilt. See also *People v. Natal*, 368 Ill. App. 3d 262, 268-69 (2006). The same evidence may be used to satisfy all three requirements. *People v. Carter*, 197 Ill. App. 3d 1043, 1046 (1990).

¶ 28 Here, there was a rational connection between defendant's possession of the laundry bag and its contents and his participation in the burglary. Although there is no evidence of the precise time at which the burglary occurred, the victim testified that when she returned home between 11 and 11:30 a.m., the back door was open, she heard a noise, and items were missing from her home. Pader testified that he saw defendant, who was carrying a laundry bag that was subsequently found to belong to the victim, at approximately 11:42 a.m. The area where defendant was taken into custody was blocks from the victim's home. The discovery of the burglary proceeds in defendant's possession, coupled with the proximity of defendant to the victim's home, sufficiently established a rational connection between defendant's possession of the property recently stolen from the victim's home and his participation in the burglary. *Housby*, 84 Ill. 2d at 424.

¶ 29 This evidence also satisfies the second part of the *Housby* test requiring that a defendant's guilt more likely than not flows from his unexplained possession of recently stolen property. *Housby*, 84 Ill. 2d at 424. In explaining his possession of the camcorder and the laundry bag, defendant told the police that he had gotten the camcorder in exchange for drugs and had been doing his laundry. However, when that explanation is considered in conjunction with the facts that defendant fled from the police and the victim's husband provided the police with a receipt for a camera, a trier of fact could reasonably conclude that defendant's explanation was false. Corroborative evidence here included not only the very short time span between the burglary and the discovery of defendant in possession of the burglary proceeds, but also the implausibility of defendant's explanation for his possession of the items. See *Housby*, 84 Ill. 2d at 430-31.

Accordingly, as the record reveals that all three parts of the *Housby* test were satisfied, the inference of defendant's guilt by the trier of fact was proper.

¶ 30 Defendant, on the other hand, contends that reasonable doubt remains because it was unclear what was actually taken from the victim's home and because he only possessed the less valuable proceeds from the robbery. While it is true that Hayes testified that Reyes told her that \$1,500 was missing from the family home, Reyes did not remember speaking with a female police officer and denied telling anyone that \$1,500 was missing. This conflict in the evidence was for the trial court, as the trier of fact, to resolve. *Sutherland*, 223 Ill. 2d at 242. This court also rejects defendant's contention that because he was found with only some of the proceeds of the robbery it is not unreasonable to conclude that defendant picked up the laundry bag after the real perpetrator "ditched" it, as our supreme court has held that speculation that another person might have committed the offense does not necessarily raise a reasonable doubt as to the guilt of a defendant. See *People v. Manning*, 182 Ill. 2d 193, 211 (1998).

¶ 31 Viewing the evidence in the light most favorable to the State, as we must, this court cannot say that no rational trier of fact could have found defendant guilty when he was taken into custody blocks from the victim's home while in possession of items taken from her home after a foot chase during which he threw a screwdriver and a knife away. *Ross*, 229 Ill. 2d at 272.

¶ 32 Defendant next argues that he was not proven guilty beyond a reasonable doubt of possession of burglary tools because the State failed to establish intent. In other words, no one saw him use these items and no evidence linked them to the victim's home. The State responds that defendant's "burglarious" intent was established through his possession and subsequent disposal of the screwdriver and knife, as well as his flight from police and his possession of items taken from the victim's home.

¶ 33 To sustain a conviction for possession of burglary tools, the State must establish that the tools are suitable for breaking and entering, the defendant possessed the tools with knowledge of their character, and the defendant intended to use tools for breaking and entering. *People v. Waln*, 169 Ill. App. 3d 264, 270 (1988). The required intent is a general intent to use the tools for a criminal purpose and may be inferred from the circumstances which accompany their possession. *People v. Obrochta*, 149 Ill. App. 3d 944, 952 (1986). The defendant's intent is the controlling factor when the tools in question could be used for both innocent and illegal purposes (*People v. Jiles*, 364 Ill. App. 3d 320, 337 (2006)), and that intent must be determined in light of the testimony before the trier of fact (*People v. Whitfield*, 214 Ill. App. 3d 446, 456 (1991)).

¶ 34 While it is certainly true that a knife and a screwdriver like those defendant discarded can be used for innocent purposes, the facts remain that defendant had these items, he threw them away as he fled from the police, and he possessed items taken from the victim's home. Consequently, this court cannot say that no reasonable trier of fact could have found defendant intended to use the tools for breaking and entering (*Whitfield*, 214 Ill. App. 3d at 456), and found him guilty (*Ross*, 229 Ill. 2d at 272). This court also rejects defendant's argument that the State was required to prove intent through the testimony of a witness who saw him using the tools, as intent may be established through circumstantial evidence. See *People v. Watson*, 24 Ill. App. 3d 237, 239 (1974). Although the record does not contain testimony regarding how the door to the victim's home was opened or whether there were tool markings on the door, it was for the trier of fact to draw reasonable inferences from the testimony that was presented at trial. *Sutherland*, 223 Ill. 2d at 242. Ultimately, this court reverses a defendant's conviction only when the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt (*Siguenza-Brito*, 235 Ill. 2d at 225); this is not one of those cases. Accordingly, we affirm defendant's conviction for possession of burglary tools.

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¶ 35 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.